

Chapter 40

Freedom and Security of the Person

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Freedom and Security of the Person

12. (1) Everyone has the right to freedom and security of the person, which includes the right

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right

- (a) to make decisions concerning reproduction;
- (b) to security in and control over their body; and
- (c) not to be subjected to medical or scientific experiments without their informed consent.¹

40.1 Introduction

(a) Drafting history

(i) Evolution of IC s 11

Section 11 of the Interim Constitution² had its origins in two distinct rights found in the early drafts of the Interim Constitution: a right to personal liberty, and a right to

¹ Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) ('FC' or 'Final Constitution').

freedom from torture and inhumane punishment.³ The initial separation of the two rights tracked the structure of international human rights instruments and the provisions of a number of foreign constitutions.⁴ After briefly forging a

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new right to 'Security of the Person' (which included the right to be free from torture or inhuman punishment),⁵ the Technical Committee on Fundamental Rights combined this new right with the right to personal liberty and called the amalgamation 'Freedom and Security of the Person'.⁶ The enacted version, IC s 11, read as follows:

Freedom and Security of the Person

(1) Every person shall have the right to freedom and security of the person which shall include the right not to be detained without trial.

(2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.

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

3 See Technical Committee on Fundamental Rights *Fourth Report* (3 June 1993). The personal liberty right read: 'Every person shall have the right to his or her personal liberty.' The freedom from torture and inhumane punishment right read: 'No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.'

4 See Universal Declaration of Human Rights, arts 3 and 5, International Covenant on Civil and Political Rights, arts 7 and 9(1), African Charter on Human and Peoples' Rights, arts 5 and 6, and European Convention on Human Rights, arts 3 and 5(1). The Canadian Charter, the German Basic Law and US Constitution also bifurcate the two sets of rights.

Section 7 of the Canadian Charter of Rights and Freedoms states that: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.' Three different dimensions of the Canadian Supreme Court's interpretation of s 7 of the Charter inform our analysis of FC s 12: (1) the restrictive definition of 'liberty'; (2) the relatively restrictive definition of 'security of the person'; (3) the residuary definition of 'fundamental justice' — a definition that invites the court to entertain a wide and unenumerated variety of substantive challenges to the law. 'Liberty' — the functional equivalent of 'freedom' in FC s 12(1) — has been construed to mean freedom from physical restraint. Such restraint occurs primarily in the context of the criminal justice system and has been understood to encompass imprisonment, mandatory fingerprinting, document production, and oral testimony. 'Liberty' under s 7 of the Charter does not embrace political liberty (expressive rights and the franchise are protected elsewhere in the Charter) nor was it intended to offer any protection for property or economic interests. However, despite the drafters' relatively clear desire to limit s 7's ambit to purely procedural challenges, the Supreme Court has imputed a substantive dimension to the provision, and, in particular, the phrase 'fundamental justice'. See S Choudhry 'The *Lochner* Era and Comparative Constitutionalism' (2004) 2 *Journal of International Constitutional Law* 1. The Charter, s 12, contains a prohibition on 'cruel or unusual treatment or punishment'. However, the Canadian Supreme Court has had little occasion to define the phrase. The Supreme Court has said that one test for cruel and unusual punishment would be 'whether the punishment prescribed is so excessive as to outrage standards of decency'. See *R v Miller and Cockeriell* [1977] 2 SCR 680, 688. The Supreme Court has, in terms of s 12, struck down a law that required a minimum sentence of seven years' imprisonment for importing narcotics as grossly disproportionate to the offense. See *R v Smith* [1987] 1 SCR 1045.

Neither the Technical Committee notes nor the Ad Hoc Committee notes offer an explanation for these changes.⁷ One inference that might be drawn is that the drafters believed the rights to personal liberty and to security of the person were

sufficiently related to place them under the same heading. Another inference, drawn by Ackermann J in *Ferreira v Levin*, is that the amalgamation of the separate rights supported a disjunctive reading of IC s 11(1) and (2) and thus a construction of IC s 11 that results in a stand-alone right to 'freedom' writ large.

(ii) Evolution of FC s 12

Article 1(1) of the German Basic Law states that 'human dignity is inviolable'. The right to human dignity has been interpreted by the Federal Constitutional Court to prevent the infliction of cruel or degrading punishment. 45 *BVerfGE* 187, 228 (1977) citing 1 *BVerfGE* 332 (1952) and 25 *BVerfGE* 269 (1969). The FCC has also held that life imprisonment may violate the right to human dignity if the possibility of parole was not built into the sentence. See 45 *BVerfGE* 187, 245 (1977) as quoted in D Currie *The Constitution of the Federal Republic of Germany* (1994) 305. Article 2(2) of the GBL contains a general guarantee of life, bodily integrity, and personal liberty comparable to the guarantee of security of the person found in FC s 12(2): 'Everyone has the right to life and to inviolability of the person. Personal liberty shall be inviolable. These rights may be impinged upon only pursuant to statute.' Article 2(2)'s commitment to personal liberty has been interpreted narrowly as protecting individuals from physical restraint and bodily invasion. See 22 *BVerfGE* 180, 218–20 (1967) as cited in Currie (*supra*) at 307. In addition, the FCC held that art 2(2)'s commitment to personal liberty limits pretrial imprisonment to that time necessary to investigate the case, to a reasonably short period of time, to cases where there is a significant chance for recurrence and to determine an accused's mental competence. The FCC has also held that while art 2(2)'s guarantee of bodily integrity may not preclude the use of electroencephalograms, it does bar the state from subjecting individuals to non-consensual spinal taps or placing accused persons on trial when they are extremely ill. Articles 1(1) and 2(2) seem to place fairly clear limits on what might count as a violation of freedom and security of the person under the GBL. However, German constitutional jurisprudence has not entirely escaped the conceptual difficulties posed by the notion of substantive due process. Article 2(1) of the GBL states that: 'Everyone has the right to the free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral code.' The FCC found that personality could not be meaningfully limited to some incorporeal set of mental events. It was therefore obliged to define the right broadly as a general right of freedom of action: the right of '[e]very person . . . to do or not to do what he wishes'. 16 *BVerfGE* 32, 36–37 (1957). Despite this broad construal of the language of the right, the Federal Constitutional Court appears to have been quite circumspect in using the right to strike down government restrictions on individual freedom. Striking down laws that prohibit intermediaries from seeking to match willing drivers with people looking for rides (17 *BVerfGE* 306 (1964)), that deny parents unlimited power to bind minor children by contract (72 *BVerfGE* 155 (1986)), or that require falconers to demonstrate the capacity to use firearms in order to procure a license to hunt with a falcon (55 *BVerfGE* 159 (1980)) hardly reflects a robust or uncontrollable understanding of 'freedom' or 'substantive due process'.

A substantial body of American jurisprudence exists on what counts as 'cruel and unusual punishment' under the Eighth Amendment. The Eighth Amendment (1791) reads: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' Banishment, terms of imprisonment radically disproportionate to the offence for which they are imposed, and quaint forms of execution such as disembowelment, having a person drawn and quartered, or burning someone alive have all been declared unconstitutional. The most contentious issue in American criminal jurisprudence turns on whether 'cruel and unusual punishment' encompasses the death penalty. As the law currently stands, the Eighth Amendment does not bar the death penalty. Given the permissive approach of US courts to capital punishment and the striking down of the death penalty in South Africa, it might be thought that US capital punishment jurisprudence has entirely lost its relevance for South African constitutional law. However, because US death penalty jurisprudence is driven by the due process, the fair trial and the proportionality of punishment guarantees afforded by the Eighth, Fifth and Fourteenth Amendments, the case law still has some resonance for similar doctrines being developed by our courts. The Fifth Amendment reads, in relevant part: 'No person . . . shall be deprived of life, liberty or property without due process of law.' The Fourteenth Amendment reads, in relevant part: 'No State shall . . . deprive any person of life, liberty or property without due process of law.'

The enacted version of s 12 of the Final Constitution varies substantially from both IC s 11 and earlier, draft formulations of FC s 12. The Constitutional Assembly had, in a relatively late draft, created a neat tripartite structure for the right that divided (and thereby emphasized) its three major components: freedom of the person, security of the person, and freedom from torture, cruel and degrading treatment and non-consensual medical experimentation.⁸ The final

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iteration of FC s 12 deviates, in some important respects, from this analytically sound rubric. The right to freedom of the person and the right to security of the person — separated in the drafts — are placed in the same subsection: FC s 12(1). FC s 12(1) now embraces three different kinds of freedom which had formerly been

What counts as 'liberty' or 'freedom' for the purposes of constitutional analysis and protection is a question which has vexed American jurists for well over two centuries. Most US Supreme Court judges over the past two centuries have defended the proposition that the drafters of both the federal Constitution and the state constitutions intended to create governments with limited powers (and thus maximum individual liberty). A second proposition, defended by a handful of Supreme Court judges, is that, in addition to the enumerated provisions of the various constitutions that restricted the exercise of governmental powers, natural law vests the people with unenumerated rights that cannot be violated constitutionally. While the first proposition is uncontroversial, the second is not. In *Calder v Bull* Judge Chase wrote that the Supreme Court was entitled to declare legislation unconstitutional if it infringed upon the sphere of natural liberty which vested in all citizens. 3 US 386 (1799). However, a majority of the *Calder* Court, in holding that the Connecticut legislature's invalidation of a probate decree did not violate the US Constitution, reasoned that the US Supreme Court could invalidate acts of the federal government and state governments only where a specific constitutional provision had been violated. In the first decade of the 20th century, the Supreme Court began to give the 'due process' guarantees in the Fifth and Fourteenth Amendments substantive, as well as formal, content. 'Substantive due process' enables courts to find law unconstitutional if 'it exceed[s] all bounds of the social compact'. R Rotunda & J Novak *Treatise on Constitutional Law: Volume I* (1992) 380. Of course, the problem with the doctrine of substantive due process is that views on what counts as behaviour being beyond the bounds of the social compact may vary dramatically. The substantive due process doctrine reached its apogee in 1905 in *Lochner v New York* 198 US 45 (1905). In *Lochner*, the Supreme Court struck down a New York statute that limited bakers to a 60-hour work week (for health-related reasons) on the grounds that that it was an arbitrary infringement of the freedom of contract protected by the due process clause of the Fourteenth Amendment. The *Lochner* Court's majority opinion elicited Justice Oliver Wendell Holmes' barbed reply that 'the Fourteenth Amendment does not enact Herbert Spencer's *Social Statics*'. Ibid at 75. The phrase, nearly a century later, is generally employed only as a term of opprobrium. Indeed, conservative American lawyers today note that the substantive due process doctrine gave birth to the 'right to privacy' and the controversial constitutional protection afforded to contraception and to abortion. S 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. See also *Griswold v Connecticut* 381 US 479 (1965)(Contraception); *Roe v Wade* 410 US 113 (1973)(Abortion).

- 5 See Technical Committee on Fundamental Rights *Fifth Report* (11 June 1993). The *Fifth Report* retained the right to personal liberty as it appeared in the *Fourth Report*. The freedom from torture and cruel punishment became the right to security of the person, with the addition of a new clause conferring the right to security of the person: '(1) Every person shall have the right to the security of his or her person. (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.'
- 6 Technical Committee on Fundamental Rights *Sixth Report* (15 July 1993). The Committee added the rather laconic Explanatory Note: 'Clauses 5 and 6 of the previous version of the draft have been combined.'
- 7 Contemporaneous academic commentary on the subject is equally ambiguous. See H Corder & L du Plessis *Understanding South Africa's Transitional Bill of Rights* (1994) 153.

placed in three different subsections: freedom of the person and its largely procedural subsections; freedom from all forms of violence; and freedom from torture and cruel and degrading treatment and punishment. FC s 12(2) underwent a change in name and in substance. It is no longer the right to security of the person. Instead it is the right to bodily and psychological integrity. The grouping of paragraphs under FC s 12(2) makes somewhat more sense than the concatenation of rights found in FC s 12(1). When viewed through the lens of women's rights, the re-organization is far less compelling. In previous drafts, the freedom from all forms of violence cohered with rights to reproductive choice and to bodily integrity. All three subsections engage matters of great urgency for the women of South Africa. Under FC s 12(2)'s new grouping, reproductive rights are combined with the right to be free from medical experimentation without informed consent. While bodily control is clearly integral to both rights, women's concerns are no longer the focus of the section.

8 The recorded drafting history of FC s 12 begins in October 1995. The first draft of the clause reflects an attempt to clarify the meaning of freedom of the person and security of the person. See Section 5 (Freedom and Security of the Person) of the Draft Bill of Rights (9 October 1995), which reads, in relevant part: '(1) Everyone has the right to physical and psychological integrity and to freedom of the person; (2) no one may be- (a) deprived of liberty arbitrarily or without just cause; or (b) detained without trial; (3) No one may be- (a) tortured in any way; (b) treated or punished in a cruel, inhuman or degrading way; or (c) subjected to medical or scientific experiments without their consent.' The first part of the draft clause separated freedom of the person from security of the person, and implicitly defined security of the person in terms of the right to physical and psychological integrity. The second part of the draft clause added a freedom from arbitrary deprivation of liberty to the freedom from detention without trial. The third part of the draft clause retained IC s 11's provisions regarding torture and cruel treatment and punishment. It added a restriction on subjecting individuals to medical or scientific experiments without their consent.

The February draft clause featured several advances. First, it divided the right into three major components: freedom of the person, security of the person, and freedom from torture, cruel and degrading treatment, and medical experimentation. Secondly, the right to freedom of the person was understood to include the right not to be deprived of liberty arbitrarily or without just cause and the right not to be detained without trial. These subsections were probably intended to emphasize that freedom of the person was designed to be primarily procedural in nature and that it was not intended as a full-blown (or even residual) right to negative freedom. Thirdly, the phrasing of the right to security of the person begins to get to grips with two rights of fundamental importance for gender equality: the right of persons to be free from all forms of violence, and to be secure in, and to control, their own bodies. While the potential ambit of these two subsections may be relatively broad, it is hard not to read them as being principally concerned with domestic violence and reproductive rights. Finally, the third subsection — freedom from torture, cruel and degrading treatment, and medical experimentation — dealt with freedom from *direct* physical abuse in three of its most fundamental senses. See *Memorandum from Panel of Constitutional Experts to Chairpersons and Executive Director of the Constitutional Assembly* (5 February 1996), s 11, which reads, in relevant part: 'Freedom and Security of the Person: (1) Everyone has the right to freedom of the person, including the right not to be- (a) deprived of liberty arbitrarily or without just cause; or (b) detained without trial; (2) Everyone has the right to security of the person [bodily and psychological integrity], including the rights- (a) to be free from all forms of violence; and [(b) to be secure in, and control their own body;] (3) No one may be- (a) tortured in any way; (b) treated or punished in a cruel, inhuman or degrading way; or (c) subjected to medical experiments without that person's consent.'

The March draft maintained the structural and the linguistic clarity of the February draft and clarified the meaning of several of the subsections. See *Discussion by Constitutional Committee Sub-Committee in Preparation for Report-Back to Constitutional Committee* (12 March 1996): 'Freedom and security of the person: 11(1) Everyone has the right to freedom of the person, including the right not to be- (a) deprived of liberty arbitrarily or without just cause; or (b) detained without trial; (2) Everyone has the right to security of the person, including the right- (a) to be free from all forms of violence; (b) to [bodily/physical] and psychological integrity; and (c) to make decisions concerning [reproduction/their body] free from coercion, discrimination and violence; (3) No one may be- (a) tortured in any way; (b) treated or punished in a cruel, inhuman or degrading way; or (c) subjected to medical or scientific experiments without that person's consent' (changes emphasized). Notice that the March draft expressly granted everyone freedom over reproductive choices. Of all the proposed drafts, the March 1996 iteration makes the most sense.

Although one might be inclined to read this final re-organization of FC s 12 as a failure to take women's concerns seriously, the actual jurisprudence emanating from FC s 12 suggests that these structural alterations have not, in fact, diminished women's rights. As we shall see, whereas IC s 11 primarily offered guarantees against state impairment of human dignity by the criminal justice system, FC s 12 extends the right's ambit to largely 'private' relationships. Real revolutions in the law have already been wrought from FC s 12's protection of individuals against various sources of physical violence and psychological harm.⁹

(b) Philosophical background

(i) IC s 11: *Ferriera v Levin*, classical liberalism and substantive due process

The drafters of the Interim Constitution could hardly have contemplated the heated philosophical exchanges that their construction of IC s 11 would occasion. The pace of negotiations, and the pressures placed upon technical committees charged with crafting provisions that would accommodate the concerns of a

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variety of parties, did not permit the luxury of rarefied academic debates. That said, the choices made by the Technical Committee responsible for IC s 11 — in particular, the conjunction of a right to personal liberty with a right to physical security — led, almost inexorably, to one of the more memorable set of exchanges amongst the original members of the Constitutional Court.

In *Coetzee v Government of the Republic of South Africa & Others*, Sachs J anticipated the gathering storm:

My principal focus is on the rights subsumed in the expression 'freedom and security of the person'. The issue of determining the precise limits and content of these words will no doubt exercise this court for a long time to come. Other jurisdictions have battled with the problem of whether the phrase should be construed as referring to one right with two facets, or two distinct, if conjoined, rights. Another jurisprudentially controversial matter has been whether the words should be considered as applying only or mainly to the absence of physical constraint or whether it should be regarded as having the widest amplitude and extend to all the rights and privileges long recognized as central to the orderly pursuit of happiness by free men and women. Even more fundamental (and even more difficult) are questions relating to the nature of citizenship and civic responsibility in a modern industrial-administrative state, the degree of regulation that is appropriate in contemporary economic and social life and the extent to which freedom and personal security are achieved by protecting human autonomy on the one hand and recognizing human interdependence on the other.¹⁰

In the quotation above, Sachs J captures the heart of the incipient debate: (1) whether 'freedom' and 'security of the person' constitute two distinct rights housed under a single roof; (2) whether 'freedom' refers to freedom from the specific incursions into personal autonomy expressly identified in IC s 11, or whether it corresponds to the liberal political tradition's more general concern with the

9 See § 40.5 *infra*.

10 *Coetzee v Government of the Republic of South Africa & Others; Matiso v Commanding Officer, Port Elizabeth Prison, & Others* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC) at para 44.

imposition of *any* unjustifiable restriction on individual autonomy.¹¹ *Ferreira v Levin NO & Others* witnessed the very tempest Sachs J had predicted.¹²

In *Ferreira*, Ackermann J both proposed a disjunctive reading of IC s 11 — separating the right to 'freedom' from the right to 'security of the person' — and

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defended a rather Berlinian conception of 'freedom' as negative liberty.¹³ In addition to — or perhaps because of — the general protection of individual liberty afforded on this account, Ackermann J's reading of IC s 11(1) protected an unspecified number of 'residual' freedom rights. That is, it guaranteed protection of rights not specifically protected elsewhere in Chapter 3 of the Interim Constitution, including immunity against self-incrimination in contexts where the IC s 25(3) fair trial rights of accused persons did not apply.

To understand exactly how Ackermann J arrived at these conclusions requires an abbreviated account of the underlying facts and law at issue. Ackermann J's robust reading of IC s 11(1) was necessitated by a legal technicality. The applicants had attacked s 417(2)(b) of the Companies Act¹⁴ as a violation of their IC s 25(3) fair trial rights.¹⁵ In particular, they objected to the fact that s 417(2)(b) compelled an

11 See J Rawls *Political Liberalism* (1993) 292 (Liberal theory prefers to confine state interference with individual conduct to those restrictions necessary to achieve mutual security and the maximum possible degree of individual autonomy); J Raz *The Morality of Freedom* (1986) 6–14 (While talk of a presumption of liberty — as with Rawls' first principle of justice — may be confusing, liberals are on more solid ground when they make the stronger claim that (a) freedom is intrinsically valuable and (b) every political act restricting any individual's freedom requires justification.)

12 *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) ('*Ferreira*'). For a fuller account of this case, see I Currie & S Woolman 'Freedom and Security of the Person' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS 5, 1999) Chapter 39; I Currie '*Ferreira v Levin*' (1996) 12 *SAJHR* 179.

13 In fairness to Ackermann J, *Ferreira* represents the Justice's first attempt to work through a Kantian conception of human dignity in terms of the provisions of the South African Constitution. See C Taylor 'Kant's Theory of Freedom' in *Philosophy and the Human Sciences: Philosophical Papers II* (1985) (Human freedom is prior to legitimate order, in that legitimate authority can only arise as the creation of human agents through consent.) For a rather unsympathetic assessment of the Kantian strain in contemporary liberal political philosophy, see M Sandel 'Introduction' in M Sandel (ed) *Liberalism and its Critics* (1984) 1. Although unsuccessful in *Ferreira*, Ackermann J's approach was, ultimately, vindicated in the Court's dignity and equality jurisprudence. For a fuller, and rather appreciative, account of Ackermann J's project and its Kantian roots, see S 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.

14 Act 61 of 1973.

15 Section 417 of the Companies Act permits examination of the officers of a company being wound up because it is unable to pay its debts, and the examination of its debtors, and of persons with information about the affairs of the company or who are in possession of property of the company. Examinees may be summoned by the Master of the High Court or by the court itself to attend an examination. Section 417(2)(b) provides for the compulsion of an examinee: 'Any such person may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him, and any answer given to any such question may thereafter be used in evidence against him.' An examinee who fails, without sufficient cause, to answer questions is guilty of an offence (s 418(5)(b)(iii)) and liable on conviction to a fine not exceeding R2 000 or six months' imprisonment, or both such fine and imprisonment (s 441(1)(f)).

examinee at a s 417 inquiry into the winding up of a company to answer potentially incriminating questions, and allowed the answers given to those questions to be used in evidence in subsequent criminal proceedings against the examinee. The applicants contended that such compulsion was inconsistent with the fair trial rights of accused persons.

The applicants had a problem, however. They were not, as yet, accused persons. They had merely been summoned for examination by the Master. The *Ferreira* Court divided on whether the applicants could challenge the validity of s 417(2)(b) as a violation of their IC s 25(3) rights if they had neither been charged with a criminal offence nor, in a criminal trial, been confronted by evidence given by them at a s 417 inquiry.

Ackermann J found that although there was, as yet, no threat to the fair trial rights expressly protected by IC s 25(3), the applicants could find relief in IC s 11(1). IC s 11(1), according to Ackermann J, must be read disjunctively: the

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right 'to freedom' is a separate and independent right, related to the right to 'security of the person'. Part of the justification for this disjunctive reading lay in a rather Rawlsian or Kantian contention that 'freedom' was prior to other fundamental rights because the liberty to pursue one's own personal development and conception of the good life lies at the core of what it means to be human.¹⁶ Another part of the justification for this disjunctive reading lay in the contention that 'freedom' was the ground for a broad array of other enumerated fundamental rights.¹⁷

Ackermann J's conception of 'freedom' in IC s 11(1) consciously corresponds with the standard philosophical account of negative liberty. Negative liberty, according to Ackermann J — and Isaiah Berlin — consists of 'the area within which . . . a person . . . is or should be left to do or be what he is able to do or be, without interference by other persons'.¹⁸ While the right to freedom does not 'deny or preclude the constitutionally valid, and indeed essential, role of state intervention in the economic as well as the civil and political spheres', such interventions must, to the extent that they are limitations of freedom, be justified on the grounds set out in IC s 33(1).¹⁹ This reading suggested, for Ackermann J, the following definition of the right to freedom: 'I would, at this stage, define the right to freedom negatively as the right of individuals not to have "obstacles to possible choices and activities" placed in their way by . . . the state.'²⁰

For the most part, this sphere of negative liberty would be captured by many of the rights specifically enumerated in the Interim Constitution's Bill of Rights. As a result, 'the freedom rights protected by [IC] s 11(1) should more properly be

16 See J Rawls *A Theory of Justice* (1973); I Berlin 'Two Concepts of Liberty' in *Four Essays on Liberty* (1969); I Kant *Groundwork of the Metaphysics of Morals* (trans and ed AW Wood, 2002).

17 See *Ferreira* (supra) at para 49 (According to Ackermann J, freedom provides the grounds for the entrenchment of the following rights: IC ss 12, 14-21, 25(2)(c) and (d), 25(3)(c) and (d), 27, 28, 30(1)(e), 30(2) and 31.)

18 Ibid at para 52.

19 Ibid.

designated "residual freedom rights".²¹ What, exactly, would the relationship between the enumerated rights and the residual freedom rights be? One would first determine whether an infringement of a specifically enumerated right had

occurred. If not, then one would determine whether a residual freedom right protected by IC s 11(1) existed. In the instant matter, no enumerated freedom right had been infringed by s 417(2)(b) of the Companies Act. Ackermann J then considered whether s 417(2)(b) impaired any of the residual freedom rights protected by IC s 11(1):

What is it about the nature and operation of the provisions of s 417(2)(b) of the Act, and their impact upon the examinee, which can be said to be inconsistent with [s 11(1)] . . .? In the first place, the examinees . . . appear at the examination under compulsion, for if they are duly summoned and fail to attend voluntarily, the Master or the court may . . . cause them to be apprehended and brought before the Master or court for examination. The examinee has no choice but to attend. The examinee is, in terms of subsec (2), obliged to submit to examination. . . . Section 417 obliges the examinee to answer all questions, even though the answer given to any such question may tend to incriminate him or her. Examinees thus have a very restricted choice if they have in the past acted in a way which might make them liable to criminal prosecution in connection with the trade, dealings, affairs or property of the company and they are examined in connection with such acts. If they refuse to answer, they face conviction and sentence to a fine or imprisonment (or both). If they answer, they run the risk of prosecution and conviction under circumstances where they might not have been prosecuted or convicted but for their answers at the examination, because s 417(2)(b) explicitly provides that even an answer which tends to incriminate the examinee may thereafter be used in evidence against him or her.²²

In addition to finding that s 417(2)(b)'s creation of 'obstacles to possible choices and activities' constituted an impairment of IC s 11(1) in its most general sense, Ackermann J concluded that it infringed a residual freedom right in IC s 11(1) — the right against self-incrimination — left unprotected by IC s 25(3). Moreover, the failure to provide examinees with immunity for their testimony could not be justified by reference to the objective sought to be achieved by the section (the protection of shareholders and creditors of a company) and thus constituted an unjustifiable limitation of the residual right to self-incrimination in terms IC s 33(1).

20 Ibid at para 54. John Stuart Mill adumbrates a similar conception of 'freedom' in his *Introduction to On Liberty* (1859) ('It comprises first, the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects . . . The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them. . . . Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived. No society in which these liberties are not, on the whole, respected is *free*, whatever may be its form of government.' (Emphasis added.))

21 *Ferreira* (supra) at para 57.

22 *Ferreira* (supra) at para 70.

The majority in *Ferreira* reached a similar conclusion via a fundamentally different route. The majority found that the IC s 25(3) challenge to the Companies Act was justiciable and that s 417(2)(b) impaired the exercise of IC s 25(3). As a result, even in terms of Ackermann J's preferred mode of analysis, the majority had no need to consider whether a residual freedom right in IC s 11(1) had been infringed. However, the majority did believe it necessary to distance itself from what it considered some of the more immoderate aspects of Ackermann J's reading of IC s 11.

According to Chaskalson P, the primary, though not necessarily the only, purpose of IC s 11(1) was to ensure the protection of the physical integrity of the individual. Read in this more restrictive manner, IC s 11(1) protects a right to physical liberty and a right to physical security.²³ 'This does not mean', Chaskalson

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P conceded, 'that we must construe [IC] s 11(1) as dealing only with physical integrity.' 'Freedom' may well entail more than that. But whatever 'freedom' does mean, Chaskalson P continued, it does not amount to a presumption of individual liberty.

Textual peculiarities and institutional comity were the two primary drivers for the majority's reasoning.

The bifurcated structure of the limitations clause under the Interim Constitution — IC s 33(1) — meant that limitations of residual freedom rights would be subject to the more onerous 'necessity' requirement, while many of the enumerated freedom rights would only have to satisfy the more deferential 'reasonable' requirement. It would be odd, indeed, reasoned Chaskalson P, if the drafters of the Interim Constitution had intended the enumerated rights found in IC Chapter 3 to be more easily impaired than unenumerated residual freedom rights ostensibly protected by IC s 11(1). Moreover, the higher threshold for justification of an impairment of IC s 11(1) would create the perverse incentive amongst litigants to pursue more aggressively residual freedom right challenges than many enumerated right challenges. Again, the majority reasoned, the drafters could not have intended such an outcome.

The potential anomalies that the limitations clause might — under an Ackermannian reading of IC s 11(1) — have a bearing on critical considerations of institutional comity. For unless the Constitutional Court was willing to compromise on its understanding of the meaning of 'necessary' in IC s 33(1), then all government action would be subject to an extraordinarily high level of justification. An unduly intrusive and exacting Constitutional Court — in the early days of a constitutional democracy — would run the risk of straining its relations with the political branches of government. The Constitutional Court was obliged, according to Chaskalson P, 'to avoid the pitfall of *Lochner v New York*.²⁴ The interventionism of the *Lochner* Supreme Court, whose willingness to frustrate remedial government action in the name of an expansive and anachronistic understanding of liberty, undermined both the authority of the court and the institution of judicial review, led Chaskalson P to conclude: 'We should not . . . construe s 11 so broadly that we overshoot the mark and trespass upon terrain that is not rightly ours.'²⁵

23 Ibid at paras 158-59 (Chaskalson P).

24 *Ferreira* (supra) at para 182, citing *Lochner v New York* 198 US 45 (1905).

What then does 'freedom' in the context of IC s 11 — and thus FC s 12 — mean? The holding of the majority in *Ferreira* can be summarized as follows. First, the right to freedom and security of the person in s 11 — and FC s 12 — is confined, primarily, to the protection of the physical liberty and physical security of the individual. Second, while freedom writ large obviously involves more than the protection of physical integrity, the protection for this more expansive understanding of freedom can generally be found in the other specific and enumerated provisions of the Bill of Rights. Third, if one cannot secure adequate protection for some basic component of individual freedom under any of the enumerated

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provisions of the Bill of Rights, then it may be appropriate to look to the right to freedom in IC s 11(1) — now FC s 12(1) — for such protection. Fourth, given that the right to a fair trial is dealt with specifically and in detail under IC s 25(3) — now FC s 35(3) — neither IC s 11 nor FC s 12 embraces a residual fair trial right. Fifth, whatever else it might encompass, the residual freedom rights to be found in IC s 11 or FC s 12 do not embrace 'a right not to have obstacles to future choices and activities placed in one's path by the state.'

The majority in *Ferreira* may have effectively blunted Ackermann J's efforts to enshrine a broad, self-standing, freedom right in the Bill of Rights of both the Interim Constitution and the Final Constitution. Its holding did not, however, end the legal community's ongoing conversation about the extent to which the Bill of Rights protects the negative conception of liberty that animates Ackermann J's opinion or, as importantly, the latitude possessed by the judiciary to flesh out the meaning of the basic law.

(aa) Negative liberty

The fate of negative liberty as grundnorm in our basic law is fairly easy to predict. Ackermann J's initial desire to ground the Bill of Rights in a fundamentally negative conception of liberty — as reflected in his judgments in *Ferreira* and *Du Plessis v De Klerk*²⁶ — was, for good reason, largely rebuffed by the rest of the Constitutional Court. As Chaskalson P's remarks above suggest, the Court was loath — especially in its early days — to make grand philosophical pronouncements about the political underpinnings of our new order. It may also be that a majority of the Court disagreed with Ackermann J about the nature of these first principles. It is fair to say that they held the winning hand in this argument as well.

Although Ackermann J did South African jurisprudence an immense service by attempting to state clearly the principles upon which his reasoning lay — a characteristic that marked his entire tenure on the Court — it is not at all clear that his argument from first principles was correct.²⁷ Although this chapter is hardly the

25 Ibid.

26 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC). For a critique of Ackermann J's jurisprudence of negative liberty, see S Woolman & D Davis 'The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and Final Constitutions' (1996) 12 *SAJHR* 361; S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31. For the most sustained and well-developed defence of modern classical liberalism, see the works of Friedrich A Hayek: FA Hayek *Law, Legislation and Liberty* (1979); FA Hayek *New Studies in Philosophy, Politics, Economics and the History of Ideas* (1978); FA Hayek *The Constitution of Liberty* (1960); FA Hayek *The Road to Serfdom* (1948).

place to engage at length in complex philosophical debates, the terms of that debate — and our preferred understanding — are easy enough to state.

While Ackermann J recognizes that certain material and social preconditions must exist for negative liberty to operate as a genuinely meaningful ideal, he defends the thesis that a clear distinction between 'freedom' and its conditions must be maintained if anyone is to have any meaningful experience of freedom itself. This commitment to the 'priority' of negative liberty, along with an entirely accurate view of the dangers of a state committed to one right way of being in the world and final solutions (read Holocaust and Apartheid), leads Ackermann J to conclude that negative liberty, and not positive liberty, is the 'truer and more humane ideal'.²⁸

This more humane ideal rests on at least two basic propositions. First, the individual determines, for herself, the sources of meaning in her life, and constructs out of these different sources a particular vision of the good life. Second, in order for an individual to pursue her preferred way of being in the world, the state must limit its intervention into the affairs of its citizens to those rules of law that are necessary for the security of the commonweal and that create the requisite space for each member of society to pursue her preferred way of being in the world in a manner consistent or compatible with the pursuit of the preferred ways of being in the world of her fellow citizens. Ackermann J states this second proposition as follows:

I wish to emphasize quite explicitly that a broad and generous interpretation of freedom does not deny or preclude the . . . essential role of state intervention in the economic as well as the civil and political spheres. On the contrary, state intervention is essential to resolve the paradox of unlimited freedom (where freedom ultimately destroys itself) in all these spheres.²⁹

The critiques of classical liberalism are well known and have, by and large, been incorporated into contemporary liberal theory. The first critique is that, as a metaphysical matter, classical liberalism has relied upon an atomistic model of the self which stresses the capacity of separate, independent selves to choose the aims and attachments by which they will define themselves. As a chooser, 'the self', as John Rawls has written, 'is prior to the ends which are affirmed by it; even a dominant end must be chosen from among numerous possibilities.'³⁰ Rawls himself later recanted this particular metaphysical commitment and recognized that all individuals have their identities or selves determined or conditioned by a vast

27 See A Cockrell 'Rainbow Jurisprudence' (1996) 12 *SAJHR* 1, 12 (Ackermann's J exploration of the meaning of freedom in *Ferreira* stands out from the bulk of Constitutional Court jurisprudence as a rigorous consideration of the substantive reasons motivating constitutional adjudication.) But see H Klug 'Striking Down Death' (1996) 12 *SAJHR* 61, 66–67 (Klug justifies the cramped definition of rights offered by the Court as a political necessity. Broad declaratory definitions of rights might require the Court, when later faced with different facts and concerns, to modify or to create exceptions from its previous articulation of a rule. More importantly, broad definitions of rights at this early stage of South African constitutional democratic history — namely, the early years of genuine majoritarian rule — could put the Court's long term political viability at risk by setting up too many conflicts with the new 'representative' government.)

28 I Berlin 'Two Concepts of Liberty' in *Four Essays on Liberty* (1969) 171.

29 *Ferreira* (supra) at para 52.

30 J Rawls *A Theory of Justice* (1973) 3–4.

network of social, historical, political, religious, educational, and linguistic practices over which they have no control whatsoever.³¹ Liberals can still defend

robust forms of associational freedom — or zones of autonomy — while recognizing that our identities are largely defined by and dependent upon the communities we inhabit.³²

The second critique is that classical liberals often assume that individuals have privileged access to the 'correct' understanding of the good life and that neither the state nor other social actors are in a position to supplant that vision of the good with some other vision of the good. As Charles Taylor and others have forcefully argued, there are any number of instances in which others do possess greater insight into our needs than we do ourselves. And if 'we cannot maintain the incorrigibility of the subject's judgments about his freedom, or rule out second-guessing', then we must admit that others — including the state — may possess the capacity, on occasion, to set us free.³³

Third, classical liberal theory generally takes the view that the state must refrain from taking decisions or making laws that determine beliefs or objectives that are deemed central to individual and group identity formation. The pithy way of putting this proposition is that liberals wish to remain 'neutral' between competing comprehensive conceptions of the good life. The more nuanced, but still liberal, response to this aspiration to neutrality is twofold: (a) although liberals are correct that the recognition of each individual as the author of her actions is a necessary condition for a free society, it does not follow that every individual choice is morally, politically or constitutionally justifiable; (b) individual selves are not merely socially constructed, but all of their actions are, in some way, addressed towards the other individuals and groups that make up their political community.³⁴ What this means for our constitutional politics is that one's belief in the correctness of a way of life does not end public debate about one's choices. While one's choices may ultimately be universally accepted — or simply acceptable in a society committed to zones of autonomy — those choices must, at the very least, be justifiable in a manner that other members of society can understand, if not live by themselves.

At a minimum, the previous analysis supports the following four propositions. First, individual autonomy and group autonomy — and the pluralist society which inevitably follows — remain valid ideals that are not contingent upon the acceptance of various axioms of classical liberal theory. Second, given our shared horizons of meaning, members of a given polity can have rational arguments about ways of

31 See J Rawls *Political Liberalism* (1993). See also C Lamore *Patterns of Moral Complexity* (1986). The original critique to which Rawls was obliged to answer was levelled by Michael Sandel. See M Sandel *Liberalism and the Limits of Justice* (1981).

32 S 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 (Recognizing that the various associations into which we are born and of which we remain a part are constitutive of the self, and that a liberal conception of freedom — or any meaningful conception of freedom — rests upon the recognition of that fact.)

33 C Taylor 'What's Wrong with Negative Liberty' *Philosophy and the Human Sciences: Philosophical Papers II* (1985) 211, 228.

34 See C Taylor *The Ethics of Authenticity* (1992).

being in the world and the extent to which particular practices conform to the ideals to which a polity has committed itself in public documents such as the Final Constitution. Third, such arguments can make a

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difference in the way others see us, and the way we see others. Thus, contrary to the positions taken by many classical liberals, the commitment to pluralism does not preclude rational discourse about values and the good life, nor does it necessarily preclude the reconciliation of differences over the ends of life — even where the goods at issue initially appear incommensurable. Furthermore, on this conception of politics, the state does not disappear. Quite the opposite. This more sophisticated form of liberalism sees the state as playing an essential role in the debate about, and the construction of, values. Fourth, the Final Constitution's commitment to transformation and to rough equality combined with the recognition that all meaningful action takes place within some form, indeed many forms, of association, results in a liberalism committed to some kind of state support for a variety of different ways of being in the world. Such support is especially important for those groups with visions of the good life which are not politically, socially or economically dominant: the state is obliged, on this account, to take more seriously the views of the good life held by aboriginal communities stripped of the wealth necessary to sustain traditional practices, or the views of the good life held by single mothers who run up against the burdens of single parenting, sexism in the workplace, and restrictions on reproductive choice.

We have shown why we have good reason to refrain — at a theoretical level — from endorsing Ackermann J's views on the meaning of 'freedom' without withdrawing our support for a liberal reading of our basic law. Having underscored our differences, we think it important to emphasize the extent to which we agree with Ackermann J that 'freedom' cannot mean that the liberal state must tolerate all ways of being in the world and concur that those ways of being which threaten the core values of this constitutional order — dignity, rough equality and the real possibility of democratic participation — must be ruled out of bounds.

We also think it important to note that our thick conception of liberalism — our commitment to more than the nightwatchman state — is more than just a theory. It is, as things stand, our Constitutional Court's practice. As Theunis Roux writes, a host of Constitutional Court decisions and dissents, as well as the text of the basic law itself, underwrites a principle of democracy that demands more than the occasional exercise of the franchise.³⁵ As Frank Michelman notes, the rule of law doctrine — as currently constructed — potentially subjects every exercise of state power to judicial review.³⁶ (Could Ackermann J have wanted more than that?) In Sandra Liebenberg's estimation, our Court has shaped its socio-economic rights jurisprudence around conceptions of interdependence in which meaningful exercise of civil and political rights is contingent upon the progressive realization of rights to housing, water, food, health and social security.³⁷ According to one of the

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

36 See F Michelman 'Rule of Law, Legality and Constitutional Supremacy' 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.

authors of this chapter, the Court's dignity jurisprudence traces an arc from the recognition that dignity begins with the refusal to turn away from suffering to the recognition that dignity requires the material transformation of the life of each South African in a manner that enables her to exercise meaningfully her agency and her capacity for self-actualization.³⁸ These discrete doctrines — especially the dignity jurisprudence explicated by Ackermann J — support the proposition that Ackermann J and the rest of the Court have generated a body of law that at once exhausts the debate about 'freedom' in *Ferreira* and, at the same time, leaves us with something far more substantial: the normative framework for a social democracy.

(bb) Substantive due process

If Ackermann J lost the battle over 'freedom', then in the end, it seems, he won the war over the value at the core of our current jurisprudence: dignity.³⁹ Could the same be said for the battle, in *Ferreira*, over whether too expansive a view of freedom would inevitably enmesh the Court in political conflicts it would do best to eschew? Recall that Chaskalson P admonished Ackermann J for falling, potentially, into the jurisprudential trap of substantive due process associated with *Lochner v New York*.⁴⁰ Chaskalson P's remarks in this regard are worth quoting in full:

Implicit in the social welfare state is the acceptance of regulation and redistribution in the public interest. If in the context of our Constitution freedom is given the wide meaning that Ackermann J suggests it should have, the result might be to impede such policies. Whether or not there should be regulation and redistribution is essentially a political question which falls within the domain of the Legislature and not the Court. It is not for the Courts to approve or disapprove of such policies. What the Courts must ensure is that the implementation of any political decision to undertake such policies conforms with the Constitution. It should not, however, require the Legislature to show that they are necessary if the Constitution does not specifically require that this be done.

In terms of our Constitution we are enjoined to protect the freedom guaranteed by s 11(1) against all governmental action that cannot be justified as being necessary. If we define freedom in the context of s 11(1) in sweeping terms we will be called upon to scrutinise every infringement of freedom in this broad sense as being 'necessary'. We cannot regulate this power by mechanisms of different levels of scrutiny as the Courts of the United States do, nor can we control it through the application of the principle that freedom is subject to laws that are consistent with the principles of 'fundamental justice', as the Canadian Courts do.

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We should be careful to avoid the pitfall of *Lochner v New York* which has been described by Professor *Tribe* in his seminal work on *American Constitutional Law*, as being 'not in judicial intervention to protect "liberty" but in a misguided understanding of what liberty actually required in the industrial age'. The *Lochner* era gave rise to

37 See S 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.

38 See S 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.

39 Ibid (Offers a detailed account of Ackermann J's contribution to this domain, as well as the evolution of his thought.)

40 *Ferreira* (supra) at para 182, citing *Lochner v New York* 198 US 45 (1905).

serious questions about judicial review and the relationship between the Court and the Legislature, and as Professor *Tribe* points out, the collapse of *Lochner* gave

'credence to the notion that the legislative process should be completely wilful and self-controlled, with absolutely no judicial interference except where constitutional provisions much more explicit than due process were in jeopardy'.

The protection of fundamental freedoms is pre-eminently a function of the Court. We should not, however, construe s 11 so broadly that we overshoot the mark and trespass upon terrain that is not rightly ours.⁴¹

Though we disagree with Ackermann J's take on 'freedom', his dismissal of Chaskalson P's *Lochner* gambit in the above passage is spot on:

There may also be the anxiety that, unless freedom is given a more restricted meaning, this Court will inevitably be drawn into matters which are the concern of the Legislature rather than the Courts and could stand accused of what *Tribe* has described as being the error in decisions such as *Lochner v New York* which was 'a misguided understanding of what liberty actually required in the industrial age'. I believe this fear to be unfounded. *Lochner* . . . was decided in 1905 at a time and in a socio-economic context completely different from ours in 1995. I do not believe that we ought to allow ourselves to be haunted by the *Lochner* ghost. It is to me inconceivable that the broad sweep of labour legislation in this country could be struck down because of an argument that it infringed rights of contractual freedom protected by the Constitution. This is so for a number of reasons.

First, the interventionist role of the State is no longer seen, in broad terms, as being limited to protecting its citizens against brute physical force and intimidation from others only, but is seen as extending to the economic and social realm as well. Secondly, there are specific provisions in the Constitution itself which will ensure that appropriate labour and other social legislation will not be invalidated because of a 'misguided understanding' of what liberty requires. Thirdly, statutory limitations on contractual freedom will . . . be justified under s 33(1) [the limitation clause], assuming the other requirements for limitation to have been fulfilled. . . . As a general proposition it is difficult to see how labour and other social legislation would be struck down where such legislation easily passes constitutional scrutiny in countries such as the United States of America, Canada and Germany.⁴²

Beyond the obvious persuasiveness of Ackermann J's rejoinder, four aspects of this exchange will deepen our understanding of 'substantive due process' in South African constitutional law.

First, a decade later, all three branches of government continue to contend with basic issues of legitimacy and are, therefore, quite anxious about their exercise of

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power in relation to the other branches.⁴³ To the extent that *Lochner* means anything at all in South Africa, it must be understood as a warning articulated by *one* Justice, on one official occasion, about how far the courts should go in a fragile society where the trust necessary for testing the good will of one's political partners does not yet possess the kind of foundation born of time and respect found in other jurisdictions. Ironically, that *Lochner* gets mentioned less frequently in a country closer to crisis may well reflect the fact that an institution attempting to establish its

41 See *Ferreira* (supra) at paras 180–83 (footnotes omitted).

42 *Ibid* at paras 65–66 (footnotes omitted).

own legitimacy and the legitimacy of the entire democratic constitutional project might be less inclined to use a metaphor synonymous with failure.

Second, for the purposes of this chapter, the most remarkable quality of the Court's jurisprudence is not its minimalism (its well-known desire to avoid making unnecessary pronouncements about the content of our basic law).⁴⁴ It is the Court's maximalism. For example, the development of the Court's rule-of-law doctrines has now outstripped the capacity of the Court to control its reach. The result is a doctrine that contains elements of *Lochnerism* — that is, characteristics of substantive due process — that the Chaskalson Court should, if operating in terms of its own logic, have worked more assiduously to control.

While the consequences of the Court's rule-of-law judgments for constitutional jurisdiction are radical, and clearly not contemplated by the drafters of the Final Constitution, it is certainly possible to view the legality principle as an inevitable consequence of a founding document committed to constitutional supremacy. What was certainly not inevitable, nor even foreseen, was the transmutation of a doctrine designed to ensure that state actors exercise their powers within the formal bounds of the law into a doctrine in which *the actual manner* in which the

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state actor behaves — within such formal bounds — could be assessed in terms of *substantive* outcomes. That may not sound revolutionary. After all, various rights, as well as the limitations clause, subject state action to a test for reasonableness. What is revolutionary about *Fedsure*, *Pharmaceutical Manufacturers* and *Modderklip* is that prior to these judgments, the constitutionality of the conduct of state actors was always measured against a specific substantive provision in the Interim Constitution or the Final Constitution.⁴⁵ Indeed, one would have thought that self-same proposition lay at the very core of the Court's holding in *Ferreira*.

With *Fedsure*, constitutional review is no longer moored to the text. The legality principle draws its force, the Court tells us, from no specific provision, but from the

43 The most recent exchange over the now moribund Constitution Fourteenth Amendment Bill — with its efforts to revamp the judiciary and bring it under the direct administrative control of the executive — is just one such example of the anxiety-ridden encounters that continue to occur between the three branches of government. For more on that exchange, see C Albertyn 'Judicial Independence and the Constitution Fourteenth Amendment Bill' (2006) 22 *SAJHR* 126. A better example may be the various pronouncements made by government officials surrounding the provision of nevirapine in order to prevent mother-to-child transmission of HIV. See *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC), 2002 (10) BCLR 1033 (CC) ('TAC'). In *TAC*, the Constitutional Court went to great lengths to point out that it was simply ensuring that the government followed its own well-articulated policy regarding the provision of anti-retrovirals — proved safe and efficacious — to a particular class of persons. At the same time, several members of the Cabinet were not quite sure how to respond to the judgment. The Health Minister, Dr Manto Tshabalala-Msimang suggested that the government was free to contravene the Court's instructions. Shortly thereafter, the Minister of Justice, Penuell Maduna, publicly disavowed the Health Minister's intimations of contempt and assured the public that the government would abide by the Court's decision. The need for quite self-conscious recognition of the powers of a co-ordinate branch of government — and the need to build trust between the branches — was on display from the very beginning of the new constitutional dispensation. Hours after President Mandela lost a legal battle in *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* he went on national television to declare not only that the Constitutional Court's judgment must be obeyed but that the simple fact of the Court's disagreement with the government was a sign of South Africa's political good health. 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC).

44 For the locus classicus on the Constitutional Court's aversion to saying more than is absolutely necessary to resolve a dispute, see I Currie 'Judicious Avoidance' (1999) 15 *SAJHR* 138

text as a whole: something more basic than the text of the basic law. With *Fedsure*, the Court enters the well-established, if controversial, domain of modern substantive due process doctrine: the territory ploughed and cultivated by the

US Supreme Court in reproductive rights cases stretching from *Griswold*⁴⁶ and *Eisenstadt*,⁴⁷ through *Roe*⁴⁸ to *Carey*,⁴⁹ and which ultimately gave birth by judicial writ to an unenumerated, but now largely accepted, right to privacy. *Pharmaceutical Manufacturers* is noteworthy, in this regard, not merely because it extends the reasoning of *Fedsure*. *Pharmaceutical Manufacturers* also holds that, despite the addition of a textual hook in the Final Constitution — FC s 1(c) — that commits us 'in

45 The principle of legality and the rule of law doctrine articulated in *Fedsure* and *Pharmaceutical Manufacturers* respectively stand for the deceptively simple proposition that every exercise of public power must comply with the law. 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*'); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC), 1998 (12) BCLR 1458(CC) ('*Fedsure*') at paras 58-59 ('It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.') The most recent expression of this principle is to be found in the dissenting opinion of Langa CJ in *AAA Investments v Micro Finance Regulatory Council & Another* CCT 51/05 (unreported decision of 28 July 2006) ('Public power can only be validly exercised if it is clearly sourced in law.') But this apparently uncontroversial thesis packs two additional punches. First, it requires that any exercise of public power be 'affirmatively authorized by positive law'. See F 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, 11-11. See also *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Others* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) at para 35. Second, because all law derives its force from the constitution, all positive law must comport with constitutional dictates, and therefore, any exercise of public power itself — as authorized by positive law — must be consistent with the explicit and implicit demands of the basic law.

While these two additional theses may appear, on their face, to be relatively tame, their consequences are revolutionary. The legality principle, and its doppelganger, the rule of law doctrine, makes every exercise of public power subject to constitutional review without any express provision of the Constitution requiring such an exacting standard. For a Constitutional Court committed to not saying anything more than necessary about the meaning of the constitutional text, the elevation of such a tacit (but perhaps penumbral) commitment to the status of a first principle makes the *Lochner* Court's gloss on the 14th Amendment's due process clause seem relatively tame. A second consequence of this doctrine that the Constitutional Court must have anticipated, but has as yet refused to address directly, is the radical expansion of its own jurisdiction. See Michelman (supra) (From the premise that every law draws its force from the basic law and that the validity of every exercise of power must be assessed in terms of the basic law, 'it apparently must follow that every possible appeal in a case at law presents a constitutional question.') By making every exercise of public power and every judicial construction of both law and conduct a 'constitutional matter', the Constitutional Court retains the capacity to review each and every judicial decision. That means, in short, that once a dispute reaches a tribunal, it becomes, potentially, a constitutional matter. (Whether the underlying dispute engages conduct by a state actor is immaterial.) Any judicial construction of law that is not authorized by law — and that includes the basic law — is meat for constitutional review. As a result, the Constitutional Court, a court of specialized and limited jurisdiction, has transformed itself into a court that could effectively be a court of plenary jurisdiction. See C Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa' (2005) 21 *SAJHR* 509.

46 381 US 479 (1965).

47 405 US 438 (1972).

48 410 US 113 (1973).

principle' to the rule of law, the rule of law doctrine is not grounded in a specific textual provision.

Enter *Modderklip*. In *Modderklip* the Supreme Court of Appeal had found that the state's failure to act on the occupation of private land by an informal settlement amounted to an expropriation under FC s 25(1) read with FC s 7(2), and ordered the state to compensate Modderklip Boerdery for the violation.⁵⁰ The Constitutional Court declined to decide the case on the same basis.⁵¹ The *Modderklip* Court relies instead, for reasons that cannot be interrogated here, on FC s 1(c) and FC s 34. No longer simply a stand-alone principle, FC s 1(c), when read with the right of access to courts, FC s 34, generates the proposition that the rule of law, properly conceived, imposes an 'obligation [on] . . . the state to provide the necessary mechanisms for citizens to resolve disputes that arise between them.'⁵² But the sting in this judgment is not that FC s 34 secures for the citizenry the legal institutions required to mediate conflict. Now read in concert with FC s 1(c), FC s 34 requires more than 'the mere provision of the mechanisms' for dispute resolution.⁵³ It demands that the state take 'reasonable steps . . . to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law.'⁵⁴

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Third, if such language alone is not striking enough — the spectre of a Zimbabwe-like constitutional crisis looms large — then three subtle shifts in language are.

- The right of access to courts is no longer primarily concerned with the existence of formal legal structures. It is now concerned, it appears, with 'effective remedies'.⁵⁵ It is concerned with *substantive* outcomes — substantive due process — and thus outcomes the constitutionality of which are to be measured by the courts for compliance with some rather murky, but no less

49 431 US 678 (1977).

50 *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)* 2004 (6) SA 40 (SCA), 2004 (8) BCLR 821 (SCA). See also *Modderklip Boerdery (Pty) Ltd v Modder East Squatters & Another* 2001 (4) SA 385 (W).

51 *President of the Republic of South Africa & Others v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) ('*Modderklip*').

52 See *Chief Lesapo v North West Agricultural Bank & Another* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC) ('*Chief Lesapo*') at para 22 (*Chief Lesapo* hints at some of the concerns raised in *Modderklip*. Mokgoro J writes that FC s 34 and the rule of law doctrine are 'foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against *vigilantism*, and the *chaos* and *anarchy* which it causes. Construed in this context of the *rule of law* and the principle against self-help in particular, access to court is indeed of cardinal importance.' (our emphasis) However, it is one thing to inveigh against individualized acts of self-help, and quite another to find the State culpable for the social disintegration that flows from a generalized failure of the state's legal dispute mechanisms to resolve conflict effectively.)

53 *Modderklip* (supra) at para 42.

54 *Ibid.*

meaningful, sense of what 'reasonable steps' are required to turn back the forces of entropy.

- It also seems clear that this new reasonableness test is not derived from FC s 34. It flows from FC s 1(c) and our commitment to the rule of law. As Langa DCJ writes: 'The precise nature of the state's obligation in any particular case and in respect of any particular right will depend on what is reasonable, regard being had to the nature of the right or interest that is at risk as well as on the circumstances of each case.'⁵⁶ FC s 1(c) will tell us, in the context of various rights, what reasonable, *substantive* steps the state — and the courts — must take to maintain order.
- The challenges of meeting such a reasonableness requirement in similar kinds of cases are not to be underestimated. For, although the Court describes these circumstances as extraordinary, they are, indeed, the circumstances in which many South Africans find themselves now.⁵⁷

In the space of several paragraphs, the *Modderklip* Court has moved from an apparently procedural gloss on the rule of law — consistent with the legality principle announced in *Fedsure* and *Pharmaceutical Manufacturers* — to something far more robust. The state — in order to comply with the dictates of the rule of law doctrine — must create and maintain courts that provide 'effective remedies'. Again, the rule of law requires not just any remedy, but an effective remedy. What is an effective remedy? An effective remedy must reflect a serious attempt to prevent 'large-scale disruptions in the social fabric' and their attendant 'chaos and misery'. Failure of the state to plan adequately for such contingencies risks censure by the courts. Moreover, such censure is no longer limited to a terse

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statement at the end of a judgment castigating the responsible Minister for a failure to discharge constitutional responsibilities. A failure to take those reasonable steps necessary to safeguard the rule of law may result in an award of constitutional damages against the state. Like the *Lochner* Court and its expansive reading of the 14th Amendment, the *Modderklip* Court also states that it will find unconstitutional that state action — or that state inaction — which falls outside that permitted by our social compact. In South Africa, we are concerned, not with the violation of freedom of contract, but with state action that risks 'large-scale disruptions in the social

55 *Modderklip* (supra) at para 42.

56 *Ibid* at para 43.

57 *Ibid* at paras 46–49 ('[C]ourt orders must be executed in a manner that prevents social upheaval. Otherwise the purpose of the rule of law would be subverted by the very execution process that ought to uphold it. . . . The circumstances of this case are extraordinary in that it is not possible to rely on mechanisms normally employed to execute eviction orders. This should have been obvious to the state. It was not a case of one or two or even ten evictions where a routine eviction order would have sufficed. To execute this particular court order and evict tens of thousands of people with nowhere to go would cause unimaginable social chaos and misery and untold disruption. In the circumstances of this case, it would also not be consistent with the rule of law. The question that needs to be answered is whether the state was, in the circumstances, obliged to do more than it has done to satisfy the requirements of the rule of law and fulfil the [FC s] . . . 34 rights of *Modderklip*. I find that it was unreasonable of the state to stand by and do nothing in circumstances where it was impossible for *Modderklip* to evict the occupiers because of the sheer magnitude of the invasion and the particular circumstances of the occupiers.')

fabric'. The Constitutional Court has retained for itself the right to intervene when it believes such disruptions pose a danger to the commonweal.

If *Modderklip* is *Lochnerism*, then it is *Lochnerism* of a certain kind. *Modderklip* announces that the Final Constitution — and the rule of law doctrine — does not simply oblige the state to act within the law. *Modderklip* warns the state that although the Final Constitution says nothing about violations of the rule of law — to say nothing about the imposition of constitutional damages for such violations — the courts will readily identify violations and impose appropriate sanctions when the state has not taken what the courts deem to be reasonable steps to maintain the rule of law. This maximalist account of what the rule of law requires is a species of *Lochnerism* because the highest constitutional tribunal in South Africa has gone far beyond the text of the Final Constitution and finds that the basic law now subjects the state to a set of due process dictates that are undeniably substantive.

Fourth, we have just argued that *Modderklip* reflects a very particular species of *Lochnerism*. If *Modderklip* is a form of *Lochnerism*, then so too must Ackermann J's opinion in *Ferreira* be. And if both *Ferreira* and *Modderklip* are species of *Lochnerism*, then Chaskalson P's charge against Ackermann J loses much, if not all, of its force. Both *Ferreira* and *Modderklip* stand for the proposition that judicial overreach is generally not 'a problem' with which most Constitutional Courts must contend. What the tag *Lochneresque* does is draw attention to the Constitutional Court's general desire to avoid offering a sustained political argument about (1) policy-decisions taken by a political branch of government; (2) the meaning of a constitutional provision; and (3) the use of a constitutional provision to uphold or strike down a law. That the exigencies of particular cases may demand such 'overreach' is an inescapable condition of doing justice in a constitutional jurisdiction. Ackermann J, in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, identifies the proper response to our courts' judicial flight from substance when he writes that:

It should 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 and that legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, fine-tuning them or abolishing them. Thus, they can exercise final control over the nature and extent of the benefits.⁵⁸

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There is, as Ackermann J indicates, no real profit to be had in describing *Modderklip* and *Ferreira* in such odious terms as 'substantive due process'. He seems, in his opinions, to suggest instead that in the years to come, the myths of *Modderklip* and *Ferreira* will tell of a society that, having thrown off the shackles of a despotic state, still manages, under the quiet but insistent tutelage of the Constitutional Court, to enjoy the fruits of 'liberty'.

(ii) FC s 12: Enumerated rights, dignity and the dialectic of enlightenment

The result of the Court's post-*Ferreira* jurisprudence and the recasting of the actual language of the right is a provision that, while more modest in reach, is more influential in practice. The right to freedom and security of the person, as one of the authors has written elsewhere, has worked major and minor revolutions in the law of

sentencing and punishment, delict, reproductive rights, remedies for public and private violence and detention.⁵⁹

FC s 12 — for all its permutations in draft form — still retains the bifurcated structure of IC s 11: FC s 12(1)'s right to freedom and security of the person; and FC s 12(2)'s right to bodily and psychological integrity. As Iain Currie and Johan de Waal rightly observe, FC s 12 has retained its prominence in our nascent body of jurisprudence not because of its expansive understanding of freedom, but because 'it affords comprehensive protection' in the areas to which it does apply.⁶⁰

FC s 12(1) provides both substantive protection and procedural protection for any deprivation of physical liberty. The substantive component requires that the state possess good reasons for the deprivation. The procedural component requires that the state employ fair proceedings or even trials when any such deprivation of freedom is contemplated.⁶¹ Because the drafters offered a far stricter and a more specific formulation of FC s 12(1), we are unlikely to witness again the kind of debate about the meaning of 'freedom' that arose under IC s 11: all five dimensions of the right, as listed in FC s 12(1)(a) through FC s 12(1)(e), speak directly to 'unwarranted' invasions of the body by the state.⁶² FC s 12(2) extends the domain of freedom secured by the right to specific forms of bodily integrity. It safeguards the reproductive rights of women and ensures that all persons subject to medical experimentation are, in so far as our limited capacity allows, aware of the potential consequences of novel medical or scientific experiments performed upon them. If a gap exists in the formulation of FC s 12 that might allow greater latitude for judicial law-making, then FC s 12(2) closes down that gap by containing provisions that further extend individual control over bodily integrity. Thus far, neither FC s 12(1) nor FC s 12(2) have elicited the kind of controversy to which IC s 11(1) gave rise.

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But the 'comprehensive protection' afforded by FC s 12 is only part of the story. FC s 12 has come to play a revolutionary role in the development of our law not because it serves as a vehicle for the preferred political philosophy of a majority of the justices on the Constitutional Court. It is at the centre of significant changes in our law because of the manner in which the Court has connected FC s 12 to the constitutional grundnorm of dignity.

Dignity represents our recognition of others as ends-in themselves, as the objects of our mutual concern and mutual respect, as capable of self-actualization and of self-governance, and, as members of our political community, entitled to the material conditions required for the meaningful exercise of individual agency.⁶³ Its

59 S 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.

60 I Currie & J De Waal *The Bill of Rights Handbook* (5th Edition, 2005) 292.

61 For a discussion of the dual nature of FC s 12 protection see § 40.2(a) *infra*.

62 *Ibid.*

63 See Woolman 'Dignity' (*supra*) at § 36.4(c) (Freedom and security of the person as refracted through the prism of dignity, has revolutionized three bodies of law: (a) the common law of delict in the context of state liability for wrongful behaviour; (b) the state's regulation of abortion; and (c) punishment.)

ultimate aim, however, is the emancipation of all of the individual members of the polity.

Such a characterization of the core tenets of our dignity jurisprudence — and its relationship to FC s 12 — places far too positive a spin on the concerns that sit at the core of the right to freedom and security of the person. As one of the authors of this chapter has noted elsewhere, the right, the value and the ideal of dignity is, originally, animated by a refusal to turn away from suffering.⁶⁴ That original, animating feature of our dignity jurisprudence — the recognition of our capacity for brutality — is what ties FC s 10's right to dignity to FC s 12's right to freedom and security of the person.

FC s 12 recognizes that the history of emancipation associated with the modern nation-state is often, if not inevitably, accompanied by domination. Robespierre and The Terror, in 1793, followed hot on the heels of the French Revolution and The Declaration of the Rights of Man and of the Citizen, in 1789.⁶⁵ After the Holocaust, Stalin's purges and the dropping of atomic bombs on Hiroshima and Nagasaki, and after the victory of Allied forces and the creation of the various international institutions founded at Bretton Woods, members of the Frankfurt School articulated a trenchant critique of modernity that remains difficult to admit in full, but equally impossible to reject out of hand: that liberation and domination in the modern democratic constitutional state are flip-sides

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of the same coin. That is, the liberation from one form of political economy, that of monarchy and mercantilism, invites new forms of domination that flow from another, that of the bureaucratic, democratic capitalist state. Adorno puts this basic thesis as follows:

The dual nature of progress, which always developed the potential of freedom simultaneously with the reality of oppression, gave rise to a situation in which peoples were more and more inducted into the control of nature and social organization, but grew at the same time, owing to the compulsion which culture placed upon them, incapable of understanding in what way culture went beyond such integration. . . . They make common cause with the world against themselves, and the most alienated condition of all, the omnipresence of commodities, their own conversion into appendages of machinery, is for them a mirage of closeness. . . .

The concept of dynamism . . . is raised to an absolute, whereas it ought, as an anthropological reflex of the laws of production, to be itself critically confronted, in an emancipated society, with need. The conception of unfettered activity, of uninterrupted procreation, of chubby insatiability, of freedom of frantic bustle, feeds on the bourgeois concept of nature that has always served solely to proclaim social violence as unchangeable. . . . It was in this, and not in their alleged leveling down, that the positive blue-prints of socialism . . . were rooted in barbarism. It is not man's lapse into luxurious indolence that is to be feared, but the savage spread of the social under the

64 Ibid.

65 The Declaration sounds the triumph of political emancipation from the despotism of monarchy. See art I — Men are born and remain free and equal in rights. Social distinctions can be founded only on the common utility; art III — The principle of any sovereignty resides essentially in the Nation. No body, no individual can exert authority which does not emanate expressly from it; art VI — All the citizens, being equal in [the eyes of the law], are equally admissible to all public dignities, places, and employments, according to their capacity and without distinction other than that of their virtues and of their talent. Only four years later France hears the indefatigable hooftaps of Robespierre, who justified mass executions in the name of progress by stating that: 'Terror is nothing other than prompt, severe, inflexible justice.'

mask of universal nature, the collective as a blind fury of activity. The naïve supposition of an unambiguous development towards increased production is itself of a piece of that bourgeois outlook which permits development in only one direction because, integrated into a totality, dominated by quantification, it is hostile to qualitative difference. If we imagine emancipated society as emancipation from precisely such totality, then vanishing lines come into view that have little in common with increased production and its human reflections.⁶⁶

We do not think it surprising that those persons who helped to bring about the end of apartheid — almost half a century after the world had declared itself rid of Nazi Germany — would imbue their founding document with a bit of grim realism about the emancipatory powers of the post-apartheid state. We find in FC s 12 a preoccupation with the worst forms of abuse that the state — and

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modern society — can visit upon the individual.⁶⁷ FC s 12 reminds us that the post-apartheid state retains the power to put people in prison without reason and without end, and that ours remains a society in which bodies are raped, tortured and otherwise exploited. Take FC s 12(1)(b) — the right not to be detained without trial. All of the original interpreters of our basic law understood that FC s 12(1)(b) was designed to remind us of apartheid's many depredations. As Ackermann J writes in *De Lange*:

When viewed against its historical background, the first and most egregious form of deprivation of physical liberty which springs to mind when considering the construction of the expression 'detained without trial' in s 12(1)(b) is the notorious administrative detention without trial for purposes of political control. This took place during the previous constitutional dispensation under various statutory provisions which were effectively insulated against meaningful judicial control. Effective judicial control was excluded prior to the commencement of the detention and throughout its duration. During such detention, and facilitated by this exclusion of judicial control, the grossest violations of the life and the bodily, mental and spiritual integrity of detainees occurred. This manifestation of detention without trial was a virtual negation of the rule of law and had serious negative consequences for the credibility and status of the judiciary in this country.⁶⁸

66 T Adorno *Minima Moralia: Reflections from Damaged Life* (trans EFN Jephcott, 1951) 146–56. Horkheimer describes the French Revolution as a 'condensed version of later history' and in words even more prescient for the common era writes:

More and more, economic questions are becoming technical ones. The privileged position of administrative officers and technical and planning engineers will lose its rational basis in the future; naked power is becoming its only justification. The awareness that the rationality of domination is already in decline when the authoritarian state takes over society is *the real basis for its identity with terrorism*. (emphasis added)

M Horkheimer 'The Authoritarian State' in A Arato & E Gebhardt (eds) *The Essential Frankfurt School Reader* (1982) 95, 105. Perhaps no better explanation exists for the current existential and political crisis in the West and in the Middle East. However, as pessimistic as both Adorno and Horkheimer are about the human condition, they were by no means fatalists. Both imagined that neo-Marxist dialectic — as opposed to liberal enlightenment conceptions of development and progress — might strengthen 'freedom' and bring about the end of exploitation. See T Adorno & M Horkheimer *Dialectic of Enlightenment* (1972).

67 Although much ink has been spilled over the meaning of 'freedom' in IC s 11 and FC s 12, it seems fair to say that FC s 12's primary focus is on security of the person. FC s 12(1)(c), FC s 12(1)(d), FC s 12(1)(e), FC s 12(2)(a), FC s 12(2)(b) and FC s 12(2)(c) all reflect the drafters' concern with very concrete forms of harm that can be worked upon the individual body rather than concerns with more abstract notions of 'freedom'.

Moreover, many, but by no means all, of our Constitutional Court Justices understood that various commonplace acts of barbarism under apartheid would find renewed expression in our post-apartheid state, and that genuine emancipation would require constant vigilance against new forms of domination. We would suggest that a majority of the *De Lange* Court recognized that permitting presiding officers (who were neither magistrates nor judges) to imprison, indefinitely and repeatedly, recalcitrant witnesses in insolvency proceedings was of a piece with the apartheid practice of detention without trial, and that this identification of a 'new' form of exploitation underwrites the Court's finding that this particular statutory grant of power to punish is unconstitutional.

Ackermann J's words may seem rather tepid compared to Adorno's largely nihilistic critique of modernity. And that is not just because judges are not

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philosophers. The Frankfurt School's post-Marxist dismissal of the Enlightenment's commitment to truth is not, as yet, a philosophical fashion that has taken root here. South Africa remains the last great modernist project. Our Final Constitution is certainly written as if it is such. It commits us to great ideals and the material transformation of the lives of those who cannot yet enter the public square without still experiencing shame. There is simply too much truth yet to be told. FC s 12 will not, therefore, be read as a double-edged sword by our courts. It will be read instead as a reminder that domination and exploitation are features of our society — as they are of every society — and that it falls to our politicians, judges, lawyers and various organs of civil society to ensure that the great emancipatory ends of our modernist project are not undermined by new forms of domination.

40.2 Relationship between FC ss 12(1), 12(1)(a), and 12(1)(b)

Despite FC s 12(1)'s disaggregation and re-formulation of the various rights found in IC s 11(1), the Constitutional Court has largely failed to give distinct content to, and delineate satisfactorily between, FC s 12(1), FC s 12(1)(a) and FC s 12(1)(b). In this section, we attempt to reconstruct the Court's FC s 12(1), FC s 12(1)(a) and FC s 12(1)(b) jurisprudence. This reconstruction apportions discrete tasks to each of the three sections and avoids offending the constitutional canon of surplusage.

(a) Dual function of FC s 12(1)

FC s 12(1) provides both substantive and procedural protection. That much is settled law. What remains unclear is the actual textual source for this dual protection.

68 *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) ('*De Lange*') at para 26. Sachs J sounds similar concerns when he writes that in terms of the

[I]nterim Constitution . . . the words 'detention without trial' stood alone as an express bar to physical restraint by the State and accordingly had to function as the sole textual basis for analysing the constitutionality of all forms of coercive State power involving physical restraint. Now it is just one item in an extensive and nuanced catalogue, and therefore needs to be given a specific significance which both justifies its place in the list and separates it from the other items. It accordingly reclaims its commonly accepted identity in South Africa as relating to a specific and unmistakable prohibition of the special and intense form of deprivation of liberty that scarred our recent history.

Ibid at para 173.

The (residual) dual protection now afforded by FC s 12(1) was first articulated by O'Regan J, in dissent, in *Bernstein v Bester*.⁶⁹ She argued that both the procedural dimension and substantive dimension of IC s 11(1) flowed from the very notion of 'freedom' itself:

[F]reedom has two interrelated constitutional aspects: the first is a procedural aspect which requires that no one be deprived of physical freedom unless fair and lawful procedures have been followed. Requiring deprivation of freedom to be in accordance with procedural fairness is a substantive commitment in the Constitution. The other constitutional aspect of freedom lies in a recognition that, in certain circumstances, even when fair and lawful

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procedures have been followed, the deprivation of freedom will not be constitutional, because the grounds upon which freedom has been curtailed are unacceptable.⁷⁰

What is important about this approach is that both safeguards are enshrined in FC s 12(1)'s general right to 'freedom and security of the person' rather than any specific subsection.

Ackermann J, while professing to follow O'Regan J's dualist approach, located the procedural aspect of the right not in 'freedom' but in the word 'trial'. Indeed, under the Interim Constitution, a unanimous Court in *Nel v Le Roux* made it clear that the procedural protection of IC s 11 was to be found in the 'trial component' of the right.⁷¹

Ackermann J was provided with another opportunity to address the same question under the Final Constitution in *De Lange v Smuts*. In *De Lange*, Ackermann J begins by stating that 'the procedural aspect of the protection of *freedom* is implicit in [FC] s 12(1) as it was in s 11(1) of the interim Constitution'.⁷² However, he later shifts the textual justification for his analysis and writes: 'Although para (b) of s 12(1) only refers to the right 'not to be detained without trial' and no specific reference is made

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

70 *Bernstein* (supra) at para 145. O'Regan J went on to note that both the procedural and the substantive protection afforded by IC s 11 received adequate protection elsewhere in the Bill of Rights. (Procedural protection is secured largely through the right to a fair trial. Substantive protection is achieved through such rights as expression, association, assembly and religion). As a result, O'Regan J conceived of IC s 11 as a residual right. *Ibid* at paras 146-47.

O'Regan J repeated this formulation in another separate judgment in *S v Coetzee* 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC) at para 159 ('They raise two different aspects of freedom: the first is concerned particularly with the reasons for which the State may deprive someone of freedom; and the second is concerned with the manner whereby a person is deprived of freedom. As I stated in *Bernstein and Others v Bester and Others NNO*, our Constitution recognises that both aspects are important in a democracy: the State may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair. The two issues are related, but a constitutional finding that the reason for which the State wishes to deprive a person of his or her freedom is acceptable, does not dispense with the question of whether the procedure followed to deprive a person of liberty is fair.')

71 *Nel v Le Roux NO & Others* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC) ('*Nel*') at para 12 ('It was contended that the [challenged procedure] did not constitute a 'trial' for purposes of s 11(1) and in any event infringed the requirement of 'fairness' or 'due process' or 'natural justice' which is implicit in the 'trial' component of this right. I have no doubt that this latter requirement, however one wishes to label it, is implicit in this right.'). See also *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) ('*De Lange*') at para 20.

to the other procedural components of such trial it is implicit that the trial must be a "fair" trial.⁷³ Indeed, he concludes that s 66 of the Insolvency Act's lack of procedural protection limits FC s 12(1)(b), not FC s 12(1). This finding confirms his holding in *Nel* that FC s 12(1)(b) — and not FC s 12(1)'s general commitment to 'freedom' — provides the desired procedural protection. In addition, Ackermann J specifically sources the substantive protection afforded by FC s 12(1) in FC s 12(1)(a)'s prohibition on deprivations of liberty 'arbitrarily or without just cause'.⁷⁴

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Mokgoro J's judgment in *De Lange* locates both the substantive and the procedural protection of freedom in FC s 12(1)(a). As far as she was concerned, substantive protection flowed from the requirement of 'just cause' and procedural protection from the prohibition on 'arbitrary' deprivations.⁷⁵

The unanimous decision in *S v Thebus* creates additional confusion about the proper construction of FC s 12(1), FC s 12(1)(a), and FC s 12(1)(b).⁷⁶ The *Thebus* Court — in rejecting a FC s 12(1)(a) challenge to the common-law doctrine of common purpose — held that '[t]he "just cause" [in FC s 12(1)(a)] points to substantive protection against being deprived of freedom arbitrarily or without an adequate or acceptable reason *and to the procedural right to a fair trial*.'⁷⁷

In sum, the Court, and its various members, offer four possible variations on the relationship between and the meaning of FC s 12(1), FC s 12(1)(a), and FC s 12(1)(b):

- Substantive protection and procedural protection both flow from the general FC s 12(1) right to 'freedom' (O'Regan J).
- Substantive protection is enshrined in FC s 12(1)(a), and procedural protection in FC s 12(1)(b) (Ackermann J).
- The term 'just cause' in FC s 12(1)(a) houses the substantive dimension of the right, while the term 'arbitrary' in FC s 12(1)(a) provides for procedural protection (Mokgoro J).

72 *De Lange* (supra) at para 22.

73 *Ibid* at para 24.

74 *Ibid* at para 22.

75 *De Lange* (supra) at para 130. See also J de Waal 'Revitalising the Freedom Right? *De Lange v Smuts No* (1999) 15 SAJHR 217, 225–26 (Agrees that part of the procedural aspect should be located in the prohibition on arbitrariness, but limits this role to requiring that the deprivation accord with the principle of legality. Whether the principle of legality truly reflects procedural protection rather than substantive protection is questionable.)

76 *S v Thebus & Another* 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC) (The Court split on issues relating to the right to silence, but was unanimous on the construction of FC s 12.)

77 *Ibid* at para 39 (our emphasis). See also *Omar v Government of the Republic of South Africa & Others (Commission for Gender Equality, Amicus Curiae)* 2006 (2) SA 289 (CC), 2006 (2) BCLR 253 (CC) ('*Omar*') (Court considers procedural issues in relation to a FC s 12(1)(a) challenge.)

- Substantive protection and procedural protection are both sourced in FC s 12(1)(a) (*Thebus*).

This confusion with regard to the actual textual source of the substantive protection and procedural protection of FC ss 12(1), 12(1)(a) and 12(1)(b) may seem rather academic. However, the ambiguity surrounding the proper construction of FC ss 12(1), 12(1)(a) and 12(1)(b) has demonstrably practical consequences for constitutional doctrine.

In *De Lange v Smuts*, for example, when asked to consider whether the detention of witnesses for failure to answer questions violated FC s 12(1)(a), FC s 12(1)(b) or both, Ackermann J found that only FC s 12(1)(b) had been impaired. O'Regan J, on the other hand, found a general breach of FC s 12(1). Mokgoro J located the limitation in FC s 12(1)(a).

The variety of positions taken in *De Lange* are just a singular manifestation of a larger problem. In *Geuking*, the Court, as a whole, relied entirely on the general

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'freedom' guarantee of FC s 12(1) to engage issues surrounding the constitutionality of a pending extradition.⁷⁸ In *Lawyers for Human Rights*, the following year, the Court addressed similar questions of detention (of illegal immigrants) in terms of 'distinct' rights afforded by FC s 12(1)(a) and FC s 12(1)(b).⁷⁹ And the year after that, in *Omar*, the Court chose to consider the constitutionality of detention for violation of domestic protection orders solely in terms of FC s 12(1)(a).⁸⁰ While some of these discrepancies may be a result of the manner in which the cases were presented, the variation in the form of analysis clearly illustrates confusion, or at least ambivalence, about how to allocate distinct analytical tasks to each of the three sections.⁸¹

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78 *Geuking v President of the Republic of South Africa & Others* 2003 (3) SA 34 (CC), 2004 (9) BCLR 895 (CC) ('*Geuking*') at para 48 (The Court was asked to consider the constitutionality of certain provisions of the Extradition Act 67 of 1962. These provisions permitted extradition to countries without an extradition agreement. A successful extradition under these circumstances requires that a magistrate be satisfied, among other things, that the requesting country has sufficient evidence for a successful prosecution. Section 10(2) of the Act provides that a certificate from the prosecuting authority of the requesting state will serve as conclusive proof of this question. The applicant alleged that this provision violated both the substantive and procedural aspects of the FC s 12(1) framework. Goldstone J rejected this argument on the grounds that '[t]he role of the s 10(2) certificate in reaching such conclusions is a narrow one, related only to the question of whether the alleged conduct is sufficient to give rise to an offence in the foreign jurisdiction. As such its conclusive character does not detract from the fact that the magistrate's enquiry and conclusion is sufficient, in the context of the purpose of the enquiry, which is to facilitate extradition, to meet the constitutional requirement of just cause.')

79 *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC) ('*Lawyers for Human Rights*') at para 32 (The Immigration Act 13 of 2002 allows the detention of foreigners who arrive at ports of entry and who are suspected of being illegally in the country. The Court rejected the High Court's interpretation that a person could be detained on the mere 'say-so' of the immigration officer. Yacoob J instead interpreted the section to permit detention only if the officer had a 'reasonable suspicion' that the person was illegally in the country. Interpreted in this way, the provision did not violate FC s 12(1)(a): 'It is not arbitrary to cause the detention of a person who has just arrived at a port of entry in South Africa, and who is reasonably suspected by an immigration officer on duty at the port of entry to be an illegal foreigner. Indeed, reasonable suspicion by an immigration officer constitutes just cause for the detention.' However, because it allowed detention without trial the act limited FC s 12(1)(b). That violation was unjustifiable only to the extent that it permitted detention for longer than 30 days without the option of having the detention confirmed by a court.)

(b) Reconstructing 'freedom': Discrete roles of FC ss 12(1), 12(1)(a) and 12(1)(b)

We are not, it should be clear, claiming that the different definitions attached by different judges, and different courts, to FC ss 12(1), 12(1)(a) and 12(1)(b) are, in fact, outcome determinative. Our task — in this section — is to provide a gloss on the three sections that makes sense of the Court's extant jurisprudence and to construct a rubric for the analysis of future cases that gives each of the three sections a distinct, and yet coherent, meaning.

We begin with FC s 12(1)(a) because this is the only component part of FC s 12(1) to have attracted the unanimous agreement of the Court — in *Thebus* — on its content. *Thebus* tells us that FC s 12(1)(a) has a substantive dimension and a procedural dimension rooted in the phrase 'just cause'.

While we may, as the *Thebus* Court does, ignore FC s 12(1) generally, it is more difficult to disregard the word 'arbitrary' in FC s 12(1)(a). As Mokgoro J suggested in *De Lange*, the term 'arbitrary' in FC s 12(1)(a) must offer, at a minimum, a form of procedural protection for some deprivations of liberty.

Nor can FC s 12(1)(b) be ignored in its entirety. In the first place, it refers solely to those instances in which a person has been 'detained' — a patently higher threshold than FC s 12(1)(a)'s 'deprivation'. In addition, FC s 12(1)(b)'s 'trial' requirements clearly warrant more stringent procedural protections than those procedural protections demanded by FC s 12(1)(a). While the procedural requirements of FC s

80 See *Omar* (supra) (The applicant questioned the constitutional validity of parts of the Domestic Violence Act 116 of 1998. The Act permitted the execution of suspended warrants of arrest following the issuance of a protection order. The challenges based on FC s 12 asserted that the possibility that a person could be arrested without notice of the protection order and that a police officer was compelled to arrest a potential offender based on the affidavit by the complainant. In rejecting both these challenges, Van der Westhuizen J failed to consider separately the twin pillars of FC s 12(1) protection and relied exclusively on FC s 12(1)(a), to address largely procedural complaints. Ibid at paras 44 and 48.)

81 While there is no doubt that the right to freedom in its various forms has two dimensions, there is a limit to the utility of the division between procedure and substance. The two dimensions of freedom, as Mokgoro J notes, are intimately related:

Where an interest of paramount importance is at issue, then stringent procedures are called for: indeed, we expect them to be more precise than when a lesser interest is implicated, and our contemplation of the substance of the matter will influence our attitude toward the procedure required. It may, however, be stated that while there are often clear examples of substantive and procedural issues that might be contrasted, sometimes the line is too fine to be drawn.

De Lange (supra) at para 128. O'Regan J concurred with Mokgoro J in this assessment. Ibid at para 143 ('[T]here is no rigid rule as to what procedural safeguards are appropriate in the context of s 12(1). The procedural safeguards required will depend on the nature of the deprivation and its purpose.') See also J de Waal 'Revitalising the Freedom Right? *De Lange v Smuts NO*' (1999) 15 SAJHR 217, 226. But not only has the court used substance in determining procedure, it has also used procedure to determine substance. In *De Lange* (supra) at para 41 Ackermann J held, while considering the substantive fairness of the provision, that '[a] further significant safeguard to the examinee's rights is [the possibility of] an unrestricted reconsideration of the grounds for the examinee's committal and continued detention [by a court].' In two more recent decisions the Court has relied almost entirely on the manner in which a decision is reached as providing the substantive justification for the deprivation of freedom in the context of extraditions (*Geuking*) and illegal aliens (*Lawyers for Human Rights*). This jurisprudence seems to point towards the adoption of a broad single test of the 'fairness' or acceptability of a deprivation rather than two discreet enquiries. In its most recent consideration of FC s 12 the *Omar* Court failed to even mention the dual nature of this section. However, it is clear that, in theory at least, the Court maintains its two-prong approach.

12(1)(a) and FC s 12(1)(b) may overlap — where a 'deprivation' in terms of FC s 12(1)(a) requires a 'trial' in terms of FC s 12(1)(b) — there exists a distinction with a difference between the procedural protections afforded by FC s 12(1)(a) and FC s 12(1)(b). FC s 12(1)(b) ought to afford persons 'detained without trial' significantly greater procedural protection.

Given this apportionment of responsibilities between FC s 12(1)(a) and FC s 12(1)(b), what role, if any, remains for the general right to 'freedom' in FC s 12(1)? While it is difficult to imagine physical deprivations of freedom that will not be protected by FC s 12(1)(a), FC s 12(1) — unlike FC s 12(1)(a) — is

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not limited to deprivations that are arbitrary or without just cause. FC s 12(1) should therefore play, as O'Regan J suggests in *De Lange*, a residual role. It will, on our account, engage those violations of physical freedom that might fall through the doctrinal cracks of FC ss 12(1)(a) and 12(1)(b).⁸²

In sum, we offer the following construction of the relationship between FC s 12(1), FC ss 12(1)(a) and 12(1)(b):

- FC s 12(1)(a) affords substantive protection and procedural protection for deprivations of freedom that are 'arbitrary' or that occur without 'just cause'.
- FC s 12(1)(b) affords more stringent procedural protection to persons 'detained without trial' than the procedural protection demanded by mere deprivations of freedom in terms of FC s 12(1)(a).
- FC s 12(1) operates as a residual right and affords both substantive protection and procedural protection for deprivations of freedom not captured by FC s 12(1)(a).

(c) The 'due process wall': FC ss 12 and 35

Although it is comprehensively dealt with elsewhere in this work,⁸³ we should briefly mention the relationship between FC ss 12 and 35. The general rule established by our Constitutional Court is that there is a 'due process wall' between the two.⁸⁴ This wall defends the following propositions: (a) the specific guarantees in FC s 35 should be confined to arrested, accused and detained persons and should not be extended to cover other situations; (b) the general right to fair procedure in FC s 12 should not influence the determination of FC s 35 rights; (c) the 'trial' under FC s 12(1)(b) is very different from, and less rigorous than, the trial anticipated in FC s 35.⁸⁵

82 This residual character of FC s 12(1) was recognized by the majority in *Ferreira*. Chaskalson P held that deprivations of freedom not enumerated elsewhere in the Bill of Rights may deserve protection in terms of FC s 12 (then IC s 11).

83 See F Snyckers & J le Roux 'Criminal Procedure: Rights of Detained, Arrested, and Accused Persons' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 51, § 51.1(a).

84 This rule flows from the Court's decisions in, among others, *Ferreira*, *Nel* and *De Lange*.

85 Snyckers & le Roux (supra) at § 51(1)(a)(iv).

Despite the clear erection of this theoretical wall between FC ss 12 and 35, Snyckers and Le Roux note that there has nonetheless been a fair degree of seepage from both sides of the barrier.⁸⁶ So while FC s 12 clearly covers very distinct terrain from FC s 35, they may not be as far apart as the Constitutional Court would like.

40.3 FC s 12(1)(a): arbitrary deprivation of freedom

The threshold inquiry to establish a violation of FC s 12(1)(a) must always be whether there has been a 'deprivation of freedom'. This inquiry itself has two

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component parts: (a) a determination of the extension of 'freedom'; (b) a determination of the extension of 'deprivation'.

(a) Meaning of 'freedom'

We have already covered the complex terrain of the Court's understanding of freedom.⁸⁷ The Court's jurisprudence strongly supports, and our gloss on the purpose of FC s 12 re-inforces, the contention that 'freedom' conduces principally to a concern about physical liberty.

(b) Meaning of 'deprivation'

Unfortunately our courts have not always been clear with respect to the question whether law or conduct amounts to a 'deprivation'.⁸⁸ What we can say with some certainty is that imprisonment always constitutes a 'deprivation' for the purpose of FC s 12(1)(a).

However, it seems equally clear — given the rejection of Ackermann J's take on IC s 11 in *Ferreira* — that not all constraints on physical freedom amount to 'deprivations'. The difficulty in constructing a predictable and a principled judicial doctrine on deprivation was squarely addressed by the European Court of Human Rights in *Guzzardi v Italy*:

In order to determine whether someone has been 'deprived of his liberty' . . . the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is nonetheless one of degree of intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes

86 Ibid at § 51(1)(a).

87 See § 40.1(b) supra.

88 In *Bernstein*, for example, Ackermann J held that '[t]he obligation to respond to a subpoena and to be present at the appointed time and place would not, on the majority view, compromise the physical integrity of the subpoenaed witness.' *Bernstein* (supra) at para 51. It is unclear whether this amounts to a finding that there was no 'deprivation' at all, or that there was a deprivation but that it was not 'arbitrary'. Currie and De Waal describe the finding as relating to 'deprivation'. I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 295. We are less certain. In the remainder of the paragraph, Ackermann J considers the necessity of subpoena proceedings in a democratic society and seems to be describing the 'just cause' or the justification for a subpoena rather than the extent of the 'deprivation'.

proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection.⁸⁹

The European Court and the European Commission have applied these guidelines to such diverse circumstances as asylum-seeking,⁹⁰ confinement of

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soldiers,⁹¹ the hospitalization of children,⁹² and the drying out of drunkards⁹³ — amongst others.⁹⁴ But while the ECHR jurisprudence should provide valuable assistance to our courts in the future, it currently provides neither bright-line rules nor anything that begins to approximate a clear definition. The Canadian Supreme Court has also applied its mind to this problem. While it has concluded that statutory requirements to submit to fingerprinting,⁹⁵ produce documents,⁹⁶ give oral testimony⁹⁷ and not to loiter near schools⁹⁸ all constitute 'deprivations of liberty',⁹⁹ the Supreme Court has been reluctant to offer a precise definition of 'deprivation'.

89 (1980) 3 EHRR 333 at paras 92-93.

90 See *Amuur v France* (1996) 22 EHRR 533 (Four Somali asylum-seekers were kept in the international zone of a Paris airport for 20 days. The Court held that they had been deprived of their liberty in terms of art 5(1). The fact that they could depart France for other countries was deemed immaterial. The applicants were entitled to seek asylum in France and it was by no means certain that another country would grant them such status.)

91 See *Engel & Others v The Netherlands (No 1)* (1976) 1 EHRR 647 (The ECHR considered various degrees of 'arrest' of military personnel. The ECHR first noted that the appropriate standard for 'deprivation' turned on the applicant's military status and that the standard differed from that of ordinary civilians. Ibid at para 59. The ECHR held that 'light arrest' — confinement to military premises while off-duty — and 'aggravated arrest' — confinement while off-duty to a specific room — did not constitute 'deprivations'. Ibid at paras 61-62. However, 'strict arrest' — confinement on and off-duty to a cell — and 'committal to a disciplinary unit' — confinement to military premises for up to six months — amounted to 'deprivations of liberty'. Ibid at paras 63-64.)

92 See *Nielsen v Denmark* (1988) 11 EHRR 175 (A 12-year-old boy was placed in a psychiatric ward by his mother against his will. He was allowed to visit his mother's home and eventually to go to school. The Commission held that the mother's consent could not be decisive of the matter and that, in the circumstances, there had been a deprivation of liberty. Application No 10929/84. The ECHR reversed this finding. While agreeing that the mother's consent was not dispositive, it held that the restrictions were no more than those that would ordinarily be required in the hospitalization of a young child.)

93 See *Litwa v Poland* (2000) 33 EHRR 1267 (Court held that detaining a drunk man in a 'sobering-up' facility for six hours, despite the short duration, amounted to a deprivation of liberty.)

94 See *Guzzardi v Italy* (1980) 3 EHRR 333 at paras 92-93 (In a 10-8 split decision, Court held that the enforced stay on a small island, combined with police supervision, limits on the areas of the island that could be visited and the lack of social contact, constituted a deprivation of liberty); *Raimondo v Italy* (1994) 18 EHRR 237 (ECHR held that placing applicant under police supervision and house confinement from 9pm — 7am was only a 'restriction' and not a 'deprivation of liberty'); *Blume v Spain* (2000) 30 EHRR 632 (A court released the applicants from state custody and ordered that they be remanded to the custody of their families. It also made provision for psychiatric treatment on a voluntary basis. Upon release, the applicants were kept locked in a hotel for 10 days and subjected to 'de-programming' by a psychologist. ECHR held that this de-programming amounted to a deprivation of liberty and could be characterized as 'false imprisonment'.) See, generally, P van Dijk & GJH van Hoof *Theory and Practice of the European Convention on Human Rights* (3rd Edition, 1998) 345-48.

Contriving a precise definition of 'deprivation' is especially important when one considers the large number of temporary restrictions on physical liberty employed by law enforcement officials: road-blocks, body searches, and requests for the production of identification. The danger here, as Currie and de Waal note, is twofold: the threshold can be set too high and hamper law enforcement, or the threshold can be set too low and fail to offer meaningful safeguards against the

abuse of police power.¹⁰⁰ Some judicial line-drawing must occur at this stage of the analysis.¹⁰¹ For, while the Court has preferred to concentrate on the extension of the internal modifiers of 'deprivation' — 'arbitrary' or 'without just cause' — it is hard to know when one ought to proceed to the procedural phase or the substantive phases of a FC s 12(1)(a) inquiry without first knowing whether a deprivation worthy of constitutional solicitude has occurred.¹⁰² As noted in *Guzzardi*, it is difficult, if not impossible, to build a meaningful test for deprivation. It therefore seems more likely that the courts will develop its content through application to specific facts. That

95 See *R v Beare* [1988] 2 SCR 387. But see *S v Huma & Another* 1996 (1) SA 232 (W), 1995 (2) SACR 411 (W) (Taking of fingerprints is not an invasion of 'physical integrity' and does not amount to 'cruel, inhuman or degrading treatment'. The court did not consider the question of arbitrary deprivation of freedom.)

96 See *Thomson Newspapers v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* [1990] 1 SCR 425.

97 See *Stelco Inc v Canada (Attorney General)* [1990] 1 SCR 617.

98 See *R v Heywood* [1994] 3 SCR 761.

99 See, generally, P Hogg *Constitutional Law of Canada* (3rd Edition, Loose-Leaf, RS 1, 2004) § 44.7(a).

100 See Currie & De Waal (*supra*) at 295.

101 See *Magagane v The Chairperson, North West Gambling Board* CCT 49/05 (Unreported decision, 8 June 2006) n73 ('[S]ome rights in the Constitution [including s 12(1)(a)] expressly provide for line drawing at the threshold inquiry.')

102 The Court's current approach to arbitrariness and deprivation in FC s 12 appears to accord with the gloss placed by the Constitutional Court on 'arbitrariness' and 'deprivation' when it comes to the assessment of the prohibition on arbitrary deprivation of property in FC s 25(1). See *First National Bank of South Africa 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*'). The Court held that '[i]n a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned.' *Ibid* at para 57. According to Theunis Roux, '[a]fter *FNB*, it is clear that the term 'deprivation' will be given a wide meaning, and that this stage of the inquiry will consequently play very little role (if any) in future cases.' T 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, 46-18. The collapsing of the analysis of the modifier into the analysis of the term modified also occurs in the context of FC s 14 analysis. In *Magagane*, the Court held that a regulatory search or inspection amounted to a 'search' in terms of FC s 14. The Court refused, however, to define the term 'search'. Writing for the Court, Van der Westhuizen J stated:

said, we believe that the courts would do well to err on the side of an expansive application at this first stage of the inquiry.

(c) Substantive dimension of FC s 12(1)(a)

(i) Arbitrariness

In *De Lange*, Ackermann J separated the inquiry into substantive protection into two distinct stages:

In the first place it may not occur 'arbitrarily'; there must, in other words, be a rational connection between the deprivation and some objectively determinable purpose. If such rational connection does not exist the substantive aspect of the protection of freedom has by that fact alone been denied. But even if such rational connection exists, it is by itself insufficient; the purpose, reason or 'cause' for the deprivation must be a 'just' one.¹⁰³

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Some commentators criticize this bifurcated inquiry as overly elaborate.¹⁰⁴ They prefer, instead, O'Regan J's single-step approach. O'Regan J's test turns on whether the grounds for the deprivation are 'acceptable'.¹⁰⁵

The Court has, as yet, to fully endorse either position — Ackermann's opinion attracted only a plurality of the *De Lange* Court. However, two good reasons exist for rejecting O'Regan J's single-step inquiry. First, it was enunciated under the Interim Constitution. IC s 11 lacked FC s 12(1)(a)'s clear language that a deprivation of freedom may be *neither* 'arbitrary' *nor* 'without just cause'. Second, as the language in FC s 12(1)(a) suggests, a distinction with a real difference exists between the two legs of Ackermann J's inquiry: a deprivation may be arbitrary but still have a just cause. This distinction exists in relation to both the substantive dimension and the procedural dimension of arbitrariness.

(aa) Substantive arbitrariness

An inquiry into substantive arbitrariness raises two primary questions.

First: Does the deprivation have a source in law? For, even if a curtailment of freedom serves the most compelling governmental purpose imaginable, a curtailment unauthorized by law remains arbitrary.¹⁰⁶

It would be undesirable to impose at the threshold inquiry an arbitrary demarcation line between degrees of intrusion that would invoke the constitutional right to privacy. Such line drawing would have the negative effect of placing certain administrative inspections beyond the reach of judicial review.

Magagane (supra) at para 59. Interestingly enough, the *Magagane* Court did note that its position might be different with respect to FC s 12 analysis.

103 *De Lange* (supra) at para 23.

104 See Currie & De Waal (supra) at 296.

105 *Bernstein* (supra) at para 145. According to Currie and De Waal, it makes no sense 'to require a reason for the deprivation of freedom in the first part of the enquiry and then to require a good reason for the deprivation in the second part of the same enquiry'. Currie & De Waal (supra) at 296 n14.

Second: Is the deprivation related to a legitimate government purpose?¹⁰⁷ For, even if a curtailment of freedom is authorized by law, if the law does not serve a legitimate government purpose, it remains arbitrary.

While the Constitutional Court has rejected expressly a number of FC s 12(1)(a) arbitrariness challenges on the grounds that the deprivations did serve a legitimate government purpose,¹⁰⁸ in *S v Z & 23 Similar Cases*, a full bench of the Eastern Cape Provincial Division condemned the keeping of children sentenced

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to reform schools in custody for inordinately long periods of time because there were no schools to which they could be sent.¹⁰⁹ The High Court held that the deprivation was arbitrary because 'it is purposeless and inflicts hardships on the juveniles that may be disproportionate to their crimes . . . and does not serve the purpose of the punishment imposed on them by the court.'¹¹⁰ *S v Z & 23 Similar Cases* demonstrates that the content of substantive arbitrariness is not exhausted by the norm of 'just cause'. Indeed, *S v Z & 23 Similar Cases* illustrates that a deprivation may be animated by a just cause, but constitute substantively arbitrary action because it fails to achieve the deprivation's objective. Again, the cause may be just, but the deprivation may remain arbitrary.

(bb) Procedural arbitrariness

In Canada, a deprivation will be deemed arbitrary (a) if inadequate criteria exist to govern the exercise of state power,¹¹¹ or (b) if the exercise of official discretion is not based upon an actual grant of authority in the empowering legislation.¹¹² This 'procedural arbitrariness' speaks to the absence of legal authority for the deprivation rather than to its purpose.

106 I Currie & S Woolman 'Freedom and Security of the Person' in M Chaskalson, J Klaaren, J Kentridge, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) 39-36 — 39-37; De Waal (supra) at 226 (Arbitrary 'simply means that any deprivation of freedom must be authorised by law and in accordance with the law'.) This requirement is based on the principle of legality, which necessitates that all exercises of public power have a source in law. A deprivation in these circumstances will have to be, and will often be able to be, justified under FC s 36.

107 A similar test of arbitrariness is used in two other contexts in South African constitutional law: where the legislation is arbitrary and violates the legality principle — see *Pharmaceutical Manufacturers* — and FC s 9(1)'s guarantee of equal protection before the law will be violated if the differentiation is arbitrary — see *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 789 (CC). For a recent consideration of arbitrariness in the context of FC s 9(1), see *Road Accident Fund v Van der Merwe* CCT 48/05 (Unreported Decision, 30 March 2006)(Legislation prohibiting spouses from claiming non-patrimonial damages from each other serves no legitimate government purpose.)

108 See, for example, *De Lange* (supra) at para 29 (Committal of witness to prison during insolvency investigation serves legitimate government purpose); *Thebus* (supra) at para 40 (The doctrine of common purpose is rationally related to the legitimate government purpose of 'controlling joint criminal enterprise'); *Lawyers for Human Rights* (supra) at para 32 (It is not arbitrary to detain at a port of entry a person reasonably suspected of being an illegal immigrant).

109 2004 (1) All SA 436 (E), 2004 (4) BCLR 410 (E) at para 21.

110 *Ibid* at para 21, n17.

This doctrine of 'procedural arbitrariness', as defined above, has not been expressly endorsed in our law. However, in *Lawyers for Human Rights v Minister of Home Affairs*, the Constitutional Court had to consider the constitutionality of a legislative provision granting an immigration officer the discretion to order the detention of a person illegally in South Africa.¹¹³ The Court held that if

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detention could be ordered on the mere say-so of the immigration officer, the section at issue would be arbitrary and unconstitutional.¹¹⁴

(ii) Just cause

(aa) Constitutional values

The somewhat elusive quality of 'just cause' is captured by this observation in *De Lange v Smuts*:

It is not possible to attempt, in advance, a comprehensive definition of what would constitute a 'just cause' for the deprivation of freedom in all imaginable circumstances. . . . Suffice it to say that the concept of 'just cause' must be grounded

111 See, eg, *R v Hufsky* [1988] 1 SCR 621, 632 followed in *R v Ladouceur* [1990] 1 SCR 1257 (Random stopping of motorists for spot checks was arbitrary detention because there were no criteria for the selection of motorists to be stopped); *R v Swain* [1991] 1 SCR 933 (Law permitting commitment to psychiatric facility of person acquitted of criminal charge on the basis of insanity arbitrary as it provided no standards on which the judge could base his decision); *R v Lyons* [1987] SCR 309 (Declaration as a dangerous offender not arbitrary as decision had to be based on defined criteria); *Thwaites v Health Sciences Centre* (1988) 51 Man R (2d) 196, 201 (CA)(Legislation allowing for the compulsory detention by a magistrate on a showing that 'a person should be confined as a patient at a psychiatric facility' was declared a violation of the right against arbitrary detention or imprisonment because the legislation failed adequately to specify relevant guiding criteria 'sufficiently defining the persons who may be subject to the legislation, and the circumstances under which they may be compulsorily detained'.)

112 See *R v Duguay* (1989) 1 SCR 93 (Arrest not on proper grounds nor with an honest belief that proper grounds were present a violation of the arbitrary detention right.) This principle is already part of our administrative law. See Promotion of Administrative Justice Act 3 of 2000, s 6(2)(e), (f) and (h).

113 *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC)(*'Lawyers for Human Rights'*). The legislative provision at issue was s 34 of the new Immigration Act 13 of 2002. Yacoob J held that the provision should be interpreted in a constitutionally compatible manner and that when this was done it permitted detention only if the officer had a reasonable suspicion that the person was an illegal immigrant. Detention under these circumstances was not arbitrary and the 'reasonable suspicion of the officer' was a 'just cause'. *Ibid* at paras 31-32. See also *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2003 (8) BCLR 891 (T).

114 *Lawyers for Human Rights* (supra) at para 29. See also *Omar v Government of the Republic of South Africa & Others (Commission for Gender Equality, Amicus Curiae)* 2006 (2) SA 289 (CC), 2006 (2) BCLR 253 (CC)(The applicant challenged various provisions of the Domestic Violence Act 116 of 1998 that permit arrest for violating a protection order. The applicant's complaint was that the arrest was mandatory if a complainant produced an affidavit alleging an infringement of the protection order and the policeman had a reasonable suspicion that the complainant could suffer imminent harm. The Court dismissed the claim on the grounds that the production of an affidavit was at least as good protection as requiring 'reasonable suspicion'. However, the Court's decision emphasized the section was saved because of the police officer retained the discretion to effect an arrest only if there was a possibility of harm.)

upon and consonant with the values expressed in s 1 of the 1996 Constitution¹¹⁵ and gathered from the provisions of the Constitution as a whole.¹¹⁶

In *De Lange v Smuts NO*, the Constitutional Court was asked to consider whether s 66(3) of the Insolvency Act¹¹⁷ allowed for the imprisonment of witnesses who refused to answer questions regarding an insolvent estate. The Court held that the provision serves the compelling public purpose of enforcing civil claims against debtors,¹¹⁸ that the penalties exacted induced necessary testimony and the production of documents about the estate by the insolvent and others, that imprisonment in terms of s 66(3) is not a criminal sanction,¹¹⁹ and that similar provisions are common in many other democratic societies.¹²⁰ These rationales for s 66(3) — and the fact that the penalties did not go any further than was necessary —

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collectively constituted a 'just cause' for the deprivation of freedom.¹²¹

The Constitutional Court has, however, handed down judgments that offer some guidance as to the kinds of deprivations that might be deemed without 'just cause'. In *Coetzee v Government of the Republic of South Africa*, the Court invalidated provisions of the Magistrates' Courts Act that permitted the detention of civil debtors.¹²² The Court found that the contested provisions would sweep up into their proscriptive net both debtors who could pay but wilfully refused and those impecunious members of society who were too poor to pay.¹²³ The *Coetzee* Court held that a 'debtors' prison' was inconsistent with new constitutionally-mandated mores and thus an unjustifiable limitation of IC s 11. Were the case to have been heard in terms of FC s 12(1)(a), the Court would have held that deprivations of freedom in these circumstances lacked a 'just cause'.

115 Section 1 provides:

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

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

For more on FC s 1, see C Roederer 'Founding Values' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 13.

116 *De Lange* (supra) at para 30 (Ackermann J).

117 Act 24 of 1936.

118 *De Lange* (supra) at paras 31–32.

119 *Ibid* at paras 37–38.

120 *Ibid* at para 39.

(bb) Basic tenets of the legal system

The concept of 'just cause' takes on somewhat greater solidity when informed by the following term of art: 'the basic tenets of the legal system'. The 'basic tenets' dimension of 'just cause' requires that courts 'abstract[] from the record of the South African legal system a sense of its fundamental principles'.¹²⁴ Members of the Constitutional Court have, on two occasions, deployed the 'basic tenets' test for 'just cause' when considering the constitutionality of statutory provisions that excluded a standard element of a criminal offence.

In *S v Coetzee*,¹²⁵ the Court was asked to determine the constitutionality of a provision that made directors and servants of a corporation liable for any acts

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for which the corporation could be held liable 'unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it'.¹²⁶ A majority of the Court regarded the provision as a simple reverse onus that violated the right to be presumed innocent.

Kentridge AJ, in his dissent, took the view that s 332(5) of the Criminal Procedure Act imposed vicarious liability on directors and servants of a company for a criminal

121 *De Lange* (supra) at paras 36 and 40. The witness effectively 'carried the key to their prison in their own pocket' as they would be released as soon as they divulged the requested information or documents. Ibid at para 36. A fine would not be an appropriate sanction because it would often have to be very large to be effective. Ibid at para 40. The Court reached similar conclusions in other insolvency cases. See *Bernstein* (supra) at para 60 (Sections 417 and 418 of the Companies Act 61 of 1973 permitted witnesses to be called to testify or produce documents at the liquidation of a company. The Court upheld the provisions on the grounds that the law neither permits the enquiry to be employed in a vexatious or unfair manner nor allows imprisonment for failing to answer questions that, if answered, would threaten the witness' constitutional rights); *Nel v Le Roux* (supra) at paras 20–21 (Judges and magistrates were given the power under s 205 of the Criminal Procedure Act to summon witnesses to answer questions put by the prosecutor about a suspected offence. The Court held that the potentially unconstitutional effect of CPA s 205 was saved by CPA s 189. CPA s 190 allows a reticent witness to refuse to answer such questions if she has a 'just excuse'. When 'just excuse' is read in light of the Bill of Rights — as required by FC s 39(2) — CPA s 205 is no longer constitutionally objectionable); *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 36 (Imprisonment for failing to answer questions at a meeting of creditors could, in terms of ss 64 and 65 of the Insolvency Act, only follow if the question was 'lawfully put' and the witness did not have a 'reasonable cause' for failing or refusing to answer. Under those circumstances there was nothing objectionable about the legislation.)

122 *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).

123 Ibid at paras 8 and 15.

124 *Currie & De Waal* (supra) at 297. In *S v Lubaxa* the Supreme Court of Appeal held that the refusal to discharge an accused after the State's case when there was not sufficient evidence to convict threatened to violate FC s 12 because it would contradict the basic common-law principle that there must be a 'reasonable and probable cause to believe that the accused is guilty of an offence' before a prosecution is initiated 2001 (2) SACR 703 (SCA) at para 19.

125 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC).

126 Criminal Procedure Act 51 of 1977, s 332(5)(emphasis added).

offence committed by a company.¹²⁷ On Kentridge AJ's reading, the 'unless' did not reverse the onus, but rather created an additional defence for the accused. The provision could not, on this reading, be challenged under IC s 25's right to presumed innocent. However, the imputation of liability and the absence of personal criminal intent were, according to Kentridge AJ, grounds for a challenge based on IC s 11. Kentridge AJ then concluded that the vicarious liability provision imposed on servants by s 332(5) unjustifiably limited IC s 11 because the imposition of absolute liability on servants (as opposed to directors) for the crimes of the body corporate is inconsistent with the basic tenets of our legal system.¹²⁸ One could neither impute to servants as a class the choice of engaging in a regulated activity nor impute to servants the element of control of the affairs of the corporate body. No law that punishes a person who exercises no control over the actions or the affairs that lead to criminal activity can be squared with IC s 11(1)'s commitment to 'freedom'.¹²⁹

O'Regan J, in her dissent, largely agreed with the conclusions reached by Kentridge AJ.¹³⁰ However, she departed from Kentridge AJ with respect to her analysis of the problem. For O'Regan J, two distinct questions had to be answered. The first question was whether it was constitutionally legitimate to impose criminal liability on directors and servants of corporate bodies in the circumstances contemplated by s 332(5) of the Criminal Procedure Act. The second question was whether it was legitimate to impose upon an accused the burden of proving that he or she could not have prevented the commission of the offence. The two questions engaged two different aspects of constitutionally protected freedom. The first question engaged the *reasons* for which the state may deprive someone of freedom in terms of IC s 11(1). The second engaged the *manner* whereby a person is deprived of freedom in terms of IC s 25.¹³¹

According to the common law, criminal liability generally arises only where unlawful conduct and fault can be established. Deprivation of liberty, without culpability for the unlawful conduct, constitutes a breach of this established rule.¹³² According to O'Regan J, s 332(5) did not require directors to show that they exercised due diligence, but merely that they could not have prevented the criminal conduct at issue. On this reading, directors could be sufficiently culpable

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to warrant the imposition of criminal liability — thus any consequent deprivation of freedom of directors would not fall foul of IC s 11(a). However, since no servant could ever engage in conduct — or undertake due diligence — that would make

127 *S v Coetzee* (supra) at para 85.

128 *Ibid* at para 100.

129 *Ibid* at para 101.

130 Sachs J appears to concur with O'Regan J. *Ibid* at paras 225 and 227. Ackermann J also concurs with O'Regan J. *Ibid* at para 66.

131 See also *Bernstein* (supra) at paras 145-47.

132 *S v Coetzee* (supra) at 176.

them criminally culpable for the purposes of s 332(5), s 332(5) infringed IC s 11(a) with respect to this class of person.¹³³

The Court has had another occasion to consider the removal of causation as an element of a criminal offence. The common-law doctrine of common purpose allows for the conviction of a group of people for the same offence even when only one person is truly — causally — responsible for the criminal act. The applicants in *S v Thebus* challenged this doctrine as an infringement of the substantive protection afforded by FC s 12(1)(a).¹³⁴ Moseneke J, writing for the Court, rejected the challenge on the grounds that many offences at common law — rape, incest or perjury — do not treat causation as an element of the crime and that a requirement of causation for criminal offences is not a 'basic tenet of the law'.¹³⁵

FC s 12(1)(a) may also be used to challenge a criminal prohibition itself.¹³⁶ For example, the legislature could not make it a crime (punishable by imprisonment) to wear a red hat. The concept of 'just cause' extends FC s 12(1)(a)'s reach to any criminal sanction that fails to serve a legitimate social goal. Just cause may also embrace a certain degree of proportionality. In *S v Boesak*, Langa DP held that imprisonment for 'theft of a sufficiently serious nature' constitutes a just cause for imprisonment.¹³⁷ Implicit in Langa DP's finding is the proposition that imprisonment for a trivial amount might not constitute 'just cause' for imprisonment. However, this proposition has not yet been recognized and ratified by the Court: challenges on this basis to the oft-questioned criminalization of prostitution¹³⁸ and bestiality¹³⁹ have both failed.¹⁴⁰

133 To the extent that we can draw any conclusions from the minority judgments, *S v Coetzee* suggests that vicarious liability offences will be justifiable deprivations of freedom in terms of FC s 12(1)(a) if the offence can be categorized as merely 'regulatory', or, as we have just seen, the imposition of vicarious liability is modified by a defence of due diligence. *Ibid* at paras 97 (Kentridge AJ), 160 (O'Regan J), 77 (Didcott J), and 57 (Mahomed DP).

134 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC).

135 *Ibid* at para 37 n60.

136 *De Lange* (supra) at para 25 ('[A]ccused persons are entitled to challenge the constitutional validity of a criminal offence with which they are charged on the substantive freedom right [on the] ground that such offence does not, for purposes of s 12(1)(a), constitute 'just cause' for the deprivation of their freedom.')

137 *S v Boesak* 2001 (1) 912 SA (CC), 2001 (1) BCLR 36 (CC), 2001 (1) SACR 1 (CC) at para 39.

138 See *S v Jordan* 2002 (6) SA 642 (CC), 2002 (11) BCLR 117 (CC) ('*Jordan*') at para 75 (While the majority refused to consider the FC s 12 challenge to laws proscribing prostitution, it was firmly rejected by O'Regan and Sachs JJ.)

139 See *S v M* 2004 (3) SA 680 (O) at para 22 (Court held that despite the lack of any material impact on the community, the criminalisation of bestiality was still justified as an abrogation of well-entrenched mores.)

140 Indeed, in *S v Jordan*, the minority suggested that such a challenge was not even possible:

(cc) Proportionality

Although the Constitutional Court has never explicitly endorsed proportionality as an element of 'just cause', it has regularly applied notions of proportionality in its IC s 11(1) and FC s 12(1)(a) decisions. In *Nel*,¹⁴¹ and *De Lange*,¹⁴² the release of a witness subsequent to an inquiry meant that the coercive measures went no further than was necessary to achieve their aim and were not, therefore, substantively arbitrary. In *De Lange*¹⁴³ and *Bernstein*,¹⁴⁴ Ackermann J specifically held that imprisonment was appropriate because it was the only effective means to achieve the objectives of the inquiry. The *Lawyers for Human Rights* Court held that the detention of illegal immigrants without confirmation by a court was unconstitutional only when the detention period exceeded 30 days. The findings in all four cases strongly suggest that proportionality is an important element of 'just cause'.¹⁴⁵

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(d) Procedural dimension of FC s 12(1)(a)

FC s 12(1)(a) does not require a 'trial' as contemplated in either FC s 35 or FC s 12(1)(b). As a result the level and the kind of procedural fairness required by FC s 12(1)(a) will often turn on the nature of the deprivation of freedom. As Mokgoro J notes:

Where an interest of paramount importance is at issue, then stringent procedures are called for: indeed, we expect them to be more precise than when a lesser interest is

[a] prostitute makes herself liable for arrest and imprisonment by violating the law. Provided that the law passes the test of constitutionality, any invasion of her freedom and personal security follows from her breach of the law, and not from any intrusion on her right by the State. In the light of the approach taken by the majority of this Court to s 11(1) of the interim Constitution, *there can be no complaint in terms of that section by a person who has been convicted and sentenced in terms of a duly enacted criminal prohibition.*

Jordan (supra) at para 75 (our emphasis). To the extent that this is what the minority were saying, they are wrong. FC s 12(1)(a) certainly does allow challenges to substantive criminal prohibitions, even if the scope is very limited.

141 *Nel* (supra) at para 11.

142 *De Lange* (supra) at para 36.

143 *Ibid* at para 40.

144 *Bernstein* (supra) at para 55 ('[I]t is not a sanction which is disproportionate to the offence, therefore s 11(1) and (2) are not impaired. The sanctions are necessary to enforce the legislation.')

145 However, the Court would do well to be cautious about extending the proportionality component of 'just cause' too far. The Canadian Supreme Court began with a definition of 'fundamental justice' (their equivalent of 'just cause') as those principles found in 'the basic tenets of the legal system'. *Re BC Motor Vehicle Reference* [1985] 2 SCR 486, 503. However, 'fundamental justice' soon became the equivalent of principles that 'would have general acceptance among reasonable people' — *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519, 607 — or that would be 'simply unacceptable to reasonable Canadians' — *Canada v Schmidt* [1987] 1 SCR 500, 522). The lack of precision manifest in *Schmidt* is reflected in two cases concerning extradition from Canada to another jurisdiction for a 'capital' offence. In 1991, the Supreme Court held that such extradition did not 'shock the conscience'. See *Kindler v Canada* [1991] 2 SCR 779. It reversed itself 10 years later. See *United States v Burns* [2001] 1 SCR 283. See, generally, Hogg (supra) at 44.10(b).

implicated, and our contemplation of the substance of the matter will influence our attitude toward the procedure required.¹⁴⁶

Deprivation of freedom in a mental hospital differs — in meaning and in substance — from the deprivation of freedom that follows from a refusal to give evidence on pain of imprisonment.¹⁴⁷ Deprivation of freedom in a mental hospital will require different processes and different justifications than deprivations of freedom to prevent the spread of a contagious disease. The Court can, in advance, offer no more content to the required procedure for a particular deprivation than to say that the deprivation must be fair under the circumstances. Deprivations of freedom in terms of FC s 12(1) (a) will require well-articulated procedures that fall somewhere between a full criminal trial and appropriate responses by law enforcement officials¹⁴⁸ who stop individuals in order to ascertain their identity.¹⁴⁹

In *Sibiya*, the High Court was asked to consider the constitutionality of procedures established to re-assess the prison terms of persons sentenced to death

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before the abolition of the death penalty by the Constitutional Court in *S v Makwanyane*. The High Court described the challenged procedures as follows:

Proceedings do not take place in public, there is Chamber consideration of documents and perhaps argument but no trial, the administrative action is performed by a judicial officer who does not purport to constitute a court of law, no evidence may be adduced

In US constitutional law, substantive due process entails a two-part analysis of a legislative measure affecting life, liberty or property: a reasonableness enquiry and a proportionality enquiry. The measure may not be unreasonable or arbitrary, and the means selected to achieve the purpose of the measure must be in proportion to that purpose. See *Nebbia v New York* 291 US 502, 525 (1933) ('The Fifth Amendment and the Fourteenth do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.') The first part of this test is expressly authorized by FC s 12(1)(a). The second part — requiring proportionality between means and ends — may be authorized by the requirement that a deprivation of liberty must be for 'just cause'. German courts have adopted a similar approach. A deprivation of personal liberty must comply with the 'principle of proportionality, which is rooted in the rule of law'. 22 *BVerfGE* 180, 220 (1967) (Institutionalization as a mental patient of a person who posed no danger to himself or others offends principle of proportionality.) See D Currie *The Constitution of the Federal Republic of Germany* (1994) 307. In German jurisprudence, proportionality means both proportionality between means and ends, and proportionality between costs and benefits. The state is justified in depriving a person of liberty only to the extent necessary for liberty and security of themselves or others. In addition, the harm prevented by the deprivation must outweigh the harm that it causes to individual liberty. Similar principles are said to underlie the European Court of Human Rights' article 5 jurisprudence. See *X v United Kingdom* 4 EHRR 188 (Validity of detention of mental patients requires an assessment as to whether the interests of the protection of the public prevail over the individual right to liberty to an extent sufficient to justify detention.)

146 *De Lange* (supra) at para 128. See also *Nel* (supra) at para 14.

147 For an examination of commitment to mental hospitals, see E Bonthuys 'Involuntary Civil Commitment and the New Mental Health Bill' (2001) 118 *SALJ* 667.

148 *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2003 (8) BCLR 891, 902B (T) (Du Plessis J found that immigration legislation that allowed a foreigner to be detained on the mere declaration that the person was an illegal by an immigration official violated both the rule of law and FC s 12(1)(a)'s procedural component.)

at all, not even an application in terms of s 316 will be entertained, there is no right to access the reasons or advice formulated as a result of this process and no judgment as resulting (sic) from a court of law emerges from this process, there is no appeal against any of these proceedings or advice, sentence is imposed by the President not a court of law.¹⁵⁰

The High Court held that, as the death sentences had been set aside, all those who had been sentenced to death were entitled to a new sentencing procedure akin to a trial.

A unanimous Constitutional Court reversed the High Court decision.¹⁵¹ The Constitutional Court noted that the death sentences had not been set aside — all that *Makwanyane* had said was that the death sentence could not be imposed or carried out after the date of the judgment. While a new sentence had to be imposed, this consequence of the Court's finding in *Makwanyane* did not entitle the affected persons to a new trial.¹⁵² It would have been perfectly consistent with the procedural requirements of FC s 12(1)(a) for the legislature to have replaced all of the death sentences with sentences of life imprisonment.¹⁵³ But the legislature had, in fact, done more. The legislative remedy for the holding and the order in *Makwanyane* was to give each prisoner an opportunity to have his sentence reconsidered by a judge. Under these circumstances, the inability to lead evidence, the holding of the proceedings in chambers and the lack of appeal did not infringe the procedural protections afforded by FC s 12(1)(a).¹⁵⁴

149 Perhaps the best manner to gauge what is and is not acceptable is to look at the procedures the Court has already found fair or unfair. It must be emphasized that not all of these decisions were taken in terms of FC s 12(1)(a). Some rely upon IC s 11(1) or FC s 12(b). However, as discussed above, we believe this part of FC s 12's protection best fits FC s 12(1)(a). In *Nel*, s 205 of the Criminal Procedure Act 51 of 1977 allowed witnesses to be summoned to appear in court to give evidence on a suspected offence. The witness could be imprisoned if he failed to answer the questions or produce the required documents. The Act, however, contained a number of safeguards: the presiding officer had to be a judge or magistrate; the subpoena had to be approved by the public prosecutor; imprisonment would only follow if it was necessary to maintain law and order; and the person would not be imprisoned if he had a just excuse. In the circumstances, and considering the importance of s 205 as an evidence gathering mechanism, the Court upheld the section. In *Geuking*, the applicant challenged the procedure for extradition which was close but not identical to an ordinary criminal trial. The proceedings were held in public before a magistrate or judge, the person liable for extradition was entitled to challenge and adduce evidence and to appeal the decision. The Court noted that extradition did not result in criminal conviction or punishment, it simply decided whether the person could be sent for trial in another country. The procedure, although falling slightly short of a full criminal trial, was fair in the circumstances. In *De Lange*, provisions allowing imprisonment for failing to answer questions or produce documents at insolvency proceedings were found invalid only to the extent that it permitted a non-judicial officer to preside.

150 *Sibiya & Others v Director of Public Prosecutions & Others* [2005] 1 All SA 105 (W) at para 188.

151 *Sibiya & Others v Director of Public Prosecution Johannesburg & Others* 2005 (5) SA 315 (CC), 2005 (8) BCLR 812 (CC) ('*Sibiya*').

152 *Ibid* at paras 10–13 and 35.

153 *Ibid* at para 35.

154 *Ibid* at paras 36–37.

As *Sibiya* suggests, a litigant relying on FC s 12(1)(a) — as opposed to FC s 35 — cannot challenge a specific procedural failure — say, the failure to be notified of the proceedings or to hold the proceedings in public.¹⁵⁵ A challenge grounded in FC s 12(1)(a) requires the court to review the entire domain of procedural safeguards afforded the applicant. If, on the whole, the proceedings are fair, then the requirements of FC s 12(1)(a) will be satisfied.¹⁵⁶

The Constitutional Court confirmed this rule in *Omar v Government of the Republic of South Africa*. The applicant had challenged provisions of the Domestic Violence Act that had resulted in his arrest for violating a protection order. One of the

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complaints raised by the applicant was that the protection order did not have to be hand-delivered but could be sent by registered mail. It was therefore possible for him to be arrested for contravening an order of which he had no knowledge.¹⁵⁷ This argument relied heavily on the fact that lack of notice was one of the seven factors that led the *Coetzee* Court to declare unconstitutional various provisions of the Magistrates' Court Act that had permitted imprisonment of civil debtors.¹⁵⁸

The *Omar* Court rejected this argument. It noted that if Omar were arrested for domestic violence, he would be entitled to all the benefits of FC s 35 — including a hearing within 48 hours of his arrest. *Coetzee*, on the other hand, was imprisoned indefinitely for a civil debt and received none of FC s 35's benefits.¹⁵⁹ The *Omar* Court concluded that, on the whole, the Domestic Violence Act's procedures were fair.

FC s 12(1)(a) can, in addition, only be invoked when a challenged provision either compels the adjudicator to act in a procedurally unfair manner or prevents her from acting in a procedurally fair manner. If the section in question is silent as to the fairness of the procedures, no constitutional complaint can be lodged against the section itself.¹⁶⁰ In *Nel v Le Roux*, this principle prompted the Court to find that even though s 205 of the Criminal Procedure Act did not require that the consequences of non-compliance be explained to the examinee, the presiding officer was constitutionally compelled to do so. The section was therefore valid.¹⁶¹ The *Bernstein* Court held that the challenged provisions should, in addition, be construed in light of the considerable body of case law that fleshed out their application.¹⁶² Given that the empowering legislation and the case law's gloss on that legislation were fair, the *Bernstein* Court held that the correct procedure would have been to approach the

155 See *Nel* (supra) at para 19 (Failure to hold the proceedings in public not unfair because it may be to the benefit of both the witness and society not to disclose the evidence at this stage.)

156 Ibid at para 20 ('The summary procedure for imprisoning a recalcitrant witness must be adjudged in the context of the s 205 proceedings as a whole.')

157 *Omar* (supra) at para 41.

158 *Coetzee v Government* (supra) at para 14.

159 *Omar* (supra) at para 44.

160 *Nel* (supra) at para 18; *De Lange* (supra) at para 85.

High Court for a review of the proceedings and the behaviour of the officer in question.¹⁶³

40.4 FC s 12(1)(b): detention without trial

FC s 12(1)(b) recognizes that 'detention without trial was a powerful instrument designed to suppress resistance to the programmes and policies of the former

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government.¹⁶⁴ Indeed, several members of the Constitutional Court have expressed the opinion that FC s 12(1)(b) should be read primarily as a reminder that this particular tool of the apartheid state cannot be used to repress political opposition and that the extension of the right should be largely determined (and curtailed) by its historical meaning. While FC s 12(1)(b) currently plays a limited role in our jurisprudence — a role largely determined by its historical resonance — the abuse of state power with which FC s 12(1)(b) is concerned could just as easily be visited upon immigrants, mental patients and common criminals. No good reason exists for limiting the protection afforded by FC s 12(1)(b) to political revolutionaries.

Moreover, FC s 12(1)(b) cannot be reduced to a purely symbolic function. Neither FC s 35(2) nor FC s 12(1)(a) can be read to require that a person detained by the state must have that detention preceded or confirmed by a 'trial'.¹⁶⁵ FC s 12(1)(b) imposes duties upon the state that differ markedly from the obligations found in FC s 35(2) and, by requiring a 'trial', goes well beyond the demands of procedural fairness manifest in FC s 12(1)(a).

(a) Detention

The 'trial' requirement only arises if a person is detained. But what is 'detention'?

The term 'detention' in FC s 12(1)(b) is best understood as the placing of a person under lock and key. 'Deprivation of liberty', in terms of FC s 12(1)(a), sets a far lower threshold: trials are not required for temporary restrictions of liberty (ie, requests for identification or even arrest¹⁶⁶) incidental to police investigation of a crime. Nor should they be. While Ackermann J, in *De Lange*, concluded that that 'detention' encompasses imprisonment, he also suggested that it embraced significant

161 *Nel* (supra) at para 21. See also *Bernstein* (supra) at para 52 (The Court considered the validity of provisions compelling witnesses to appear and produce evidence at hearings regarding insolvent companies. When dealing with the contention that the section was open to abuse, Ackermann J held that '[t]he fact that the power of subpoena may possibly be abused in a particular case to the prejudice of the person subjected to such abuse does not mean that the power should, for this reason, be characterised as infringing s 11(1) of the Constitution. The law does not sanction such abuse; it merely recognises that it is difficult to control it and that a clear case of abuse must be established in order to secure a discharge from a subpoena.')

162 *Bernstein* (supra) at para 46.

163 *Ibid* at para 47.

164 *De Lange* (supra) at para 115 (Didcott J). See also *Lawyers for Human Rights* (supra) at para 36.

165 FC 35(2)(d) allows a detainee to challenge the lawfulness of his detention. However, FC s 12(1)(b) compels the state to provide a trial without any request or any challenge by the detainee.

'restriction of physical movement'.¹⁶⁷ However, the 'restriction of physical movement' contemplated by FC s 12(1)(b) must be comparable to incarceration for there to be a meaningful distinction between 'detention' and 'deprivation'.

That said, *Sibiya* suggests that 'detention' must be read as 'detention without trial'. *Sibiya* turned on the failure of the state to alter the sanction imposed on those persons sentenced to death prior to the Interim Constitution coming into effect. The *Sibiya* Court considered the matter in terms of FC s 12(1)(a) rather than FC s 12(1)(b) because the continued 'deprivation of liberty' did not constitute 'detention without trial'.¹⁶⁸ The 'trial' required by FC s 12(1)(b) had already taken place.

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(b) Trial

As the *Nel* Court notes, a FC s 12(1)(b) 'trial' requires somewhat more than a mere administrative inquiry, but somewhat less than what FC s 35 demands:

The 'trial' envisaged by this right does not, in my view, in all circumstances require a procedure which duplicates all the requirements and safeguards embodied in s 25(3) of the [Interim] Constitution. *In most cases it will require the interposition of an impartial entity, independent of the Executive and the Legislature to act as arbiter between the individual and the State.*¹⁶⁹

Although the precise nature of this 'impartial entity' was left open, the *Nel* Court appeared to commit itself to the proposition that the official in question would always be a 'judicial officer who ordinarily functions as such in the ordinary courts'.¹⁷⁰

In *De Lange*, the Court was asked to consider whether non-judicial officers could participate in the 'impartial entity' described by *Nel*. The question elicited significant disagreement.¹⁷¹ *De Lange* concerned the constitutionality of s 66(3) of the Insolvency Act. That provision permitted the imprisonment of a witness summoned to give testimony about an insolvent estate. More importantly, the incarceration could be ordered by an official of the Master's office.

A plurality of the *De Lange* Court found that FC s 12(1)(b) demands 'a hearing presided over or conducted by a judicial officer in the court structure established by the [Final] Constitution and in which [FC] s 165(1) has vested the judicial authority of the Republic'.¹⁷² The doctrine of separation of powers — as manifest in Chapter 8 of the Final Constitution — requires that laws be enforced by the executive and

166 *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2003 (8) BCLR 891, 898E-F (T)(Arrest is not included in detention for the purposes of FC s 12(1)(b).)

167 *De Lange* (supra) at para 28.

168 *Sibiya* (supra) at para 32.

169 *Nel* (supra) at para 14 (our emphasis).

170 *Ibid* at para 15.

171 The plurality judgment is contained in the judgment of Ackermann J (Chaskalson P, Langa DP and Madala J). Sachs and O'Regan JJ concurred with the judgment.

adjudicated by bodies independent of the executive. Officials of the Master's office, despite having the requisite skill and experience, remained members of the executive branch of government.¹⁷³ Although they may be impartial, executive officers could never be independent. The section was, therefore, found to be invalid to the extent that it allowed a person other than a judge or magistrate to commit another to prison.¹⁷⁴

The nature of the 'entity' that could conduct a trial in terms of FC s 12(1)(b) was considered again in *Freedom of Expression Institute v President, Ordinary Court Martial, Lt Col Mardon NO & Others*.¹⁷⁵ Provisions of the Defence Act and the Military Discipline Code in the First Schedule to the Act were challenged on the basis that the Code permitted army officers to adjudicate court martials.¹⁷⁶ None of the three army officers were required to have any legal training or qualification. A court martial could result in a sentence of up to two years imprisonment.¹⁷⁷ The Court found that, although a court martial could 'be presided over by a layman notwithstanding that such court has the power to deprive a convicted accused of his liberty',¹⁷⁸ the absence of meaningful independence amongst the convening authority, the prosecutor and the court martial personnel meant that the court martial failed to qualify as a 'trial' for the purposes of FC s 12(1)(b).¹⁷⁹

Although the foregoing analysis suggests that the form of a FC s 12(1)(b) 'trial' has yet to be finally determined, *De Lange* and *Freedom of Expression* stand for the

172 *De Lange* (supra) at para 57.

173 *Ibid* at para 59.

174 *Ibid* at paras 48–56 and 87–101. Didcott and Kriegler JJ disagreed with the majority. For Didcott and Kriegler JJ, Ackermann J's judgment 'concentrate[d] on form at the expense of substance'. Officers of the Master's office were, on this account, just as impartial as magistrates, and any irregularity would in any event be reviewable by an independent court. *Ibid* at para 125. Didcott and Kriegler JJ found s 66(3) wholly unobjectionable. Mokgoro J argued that the case was about process, not office: 'The mere fact without more that a person committing the recalcitrant witness to prison is in name a judicial officer, in my view, is, in itself, not an adequate safeguard that the committal is acceptable in an open and democratic society that has such high regard for individual liberty.' *Ibid* at para 137. As s 66(3) lacked any procedural safeguards, it constituted an unjustifiable limitation of FC s 12(1)(a). O'Regan J concluded that 'no person may be imprisoned indefinitely for coercive purposes except by a court of law, or an independent and impartial institution of a character similar to a court of law.' *Ibid* at 165. As the meeting of creditors envisaged in the s 66(3) procedure did not function as a court of law — even when presided over by a magistrate — it constituted a limitation of FC s 12(1). O'Regan J did not rely on FC s 12(1)(b), but on the general guarantee of procedural fairness in FC s 12(1).

175 1999 (2) SA 471 (C), 1999 (3) BCLR 261 (C).

176 Act 44 of 1957.

177 *Freedom of Expression* (supra) at para 21. The Full Bench of the Cape High Court had previously adopted the finding of the High Court in *De Lange v Smuts* (supra) that 'only a court of law may deprive a person of liberty.' Such a 'court of law' must 'be an ordinary court which conforms with the spirit of the Constitution and which affords an accused person a fair trial'. The court martial clearly fell far short of this ideal.

178 *Ibid*.

proposition that an independent and impartial entity similar, if not identical to a court of law, is required. In addition, two forms of 'detention without trial' do not violate FC s 12(1)(b): an accused person awaiting his or her first court appearance may be detained for a period of 48 hours,¹⁸⁰ and an accused person awaiting trial may be detained pending trial where bail has not been granted.¹⁸¹

(c) Limitation

Detention with anything less than a 'trial' constitutes a limitation of FC s 12(1)(b). In *Lawyers for Human Rights*, the Constitutional Court had an opportunity to assess the constitutionality of a range of limitations on the right.

Section 34 of the new Immigration Act permitted people to be detained pending deportation if an immigration officer reasonably suspected that they were an

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illegal foreigner. Yacoob J, writing for the *Lawyers for Human Rights* Court, held that detention based upon mere suspicion violated FC s 12(1)(b).¹⁸²

The difficulties with the Act flowed from its differential treatment of various classes of person. Immigrants who arrived by air would be kept in a state facility for a maximum of 30 days before they had to be released or before an order of court had to be issued to extend the detention. Any such detainee could also demand the confirmation of his detention by a warrant issued by a court. If the warrant was not issued within 48 hours, the detainee had to be released. The *Lawyers for Human Rights* Court found that, if due regard was had to these procedural safeguards, the provisions of the Act governing detainees who arrived by air were justifiable under FC s 36.¹⁸³

For those who arrived by ship, the Act's position was somewhat more complicated. They could, at the discretion of the officer, be detained, as described above, with the same procedural safeguards. However, they could also be detained on the ship until that ship left port. In ship detention cases, detainees could be held, on the ship, for periods substantially longer than 30 days. Moreover, these detainees could not challenge their detention in court. The *Lawyers for Human Rights* Court held that unlimited ship detention and the inability to challenge such detention constituted unjustifiable limitations of FC s 12(1)(b). It read various provisions into the legislation to cure these defects.¹⁸⁴

179 Ibid at paras 19–20. Hlophe ADJP sets out the test for independence as 'whether the tribunal from the objective standpoint of a reasonable and informed person will be perceived as enjoying the essential conditions of independence.' Ibid at para 25.

180 FC s 35(1)(d).

181 FC s 35(1)(f). See *Dlamini* (supra) at para 36. As Kriegler J noted, '[t]he Constitution itself . . . places a limitation on the liberty interest protected by s 12' in terms of FC s 7(3). FC s 7(3) reads: 'The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.'

182 *Lawyers for Human Rights* (supra) at para 33.

183 Ibid at para 44.

40.5 FC s 12(1)(c): public and private violence

The right in FC s 12(1)(c) 'to be free from all forms of violence from either public or private sources', though seldom mentioned, can be accredited with some of the most meaningful recent developments of the common law. While only recognized expressly under the Final Constitution, this right had already been recognized by the courts under the Interim Constitution.¹⁸⁵

FC s 12(1)(c) draws its inspiration from art 5 of the Convention on the Elimination of All Forms of Racial Discrimination ('CERD'). Article 5 imposes duties on States Party to protect people from 'violence or bodily harm whether inflicted by government officials or by any individual, group or institution'.¹⁸⁶ In addition to these traditional negative duties, the Convention contains affirmative obligations to prohibit, to punish and to discourage violence.¹⁸⁷ While the apposite articles of

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the CERD are directed exclusively towards racially-motivated carnage, FC s 12(1)(c) aims to thwart all forms of violence.¹⁸⁸

(a) Violence

The term 'violence' has been defined by some commentators as a 'grave invasion of personal security'.¹⁸⁹ This denotation of the term suffers from several limitations.

First, we see little reason to distinguish, *ab initio*, 'grave invasions' from 'ordinary invasions' of personal security. The critical distinction is not the extent of the invasion, but its nature. For example, a person arbitrarily detained for three years would have experienced a 'grave invasion' of personal security, but it would hardly seem right to characterize that experience as 'violent'. Violence generally involves some immediate threat to life or physical security. (The source of this threat is immaterial.) Second, we think that the curtailment of FC s 12(1)(c)'s protection to 'grave' violations would fail many of those the right is meant to protect. Women (or men) trapped in abusive relationships may suffer from psychological, as well as physical violence that could probably not be successfully characterized as 'grave'. That such threats and acts of intimidation are often the hallmark of such

184 *Ibid* at para 43.

185 See *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) at para 44 the Constitutional Court found that IC s 11 imposed a duty on the state to prevent criminals in custody from committing violent acts against members of the public. This finding was followed by the High Court and the Supreme Court of Appeal. See *Carmichele v Minister of Safety & Security & Another* 2003 (2) SA 656 (C); *Minister of Safety and Security & Another v Carmichele* 2004 (3) SA 305 (SCA), 2004 (2) BCLR 133 (SCA) ('*Carmichele SCA*').

186 Convention on the Elimination of All Forms of Racial Discrimination, art 5(b).

187 *Ibid* art 2. These positive obligations contemplate both legislation and executive action to combat violence.

188 See Currie & De Waal (*supra*) at 303 n51.

189 *Ibid* at 304.

relationships supports our contention that the violence contemplated by FC s 12(1)(c) ought not to be narrowly construed (even when FC s 12(2)'s right to psychological integrity may also be invoked.)

(b) Positive obligations

(i) Vertical application

The Constitutional Court first recognized the positive dimensions of FC s 12(1)(c) when considering a challenge to the Domestic Violence Act in *S v Baloyi*:

The specific inclusion of private sources emphasises that serious threats to security of the person arise from private sources. Read with s 7(2), s 12(1) has to be understood as *obliging the State directly* to protect the right of everyone to be free from private or domestic violence.¹⁹⁰

The Court subsequently confirmed the positive duty imposed on the state by FC s 12(1)(c) in *Carmichele v Minister of Safety and Security*.¹⁹¹

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In *Carmichele*, a woman had been attacked by a man — accused of rape and murder — who had recently been released from jail on bail. The gravamen of Carmichele's complaint was that the attack was a direct consequence of the failure of the state — in the form of the investigating officer and the prosecutor — to oppose bail for her attacker in a previous matter. Both the High Court and the Supreme Court of Appeal refused her claim. They held that the state had no legal duty to prevent the harm in question. Although Carmichele had failed to raise constitutional issues in either the High Court or the Supreme Court of Appeal, the Constitutional Court found that all courts have an obligation to develop the common law in light of the spirit purport and objects of the Bill of Rights.¹⁹² The Constitutional Court then found, without specifically relying on FC s 12(1)(c),¹⁹³ that

there is a duty imposed on the State and all of its organs not to perform any act that infringes these rights [including s 12(1)(c)]. In some circumstances there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.¹⁹⁴

190 *S v Baloyi (Minister of Justice & Another Intervening)* 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC) at para 11 (Emphasis added. Footnote omitted)(Domestic Violence Act 116 of 1998 read not to impose a reverse onus provision on accused.)

191 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC)(*'Carmichele'*).

192 *Carmichele* (supra) at para 39.

193 According to Marius Pieterse, two obvious reasons exist for the Court's silence in this regard. First, since the case had initially been brought in terms of the Interim Constitution, the Court did not want to address the thorny issue of retrospective effect. Second, the subsequent constitutional challenge was brought in terms of FC s 39(2). FC s 39(2)'s general obligation to develop the common law in light of the spirit, purport and objects of the Bill of Rights. See M Pieterse 'The Right to be Free from Public and Private Violence after *Carmichele*' (2002) 119 *SALJ* 27, 32. FC s 39(2), as one of the authors notes elsewhere, does not permit reliance on a specific substantive section of the Bill of Rights. S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.4(e).

This holding has spawned a revolution in the law of delict.¹⁹⁵ This new duty — grounded in FC ss 39(2) and 12(1)(c) — extends the state's general duty to protect

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its citizens by imposing liability in the event of egregious failures.¹⁹⁶ It is worth noting that a significant proportion of these successful delictual actions have vindicated the rights of women to be free from violence.

It is also worth noting that the courts have linked the right to freedom from violence to the constitutional value of accountability. In *Van Duivenboden*, the Supreme Court of Appeal wrote:

Where the conduct of the State, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights, in my view, the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognised in any particular case.¹⁹⁷

The *Van Duivenboden* Court emphasized that delictual liability did not follow, automatically, from the state's failure to discharge its duties of accountability. Other

194 *Carmichele* (supra) at para 44. In coming to this conclusion, the *Carmichele* Court rejected the position taken by the US Supreme Court in *De Shaney v Winnebago County Department of Social Services*. 489 US 189 (1988)(US Supreme Court declines to hold state liable for failure to prevent child abuse although state was on notice that such abuse had occurred.) The *Carmichele* Court preferred the reasoning of the European Court of Human Rights in *Osman v United Kingdom*. See *Carmichele* (supra) at para 45 quoting *Osman v United Kingdom* 29 EHHR 245 at para 115 ('It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that article 2 of the European Convention on Human Rights may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.') See also *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) at para 40 ('The State is further under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people and especially children from maltreatment, abuse or degradation.')

195 The Minister of Safety and Security has since been held liable for a failure to take positive steps in the following Supreme Court of Appeal cases: *Minister of Safety and Security & Another v Hamilton* 2004 (2) SA 216 (SCA)(State responsible for damage caused by a mentally unstable woman issued a gun licence); *Van Eeden v Minister of Safety and Security (Women's Legal Centre as Amicus Curiae)* 2003 (1) SA 389 (SCA), 2002 (4) All SA 346 (SCA)(Police failure to close a gate allowed a dangerous prisoner to escape and to rape and assault a young woman); *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA)(The failure of the police failed to remove a gun from a man they knew to be dangerous led, almost ineluctably, to the shooting deaths of the man's wife and daughter.) The High Court has also acknowledged *Carmichele's* revolution in the common law of delict. See *Seema v Lid van die Uitvoerende Raad vir Gesondheid, Gauteng* 2002 (1) SA 771 (T)(Authorities of state mental hospital have a duty to the public to ensure that patients do not escape and cause harm); *Moses v Minister of Safety and Security* 2000 (3) SA 106 (C) (Plaintiff's husband had been assaulted and killed by other inmates while in police custody); *Geldenhuys v Minister of Safety and Security* 2002 (4) SA 719 (C)(Police held liable for failure to provide speedy medical assistance.) In *Geldenhuys* Davis J wrote:

'The facts of this case recall a sad part of the apartheid past, of individuals left to die in cells, of a systematic destruction of human dignity of people who were in the custody of the police. That was our past and it can no longer be our future, for if it is, then the wonderful aspirations and magnificent dreams contained in the Constitution will turn to post-apartheid nightmares. The transformation of our legal concepts must, at least in part, be shaped by memory of that which lay at the very heart of our apartheid past. When considering police action, the past is of great importance in assisting to shape legal concepts which are congruent with our constitutional future.'

kinds of remedies or extra-judicial mechanisms might well ensure the government's accountability.¹⁹⁸ However, the *Van Duivenboden* Court held that 'where the State's failure occurs in circumstances that offer no effective remedy other than an action for damages, the norm of accountability will . . . ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm.'¹⁹⁹

The Constitutional Court in *Rail Commuters* extended the logic of *Van Duivenboden* to the failure of any organ of state to discharge its constitutionally-mandated delictual duties.²⁰⁰ At the same time, the *Rail Commuters* Court agreed with the *Van Duivenboden* Court that, although there is a strong link between the right to freedom from violence and accountability, the constitutional requirement of accountability would not always result in a finding of delictual liability. O'Regan J outlined the *Rail Commuters* Court's approach as follows:

In determining whether a legal duty exists whether in private or public law, careful analysis of the relevant constitutional provisions, any relevant statutory duties and the relevant context will be required. It will be necessary too to take account of other constitutional norms, important and relevant ones being the principle of effectiveness and the need to be responsive to people's needs.²⁰¹

As the above quotation suggests, the Constitutional Court has not merely confined FC s 12(1)(c)'s reach to instances that require it to redefine delictual liability. The *Rail Commuters* Court overruled an earlier decision of the Supreme Court of Appeal²⁰² and concluded that the Final Constitution required that the statutory provisions governing Metrorail's responsibilities imposed a positive duty — that is, a

This decision was subsequently overruled by the Supreme Court of Appeal on the grounds that negligence had not been proven. See *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA). See also *Mpongwana v Minister of Safety and Security* 1999 (2) SA 794 (C)(The plaintiff was paralysed by a stray bullet while in a taxi. The shot was fired by a rival taxi organisation. She claimed against the minister as the police had known about the volatile relationship between the rival organisations and had failed to prevent it erupting in violence. The court recognised the validity of the claim in principle by dismissing an exception to the claim); *Botha v Minister van Veiligheid en Sekuriteit* 2003 (6) SA 568 (T)(While effecting an arrest a policeman accidentally shot the plaintiff who successfully claimed for damages against the Minister); *Van der Spuy v Minister of Correctional Services* 2004 (2) SA 463 (SE)(The court upheld a claim by an innocent bystander who was shot by an escaping prisoner.) For a general discussion of FC s 12(1)(c)'s impact on the law of delict see J Neethling 'Delictual Protection of the Right to Bodily Integrity and Security of the Person against Omissions by the State' (2005) 122 *SALJ* 572.

196 *Van Eeden* (supra) at para 23.

197 *Van Duivenboden* (supra) at para 21. See also *Carmichele* (SCA) (supra) at para 37; *Van Eeden* (supra) at para 17.

198 *Ibid.*

199 *Ibid* at para 21.

200 *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC)('Rail Commuters') at para 76 ('The principle that Government, and organs of State, are accountable for their conduct is an important principle that bears on the construction of constitutional and statutory obligations, as well as on the question of the development of delictual liability.')

prospective duty, on Metrorail 'to ensure that reasonable measures are in place to provide for the security of rail commuters.'²⁰³ *Rail Commuters* reads the statutory provisions at issue through the lens of FC s 12(1)(c) and suggests that we would all be better served if the law were read to compel the state to prevent the violence in the first place and not simply to justify the award of damages after the fact.

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FC s 12(1)(c), read with the requirement of accountability, has also broadened the common-law doctrine of vicarious liability.²⁰⁴ In *K v Minister of Safety and Security*, the applicant had been raped by three on-duty policemen who had offered her a lift home. Both the High Court and the Supreme Court of Appeal rejected her delictual claim on the grounds that the policemen had been acting contrary to the purpose of their employment and that the Minister could accordingly not be held liable for their actions. O'Regan J found that the Supreme Court of Appeal had misunderstood the facts of the case and had therefore misapplied the common-law test. According to the Constitutional Court, the policemen who raped K had committed a crime while operating under the colour of law. Or to put the matter in slightly different terms, the officers simultaneously committed a crime that fell outside their duties and omitted to protect K from a crime that fell well within their duties. The omission created the basis for the finding of vicarious liability. The link drawn by the *K* Court between the commission of a crime and the failure to fulfil a constitutional duty echoes FC s 12(1)(c)'s link between the duty not to cause violence (negative) and the duty to prevent violence (positive).²⁰⁵

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(ii) Horizontal application

201 Ibid at para 78 (footnotes omitted). The reasons for this reliance on accountability are not entirely clear. Surely, the text of FC s 12(1)(c) provides sufficient basis for increasing the State's liability. The deployment of the value of 'accountability' serves two functions. Firstly, although a large number of 'accountability' cases have involved an element of violence, by relying on state accountability rather than the right to be free from violence, the courts have given themselves the opportunity to extend state liability to cases in which violence is absent. Indeed, a number of such 'accountability' cases have already occurred. Applicants seeking compensation for unfair administrative action have relied upon the extension of state liability recognized in the FC s 12(1)(c) 'accountability' cases. See, eg, *Olitzi Property Holdings v State Tender Board & Another* 2001 (3) SA 1247 (SCA), *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA). Secondly, the FC 12(1)(c) 'accountability' challenges have all been brought as statutory interpretation or development of the common law cases in terms of FC s 39(2). Thus, any support that can be found in the constitutional text to alter the current state of the law is of great rhetorical value. However, the reliance on accountability does detract from the State's specific duty, in terms of FC s 12(1)(c), to protect especially vulnerable members of our community from violence.

202 *Transnet Ltd t/a Metrorail & Others v Rail Commuters Action Group & Others* 2003 (6) SA 349 (SCA), 2003 (12) BCLR 1363 (SCA). The Supreme Court of Appeal decision had overruled the previous judgment of Davis J in the Cape High Court. See *Rail Commuter Action Group & Others v Transnet Ltd t/a Metrorail & Others (No 1)* 2003 (5) SA 518 (C), 2003 (3) BCLR 288 (C).

203 *Rail Commuters* (supra) at para 84.

204 *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC) ('K'). See also the Supreme Court of Appeal's judgment in *Minister of Safety and Security v Luiters* Case Number 213/05 (as yet unreported decision of 17 March 2006) (The Minister was held liable for the actions of an off-duty policeman who fired on nine innocent people while allegedly looking for robbers. At the time of writing, the case was on appeal to the Constitutional Court.)

Although a number of the aforementioned matters engage domestic violence, they do so in terms of existing legislation designed to protect women. The courts have not, as yet, been required to use FC s 12(1)(c) to develop the common law of delict in purely private disputes.²⁰⁶

(c) Negative obligations

FC s 12(1)(c) imposes both positive obligations and negative obligations.²⁰⁷ These two duties often overlap. Whenever the police arrest a suspected criminal or

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break up a riot, they must simultaneously act *positively* to prevent further violence from private sources and at the same time act *negatively* to minimise the violence they necessarily employ, as agents of the state, to achieve their aims.

205 The state's obligation to prevent violence in terms of FC s 12(1)(c), read with FC s 39(2), was further extended in *Omar v Government of the Republic of South Africa & Others (Commission for Gender Equality, Amicus Curiae* 2006 (2) SA 289 (CC), 2006 (2) BCLR 253 (CC) ('Omar'). The applicant had challenged various provisions of the Domestic Violence Act 116 of 1998 that facilitated the issuance of protection orders and warrants for arrest on the grounds that they violated his rights to freedom and security of the person, access to courts and fair trial. The *Omar* Court rejected the applicant's challenges and justified the legislation on the grounds that FC s 12(1)(c) requires the state to take active steps to prevent domestic violence and to encourage victims to report all instances of it:

Whereas the privacy of the home and the centrality attributed to intimate relations are valued, privacy and intimacy often provide the opportunity for violence and the justification for non-interference. Victims are ambivalent about their fate and reluctant to go through with criminal prosecution. It is understandable for the legislature to enact measures that differ from those generally applicable to criminal arrests and prosecutions. It is clear that the Act serves a very important social and legal purpose.

Ibid at para 18. FC s 12(1)(c) could potentially have played a similar interpretative role in *Road Accident Fund v Van der Merwe* CCT 48/05 (Unreported, 30 March 2006). The complainant's husband had intentionally run her over with his car and reversed over her again. The Road Accident Fund rejected her claim on the grounds that it was barred by the Matrimonial Property Act. The *Van der Merwe* Court held that the challenged provision of the Matrimonial Property Act violated FC s 9(1) because it often impaired a woman's ability to claim adequate compensation. Although the *Van der Merwe* Court did not rely upon FC s 12(1)(c) in reaching its conclusions, the Court did have this to say in response to the amicus' invocation of the right to be free from violence: 'Spouse batterers and wrongdoers in delict are in effect immunised from making good patrimonial damages of their marriage partners. This ouster provision seems to be at odds with the constitutional protection extended to a person's bodily integrity.' Ibid at para 69.

206 The existence of a duty to act that can give rise to a delictual liability is a well-ventilated topic. At common law, the presence of a number of factors can establish liability for an omission:

- (1) Whether there was prior conduct which created a danger; the existence of prior conduct was once considered an absolute requirement for liability; see, eg, *Silva's Fishing Corporation (Pty) Ltd v Mazewa* 1957 (2) SA 256 (A) (Owner of fishing fleet liable for failing to rescue drifting boat);
- (2) The control of a dangerous object; see, eg, *Minister of Forestry v Quathambla (Pty) Ltd* 1973 (3) SA 69 (A) (Owner liable for fire on property under his control); *Oosthuizen v Homegas (Pty) Ltd* 1992 (3) SA 463 (O) (Liability for explosion caused by failure to properly warn or instruct about dangers); *Cape Town Municipality v Butters* 1996 (1) SA 473 (C) (Municipality liable for failure to properly warn of dangerous slope next to parking area); see also Neethling, Potgieter & Visser (supra) at 63-66;
- (3) The existence of a rule of law; see *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) ('Ewels') (Existence of a duty to prevent crime was a factor in the holding that the Minister was liable for the failure of a policeman to prevent an assault); see also *Carmichelle* (supra); Neethling, Potgieter & Visser (supra) at 66-68;

The Constitutional Court considered the relationship between these two obligations in *Walters*. At issue in this case was the constitutionality of provisions allowing the police to use force, including lethal force, when affecting an arrest.²⁰⁸ Kriegler J reasoned that an arrest was never an end in itself, but merely one means of getting a suspect into court. As a result, force could only be justified when an arrest was necessary to achieve that goal. If an arrest is necessary, the force employed must be the minimum necessary to effect the arrest,²⁰⁹ and must be proportionate with respect to the offence committed or the continued threat of violence.²¹⁰

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- (4) The existence of a special relationship between the parties; see *Mtati v Minister of Justice* 1958 (1) SA 221 (A)(Relationship between police officer and detained person); *Ewels* (supra) (Relationship between policeman and citizens); *De Beer v Sergeant* 1976 (1) SA 246 (T)(Duty on parent to prevent child committing a delict); see, generally, Neethling, Potgieter & Visser (supra) at 69-70;
 - (5) The holding of a particular office; see *Macadamia Finance Ltd v De Wet* 1991 (4) SA 273 (T) (Liquidators liable for failure to insure assets);
 - (6) Contractual undertaking to protect a third party; see *SAR & H v Estate Saunders* 1931 AD 276 (Liability for failure to move a trailer in terms of a contract); *Blore v Standard General Insurance Co Ltd* 1972 (2) SA 89 (O)(Garage accepted responsibility for safety of car's steering mechanism and therefore liable for loss suffered as a result); see also Neethling, Potgieter & Visser (supra) at 70-71;
 - (7) The creation of an impression that a third party's interests will be protected; See *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 (2) SA 520 (W)(Security firm protecting premises owes duty to third parties lawfully on the premises to protect their property). See also Neethling, Potgieter & Visser (supra) at 71-72.

None of these factors constitute necessary or sufficient conditions for the imposition of a duty. Courts often require the presence of a number of such factors before finding that an omission to act violated a duty of care. See Neethling, Potgieter & Visser (supra) at 72.

The courts are, in this domain, developing a fairly progressive doctrine even where they do not invoke FC s 12(1)(c). For example, the Supreme Court of Appeal in *Media 24 v Grobler* found that employers have a positive duty to protect their employees not only from physical violence, but also from such forms of psychological violence as sexual harassment. *Media 24 Ltd & Another v Grobler* 2005 (6) SA 328 (SCA) at para 65 ('This duty cannot in my view be confined to an obligation to take reasonable steps to protect them from *physical* harm caused by what may be called *physical* hazards. It must also in appropriate circumstances include a duty to protect them from *psychological* harm caused, for example, by sexual harassment by co-employees.' (Our emphasis))

- 207 Although FC s 12 requires no further justification, part of the rationale behind the prohibition on public violence is to promote greater respect for life and dignity. Langa J explains this commitment as follows:

Implicit in the provisions and tone of the Constitution are values of a more mature society, which relies on moral persuasion rather than force; on example rather than coercion. In this new context, then, the role of the State becomes clear. For good or for worse, the State is a role model for our society. A culture of respect for human life and dignity, based on the values reflected in the Constitution, has to be engendered, and the State must take the lead. In acting out this role, the State not only preaches respect for the law and that the killing must stop, but it demonstrates in the best way possible, by example, society's own regard for human life and dignity by refusing to destroy that of the criminal. Those who are inclined to kill need to be told why it is wrong. The reason surely must be the principle that the value of human life is inestimable, and it is a value which the State must uphold by example as well.

S v Makwanyane 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 222.

40.6 FC s 12(1)(d): torture

(a) Definition

Before offering a definition of 'torture', it may help to consider the purposes for which torture has, traditionally, been used: (1) as part of the victor's pleasure after military victory; (2) to promote terror in the general population; (3) as a form of punishment; (4) as a means of extracting confessions; and (5) as a method of gathering intelligence.²¹¹ Luban notes that the last purpose is both the most recent to develop and the only one that citizens of liberal democracies accept as a

208 *Ex Parte Minister of Safety and Security & Others: In re Ex Parte Walters & Another* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC). The constitutional challenges to the Criminal Procedure Act were not limited to FC s 12(1)(c). The applicants raised challenges grounded in the right to life (FC s 11), the right to human dignity (FC s 10) and other rights to freedom and security of the person (specifically, FC ss 12(1)(e) and 12(2)(b)). Although the majority of the references in the judgment are to the right to bodily integrity — FC s 12(2) — the Court's observations remain relevant to our understanding of FC s 12(1)(c). See Currie & De Waal (supra) at 309. For a more detailed account of the constitutional dimensions of arrest, see F Snyckers & J le Roux 'Criminal Procedure' 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.

209 *Walters* (supra) at para 54 ('Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used.')

210 *Ibid* ('In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrestor or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances.'). See also *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA), 2001 (11) BCLR 1197 (SCA) at paras 19-20 (Court interprets statute to only allow use of force when there are reasonable grounds to believe that the suspected offence involved the infliction or threat of serious bodily harm or where the suspect poses an immediate threat of serious bodily harm to him or her, or a threat of harm to members of the public.)

The requirement of proportionality echoes the sentiments of Justice White in *Tennessee v Garner* 471 US 1 (1985) 11-12 ('It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorises the use of deadly force against such fleeing suspects. It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.')

The High Court has twice held that allowing the police to order the surgical removal of a bullet from a suspect's leg amounted to a violation of FC s 12(1)(c). The removal of the bullet constituted violence beyond that necessary to effect an arrest. See *Minister of Safety and Security and Another v Xaba* 2003 (2) SA 703 (N), 708H; *S v Gaqa* 2002 (1) SACR 654, 658H (C).

The dual duties of the police become particularly complicated when two opposing protesting groups resort to violence. The European Court of Human Rights held that the police have a duty to interfere, with force if necessary, to prevent the two private groups from causing further violence. See *Plattform Ärzte für das Leben v Austria* (1991) 13 EHRR 204; S 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.

legitimate justification.²¹² As a result, our discussion of the definition of and the justification for torture will be limited to the relationship, if any, between torture and the need to gather information deemed necessary to protect the general safety of the commonweal.²¹³

South African courts have not, as yet, been called upon to determine the scope

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of the term 'torture'.²¹⁴ However, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT'), which has been ratified by South Africa, offers the following authoritative international definition:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a

211 See D Luban 'Liberalism, Torture, and the Ticking Bomb' (2005) 91 *Virginia Law Review* 1425, 1429-37.

212 Ibid at 1437. According to Luban, the utilitarian moral philosophy that informs political liberalism enables some liberals to conceive of torture, in the worst case scenario, as consistent with liberalism. Luban writes:

To speak in a somewhat perverse and paradoxical way, liberalism's insistence on limited governments that exercise their power only for instrumental and pragmatic purposes creates the possibility of seeing torture as a civilized, not an atavistic, practice, provided that its sole purpose is preventing future harms. Now, for the first time, it becomes possible to think of torture as a last resort of men and women who are profoundly reluctant to torture. And in that way, liberals can for the first time think of torture dissociated from cruelty — torture authorized and administered by decent human beings who abhor what circumstances force them to do. Torture to gather intelligence and save lives seems almost heroic. For the first time, we can think of kindly torturers rather than tyrants.

Ibid.

213 Sachs J offers a brief look at the history of torture in Southern Africa from the outset of Dutch settlement in his concurring judgment in *Makwanyane. S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC) at paras 384-87. For a brief exposition of torture's evolution into an acceptable form of law enforcement, see S Williams 'Your Honor, I Am Here Today Requesting The Court's Permission to Torture Mr. Doe': The Legality of Torture as a Means to an End versus The Illegality of Torture as a Violation of Jus Cogens Norms Under Customary International Law' (2004) 12 *University of Miami International and Comparative Law Review* 301, 307-11.

214 See *Fose v Minister of Safety Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) ('Fose'). The Constitutional Court was asked to consider whether a man was entitled to constitutional damages in addition to delictual damages for the severe assaults he had suffered while in police custody. The *Fose* Court casually referred to the assaults as 'torture'. Ibid at paras 81, 89, 101 and 103. Indeed, the Court accepted allegations that 'torture' was a 'widespread and persistent phenomenon at South African police stations.' Ibid at para 103. However, it made no attempt to define the term.

The *Constitutional* Court has been presented with other opportunities in which it could have analyzed law or conduct in terms of the prohibition of torture. It has preferred, however, to view the challenged law or conduct in terms of the prohibition on 'cruel, inhuman and degrading treatment or punishment'. See *Makwanyane* (supra) at para 78 (Death penalty constitutes cruel, inhuman and degrading punishment.) However, Chaskalson P suggests, without making a specific finding, that the death penalty would not amount to torture. *Makwanyane* (supra) at para 97. Similarly, in *Williams*, while the Court was willing to engage some foreign jurisprudence on torture, it ultimately found that the whipping or the caning of juveniles constituted cruel, inhuman and degrading punishment. *S v Williams* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at para 63.

third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.²¹⁵

Four essential features of torture emerge from this definition:²¹⁶ (a) *severe* mental or physical pain or suffering; (b) *intentionally* inflicted; (c) for a listed *purpose*;²¹⁷ and (d) by, or with the consent of, an *official* actor. While intention and official sanction are undoubtedly important elements for a finding of torture, it is the notion of 'severity' that attracts the greatest amount of jurisprudential debate.²¹⁸

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The practical difficulties associated with determining whether pain or suffering is sufficiently severe to constitute torture are well documented in *Ireland v The United Kingdom*. In response to increased 'terrorist' activity by the IRA and other armed Irish activists, the United Kingdom began using various 'techniques' to extract information. The 'techniques' involved protracted standing against the wall on tip-toes, the covering of the suspect's head throughout most of the detention, the exposure of the suspect to loud noise for a prolonged period of time, and deprivation of sleep, food and drink. The European Commission on Human Rights found that these practices, employed collectively, amounted to torture.²¹⁹ The European Court on Human Rights, in a divided judgment, reversed the Commission's decision. It wrote:

Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the peculiar intensity and cruelty implied by the word torture.²²⁰

215 (1984) UN Doc A/39/51 (ratified by South Africa on 10 December 1998) art 1.

216 See LM Keller 'Is Truth Serum Torture?' (2005) 20 *American University International Law Review* 521, 569.

217 There is some disagreement over the content of this element. See N Jayawickrama *The Judicial Application of Human Rights Law* (2002) 307. As a general matter, the listed purposes involve the domination of the victim to achieve a predetermined end.

218 The United Nations General Assembly has declared that 'torture constitutes an *aggravated and deliberate* form of cruel, inhuman or degrading treatment or punishment.' Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975) GA res 3452, UN Doc A/10034 ('Torture Declaration') art 1(2)(Our emphasis). Intention and severity also form the backbone of the European Court's and European Commission's understanding of torture. In *Denmark v Greece*, the European Commission wrote: 'The word 'torture' is often used to describe inhuman treatment which has a purpose such as the obtaining of information or confessions, or the infliction of punishment, and is generally an aggravated form of inhuman and degrading treatment.' Application Numbers 3321-3/67 and 3344/67 (1969) 12 *European Commission for Human Rights Yearbook* 186. The European Court expressed a very similar statement in *Ireland v The United Kingdom* (1978) 2 EHRR 25 ('*Ireland v UK*'). The *Ireland v UK* Court found that 'it was the intention that the Convention, with its distinction between 'torture' and 'inhuman or degrading treatment' should by the first of these terms attach a special stigma to *deliberate* inhuman treatment causing *very serious* and cruel suffering.' *Ibid* at para 167 (our emphasis).

219 *Ireland v United Kingdom* Commission Report (25 January 1976).

A majority of the *Ireland v The United Kingdom* Court recognized that an undeniable benefit attaches to limiting the kinds of practices we identify as torture. If every undesirable interrogation technique amounts to torture, then the term 'torture' may lose its capacity to elicit the desired levels of public repugnance.

The conflicting conclusions the European Commission and the European Court reached regarding the 'levels of suffering' required to support a finding of torture reflect but one of the unsettled dimensions of this unsettling practice. Other courts and commentators have noted, however, that to focus on the severity of pain as the primary criterion for a finding of torture is to misconceive the essence of torture itself. As these writers often point out, the victims of war, disease and starvation often experience greater degrees of pain. What distinguishes torture from these other horrific experiences is that the pain is associated with a particularly malignant set of motives: the domination and the destruction of the personality of individual.²²¹ It is not pain, but cruelty bordering on barbarism

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that distinguishes torture from other forms of physical violence or psychological abuse. So, for example, in *Estrella v Uruguay* the Human Rights Commission held that threats of violence to friends or relatives, the threat of deportation and the mock amputation of an arm with an electric saw — despite the infliction of minimal amounts of physical pain — amount to torture.²²²

Making 'severity' the linchpin of torture analysis also enables proponents of novel interrogation techniques to distinguish their more 'humane' forms of information extraction from such medieval forms of persecution as the rack.²²³ Modern

220 *Ireland v UK* (supra) at para 167. The Israeli Supreme Court has held that similar practices — prolonged standing or uncomfortable sitting positions, tight hand or ankle cuffing, loud noise, sleep deprivation, hooding, cold rooms, and violent shaking — do not amount to torture. See *Public Committee Against Torture in Israel v The State of Israel* (1999) 53(4) PD 817 reprinted as *Supreme Court of Israel: Judgment Concerning the Legality of the General Security Services Interrogation Method* (1999) 38 ILM 1471.

221 While arguing that the threat of escalating pain can constitute torture, Parry contends that torture 'can include not just the most intensely painful practices but also all the practices that use pain to punish or gather information, upend the victim's worldview, and express the domination of the state and the torturer'. J Parry 'What is Torture, Are We Doing it, and What if We Are?' (2003) 64 *University of Pittsburgh Law Review* 237, 248. Copelon argues that

to treat physical brutality as the sine qua non of torture obscures the essential goals of modern official torture: the breaking of the will and the spread of terror. It obfuscates the relationships between acts of violence and the larger context of torture, between physical pain and mental stress, and between mental integrity and human dignity. It ignores the facts that abuse of the body is humiliating as well as searing, and that the body is abused and controlled not only for obscene sadistic reasons but ultimately as a pathway to the mind and spirit.

R Copelon 'Recognizing the Egregious in the Everyday: Domestic Violence as Torture' (1994) 25 *Columbia Human Rights Law Review* 291, 309-10.

222 Communication No 74/1980 *HRC 1983 Report* (1983) Annex XII. See also *Cariboni v Uruguay* Communication No 159/1983 *HRC 1988 Report* (1988) Annex VII. A (A university professor was kept hooded and sitting straight for seven days. When he had a meal he had to kneel and use the chair as a table. He was only taken to the toilet twice a day. He could often hear loud shrieks, possibly from a nearby torture in progress. The shrieks were accompanied by very loud music and noise. He was often threatened with torture and abruptly moved to a new location.) See also *E Quinteros and MC Almeida de Quinteros v Uruguay* UN Doc A/38/40 (1981)(Mother of daughter who was tortured also a 'victim of the violations suffered by her daughter.')

interrogation practices — often described as 'torture-lite' — may seem benign by comparison.²²⁴

The third requirement — the official sanction for such abuse — is often taken for granted in the international literature because the cases themselves turn on allegations of brutality by state actors.²²⁵ That said, official sanction for this form of physical abuse and psychological violence seems to us to lie at the heart of contemporary debates about the nature of, and the justification for, torture. For example, our disgust at the treatment of prisoners at Guantanamo Bay stems, in large part, from the fact that such treatment was officially sanctioned by the US government.²²⁶

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(b) Justification

In *S v Makwanyane* Chaskalson P (as he then was) wrote that '[i]t is difficult to conceive of any circumstances in which torture, which is specifically prohibited under IC s 11(2), could ever be justified.'²²⁷ Even in times of war or public emergency torture is, under international law, absolutely prohibited.²²⁸ But while the Final Constitution does not allow derogation from FC s 12(1)(d) or (e) during a state of

223 As Parry has noted, '[t]he difference between wall-standing and the rack is a matter of degree, not of kind.' Parry (supra) at 249. See also *Ireland v UK* (supra) at 116 (O'Donoghue J, dissenting) ('One is not bound to regard torture as only present in a medieval dungeon where the appliances of rack or thumb screw or similar devices were employed. Indeed, in the present day world there can be little doubt that torture may be inflicted in the mental sphere.')

224 See RB Schechter 'Intentional Starvation as Torture: Exploring the Gray Area Between Ill-treatment and Torture' (2003) 18 *American University International Law Review* 1233.

225 As a general matter, torture is understood to be a form of public, state-sanctioned violence. Private violence — no matter how gruesome — does not qualify as torture. But see Copelon (supra) at 342 (Argues that domestic violence should be regarded as torture. According to Copelon there is no real difference between the dominant position of the state and the position of a domestic abuser. Both are in a position of complete and often unquestionable control over their victim.)

226 See *Tyrer v United Kingdom* (1979-80) EHRR 1 at para 33, cited with approval in *Williams* (supra) at para 33 ('Furthermore, [corporal punishment] is institutionalised violence, that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment — whereby he was treated as an object in the power of the authorities — constituted an assault on precisely that which is the main purpose of art 3 to protect, namely a person's dignity and physical integrity. The institutionalised character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender.') In *Aydin v Turkey*, the European Commission for Human Rights held that one of the factors that raised the treatment of the complainant to the level of torture was that it was 'committed by a person in authority over the victim'. *Commission Report* (7 March 1996) at para 189.

227 *Makwanyane* (supra) at para 97. In his concurring judgment, Sachs J also suggests that the prohibition of torture may be non-justifiable. He writes:

In the case of other constitutional rights, proportionate balances can be struck between the exercise of the right and permissible derogations from it. In matters such as torture, where no derogations are allowed, thresholds of permissible and impermissible conduct can be established.

Ibid at para 352. The implication of this statement is that once an act is classified as torture, then it can no longer be justified.

emergency,²²⁹ it does not exclude the possibility that legislation permitting torture in specific circumstances could be justified under FC s 36. The crisp question, in this section, is whether 'conditions exist in which torture might be justifiably used to prevent the destruction of the constitutional order itself, the death of millions of this country's inhabitants or, perhaps, just one other life'.²³⁰

Recent allegations of torture of suspected terrorists and prisoners of war by US forces in Iraq and other parts of the world have rekindled serious academic

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debate about when, if ever, torture can be justified.²³¹ For those who advocate the judicious use of torture, the preferred intuition pump is the 'ticking-bomb' scenario: a bomb has been planted in a densely populated area and the police have a man who knows where the bomb is and how to disarm it. For torture abolitionists, this scenario is what Wittgenstein would call 'the picture that bewitches us'.²³² It serves as an effective (but misleading) metaphor because it is loaded in favour of the judicious, but highly selective, use of torture: because the 'terrorist' possesses the relevant information for disarming the threat to our safety, torture will succeed in extracting accurate information. But this scenario, abolitionists contend, relies on a set of assumptions that do not in fact obtain:²³³ knowledge of the bomb's existence and its location, and the ability of the suspect to defuse the bomb or somehow halt the countdown to detonation.²³⁴ Because these assumptions are built in to the 'ticking-bomb' scenario, it commits us to accepting the use of torture when it is not, in fact, certain that torturing the suspected terrorist will save lives. Moreover, once we accept that torture may be a legitimate interrogation technique for significant threats to life where an explosion is imminent, the

228 CAT art 2(2) states that: 'No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.' These words are echoed in art 3 of the Torture Declaration and art 5 of the American Torture Convention. Article 5 of the American Torture Convention precludes the use of such factors as 'the dangerous character of the detainee or prisoner' or 'the lack of security of the prison establishment' to justify torture. Article 9 of the OAU Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa also specifically ban the use of any type of necessity, threat of war or national emergency as a justification for torture. The extensive ratification of CAT (138 state parties) and the proliferation of similar treaties and guidelines that prohibit the justification of torture could be used to argue that the prohibition is in fact part of international customary law, if not a jus cogens norm. International customary law forms part of South African law (FC s 232), legislation must be interpreted to accord with international law if possible (FC 233) and the Constitution itself must be interpreted in light of international law (FC s 39(1)(b)). See, generally, H Strydom & K Hopkins 'International Law' 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 31. All these factors suggest that torture would not be justifiable under the Final Constitution. However, international customary law is only binding only if it is not inconsistent with the Final Constitution or an Act of Parliament. The Final Constitution would require an independent inquiry to determine whether torture could ever be justified. It seems safe to say that torture under any circumstances violates South Africa's international obligations under CAT, a reasonable reading of international customary law and the general trend amongst constitutional democracies.

229 FC s 35(5) lists torture and cruel, inhuman and degrading punishment as non-derogable rights. See, generally, N Fritz 'States of Emergency' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 60.

230 I Currie & S Woolman 'Freedom and Security of the Person' in M Chaskalson, J Klaaren, J Kentridge, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) 39.3(b).

other danger is that we will then feel that other potentially life-threatening situations warrant the same interrogation techniques.²³⁵ Our bewitchment may lead us to endorse the use of torture to ensure, for example, the speedy return of a kidnapped child.²³⁶

Of course, the slippery-slope argument of the abolitionist is itself an intuition pump. It is designed to sow sufficient doubt about the efficacy of torture in the collective consciousness that we, the political community, will ultimately no longer be inclined to view the benefits that might flow from torture as ever sufficient to outweigh the costs.

Because neither the advocates nor the abolitionists can rely on 'facts' with respect to the 'ticking-bomb scenario', the arguments for and against torture cannot

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- 231 For a vigorous defence of state-sanctioned torture, see A Dershowitz *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (2002)(Dershowitz advocates a system of judicial warrants for torture.) For a critique of 'torture warrants', see M Strauss 'Torture' (2004) 48 *New York Law School Law Review* 201, 271-73. For other justifications of torture, see M Bagaric & J Clarke 'Not Enough Official Torture in the World: The Circumstances in Which Torture is Morally Justifiable' (2005) 39 *University of San Francisco Law Review* 581, 611 ('The only situation where torture is justifiable is where it is used as an information gathering technique to avert a grave risk. In such circumstances, there are five variables relevant in determining whether torture is permissible and the degree of torture that is appropriate. The variables are (1) the number of lives at risk; (2) the immediacy of the harm; (3) the availability of other means to acquire the information; (4) the level of wrongdoing of the agent; and (5) the likelihood that the agent actually does possess the relevant information. Where (1), (2), (4) and (5) rate highly and (3) is low, all forms of harm may be inflicted on the agent — even if this results in death.') See further, Parry (supra) at 258 ('There is no way to escape the fact that torture is an awful practice. People's lives are ruined, often beyond repair. The drafters of the Convention [Against Torture] were right: no one should torture; no one should suffer from torture; torture is always wrong' but 'Government agents should use torture only when it provides the last remaining chance to save lives that are in imminent peril.') See also J Parry & W White 'Interrogating Suspected Terrorists: Should Torture Be an Option?' (2002) 63 *University of Pittsburgh Law Review* 743, 760; A Moher 'The Lesser of Two Evils: An Argument for Judicially Sanctioned Torture in a Post-9/11 World' (2004) 24 *Thomas Jefferson Law Review* 469 (Argues that the Dershowitzian model is preferable to the current climate of secrecy in which torture occurs unregulated.)
- 232 This criticism of the 'ticking-bomb' scenario is largely parasitic on Luban's insights and the criticism offered by Marcy Strauss. See Strauss (supra) at 265-68.
- 233 For arguments against torture under any circumstances, see Luban (supra)(Examines torture's place in liberal theory and argues that the 'ticking-bomb' scenario is a fantasy used to justify the unjustifiable); S Williams 'Your Honor, I Am Here Today Requesting The Court's Permission to Torture Mr. Doe': The Legality of Torture as a Means to an End v. The Illegality of Torture as a Violation of Jus Cogens Norms under Customary International Law' (2004) 12 *University of Miami International and Comparative Law Review* 301, 360 ('If we, as human beings, wish to continue to characterize ourselves as 'civilized,' torture should never be legalized because it is the ultimate act of incivility and the epitome of inhumanity.');
- 234 See Luban (supra) at 1442-44.
- 235 The scenario is normally presented as a simple utilitarian 'ends-justify-the-means' argument. It is also sometimes characterized as a form of self-defence. See Strauss (supra) at 260-61.
- 236 Luban describes the slippery slope argument as follows:

rely on the conclusions each side draws from this particular intuition pump. And for that reason we too wish to remain agnostic as to the justifiability of torture under the kinds of circumstances described above.

A more compelling and nuanced argument against torture — one that does not rely upon cost-benefit analysis — has recently been offered by Michael Ignatieff. First, Ignatieff contends that:

[P]hysical torture . . . inflicts damage on those who perpetrate it as well as those who are forced to endure it. Any liberal democratic citizen who supports the torture of terrorist suspects in ticking-bomb cases must accept responsibility for the psychological damage done to victim and interrogator. Torture exposes agents of a democratic state to the ultimate moral hazard. The most plausible case for an absolute ban on physical torture relates precisely to this issue of moral hazard. No one should have to decide when torture is or is not justified, and no one should be ordered to carry it out. An absolute prohibition is legitimate because in practice it relieves public servants from the burden of making intolerable choices.²³⁷

Second, the damage done by torture extends beyond the immediate participants. Ultimately, torture implicates each and every citizen:

For torture, when committed by a state, expresses the state's ultimate view that human beings are expendable. This view is antithetical to the spirit of any constitutional society whose *raison d'être* is the control of violence and coercion in the name of human dignity and freedom.²³⁸

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In sum, what makes torture anathema for Ignatieff is not so much the pain or the indignity experienced by the person tortured, but the extent to which the practice of torture undermines the 'dignity' of the persons charged with the responsibility of extracting information by such means, and the collective 'dignity' of a society that tolerates such practices. In this respect, Ignatieff sounds a set of cautionary notes consistent with the dignity jurisprudence of our own Constitutional Court. In *Port Elizabeth Municipality*, the Court writes:

It is not only the *dignity* of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society *as a whole* is demeaned when state action intensifies rather than mitigates their marginalisation.²³⁹

The real debate is not between one guilty man's pain and hundreds of innocent lives. It is the debate between the certainty of anguish and the mere possibility of learning something vital and saving lives. And, above all, it is the question about whether a responsible citizen must unblinkingly think the unthinkable and accept that the morality of torture should be decided purely by totaling up costs and benefits. Once you accept that only the numbers count, then anything, no matter how gruesome, becomes possible. 'Consequentialist rationality,' as Bernard Williams notes sardonically, 'will have something to say even on the difference between massacring seven million, and massacring seven million and one.'

Luban (supra) at 1444, citing B Williams 'A Critique of Utilitarianism' in JJC Smart & B Williams *Utilitarianism: For and Against* (1973) 75, 93.

237 M Ignatieff 'Evil under Interrogation: Is Torture ever Permissible?' *Financial Times* (May 15, 2004) ('Evil under Interrogation'). See also M Ignatieff *The Lesser Evil: Political Ethics in an Age of Terror* (2004).

238 Ignatieff 'Evil under Interrogation' (supra).

Dignity, as one of the authors of this chapter has written elsewhere, is not simply a constellation of negative duties owed by the state to each human subject, or a set of positive entitlements that can be claimed by each member of the polity. Dignity is that which binds us together as a community, and it occurs only under conditions of mutual recognition and mutual respect.²⁴⁰

40.7 FC s 12(1)(e): cruel, inhuman or degrading treatment or punishment

(a) Components of FC s 12(1)(e)

FC s 12(1)(e) prohibits six distinct forms of mischief: cruel treatment; inhuman treatment; degrading treatment; cruel punishment; inhuman punishment; and degrading punishment.²⁴¹

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(i) Treatment and punishment

The first important terms to understand are 'treatment' and 'punishment'. Plainly, if the challenged practice cannot be characterized as either 'punishment' or 'treatment', then FC s 12 cannot be successfully invoked.²⁴²

239 See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) at para 18 (emphasis added).

240 See S Woolman 'Dignity' (supra) at 36-15. The kind of community that both Ignatieff and the Constitutional Court have in mind is captured by Langa J's aperçu on ubuntu in *Makwanyane*. Langa J explains how ubuntu illuminates the right not to be tortured or to be subject to cruel, inhuman or degrading treatment as follows:

[Ubuntu exists in] 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.

Makwanyane (supra) at paras 224-25 (emphasis added). Langa J, like Ignatieff, connects the dignity of discrete individuals to the solidarity necessary to maintain the kind of community contemplated by the Final Constitution. See also *Khosa* (supra) at para 74 (Court writes that the Final Constitution commits us to an understanding of dignity in which 'wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole'); S Hoctor 'Dignity, Criminal Law and the Bill of Rights' (2004) 121 *SALJ* 265, 315 ('Dignity has a communitarian aspect: by requiring respect for others' claims to dignity, vindication of the human dignity of all is better assured, and a community of mutual co-operation and solidarity is fostered.')

241 *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at paras 93 and 276; *S v Williams* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) ('Williams') at para 20; *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC) ('Dodo') at para 35; *S v Niemand* 2002 (1) SA 21 (CC), 2001 (11) BCLR 1181 (CC) at para 21; *S v Huma* 1996 (1) SA 232 (W), 236A ('Huma'). Similar provisions in the Namibian and Zimbabwean constitutions have also been interpreted disjunctively. See *Ex parte Attorney General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmS), 86; *S v Ncube*; *S v Tshuma*; *S v Ndhlovu* 1988 (2) SA 702 (ZS), 715 ('Ncube').

242 See P Hogg *Constitutional Law of Canada* (3rd Edition, Loose-Leaf, RS 1, 2004) 50.2.

'Punishment' embraces most criminal sanctions. The death penalty (*Makwanyane*), corporal punishment (*Williams*) and imprisonment (*Dodo*) have all been found, without any difficulty, to constitute 'punishment' for the purposes of FC s 12(1)(e). It remains unclear, however, whether fines, or the confiscation of a licence, fall within this term. The horizontal application of 'punishment' could also extend beyond purely criminal sanctions to disciplinary procedures in the workplace, schools or universities.²⁴³ 'Punishment' is, in reality, a subset of 'treatment'. Generally, punishment should be understood as a form of treatment by an authority — public or private — occasioned by the transgression of a rule.

But what, then, is 'treatment'? In *S v Ncube* the Zimbabwean Supreme Court remarked that

[t]reatment has a different connotation from punishment. It seems to me that what is envisaged is treatment which accompanies the sentence. In other words, the conditions associated with the service of sentences of imprisonment are now subject to the proscription. The frequency and conditions of searches of convicts and remand prisoners, the denial of contact with family and friends outside the prison, crowded and unsanitary prison cells and the deliberate refusal of necessary medical care, might afford examples.²⁴⁴

'Treatment' would also encompass the circumstances in which a person is kept in custody prior to punishment. For example, in *S v Huma* the High Court held that the taking of fingerprints was not punishment, but did amount to treatment.²⁴⁵ In *Dilworth v Reichards*, Claassen J held that knowingly subjecting an innocent man to arrest and several appearances in court was a '*prima facie*' violation of FC s 12(1)(e).²⁴⁶

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Neither FC s 12 nor the Constitutional Court, however, confines the extension of 'treatment' to events that occur during custody or imprisonment. Such a narrow reading would make 'treatment' a mere adjunct of 'punishment'. In *Mohamed v President of the Republic of South Africa*, a unanimous Constitutional Court held that the deportation or extradition of a person within the custody of South African law enforcement officials to the receiving state without first obtaining the assurance

243 See *Tyrer v United Kingdom* (1979-80) 2 EHRR 1 (Corporal punishment in school specifically held to be 'punishment', not treatment.)

244 *Ncube* (supra) at 715E-F. At international law, the following forms of treatment — during punishment — have been found to amount to cruel inhuman or degrading treatment: *Massiotti v Uruguay* Communication No 25/1978 (1982) HRC Report Annex XVIII and *Bazzano v Uruguay* Communication No 5/1977 (1979) HRC Report Annex VII (Overcrowding in prisons); *Cyprus v Turkey* (1976) 4 EHRR 482 at para 405 and *Whyte v Jamaica* Communication No 732/1997 (1998) HRC Report Annex XI.V (Withholding of food, water or adequate medical treatment); *Young v Jamaica* Communication No 615/1995 (1998) HRC Report Annex XI.J (Repeated soaking of bedding); *Ireland v The United Kingdom* (1978) 2 EHRR 25 ('*Ireland v UK*') (Combination of practices including prolonged standing, sleep deprivation and exposure to loud noise while in custody are 'treatment' not 'punishment').

245 *Huma* (supra) at 235H.

246 *Dilworth v Reichard* 2003 (4) BCLR 388, 402F (W) (The plaintiff and defendant were both in the vicinity of a shooting. The plaintiff was arrested and charged. The defendant knew that the plaintiff had been charged and that the plaintiff was innocent. The plaintiff was subsequently released. The defendant was then arrested and eventually convicted. The plaintiff sued the defendant for failing to report his involvement to the police. The High Court upheld the claim.)

from the receiving state that the death penalty will not be imposed impairs FC s 12(1)(e).²⁴⁷ The deportation or the extradition itself, in *Mohamed*, constitutes unconstitutional 'treatment'.²⁴⁸ Even further outside the realm of criminal sanction, the European Commission of Human Rights has found that the invidious differentiation of racial groups by immigration law or policy amounts to degrading 'treatment'.²⁴⁹

The unfair operation of a criminal sanction will probably not amount to 'treatment' that may be challenged in terms of FC s 12(1)(e).²⁵⁰ According to the Canadian Supreme Court

[t]here must be some more active state process in operation, involving an exercise of state control over the individual, in order for the state action in question, whether it be positive action, inaction or prohibition, to constitute 'treatment' which is absent in the case of a 'mere prohibition'.²⁵¹

The requirement of control, if generously interpreted, provides a sound basis for determining the outer limits of FC s 12(1)(e)'s application.

The potential horizontal application of FC s 12 might mean that 'the control' in question could be exercised by a party other than the state.²⁵² Given the

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extension of the law of delict to state action and to state omission with respect to various forms of violence, one could well imagine a court applying FC s 12(1)(e) to

247 *Mohamed & Another v President of the Republic of South Africa & Others (Society for the Abolition of the Death Penalty in South Africa & Another Intervening)* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC) at para 60 (A suspected terrorist was deported to the USA from South Africa without any assurance from US authorities that that the suspect would not be subject to the death penalty. The Court declared that the government had failed to give effect to the Final Constitution and ordered that a copy of its judgment be sent to the federal district trial court in New York. Mohamed was not, in the end, sentenced to death.)

248 See *Chahal v United Kingdom* (1996) 23 EHRR 413 (European Court holds that deportation constitutes 'treatment'.) In Canada, deportation is not regarded as punishment, but whether it falls within the ambit of 'treatment' has been left open. *Canada v Chiarelli* [1992] 1 SCR 711.

249 *East African Asians v United Kingdom* (1973) 3 EHRR 76 (Immigration laws that discriminated on the basis of race constitute degrading treatment.) In South Africa such conduct will more likely be attacked as unfair discrimination under FC s 9. There is little, if anything, that s 12(1)(e) can add to the protection already afforded against discrimination.

250 *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519 ('*Rodriguez*') (The applicant was a terminally-ill patient who wanted to commit suicide but would soon be unable to do so without assistance. She argued that legislation prohibiting her assisted suicide was cruel and unusual punishment or treatment. The Supreme Court of Canada found that the prohibition was clearly not 'punishment' and also did not amount to 'treatment'.)

251 *Ibid* at para 67.

252 See *Canadian Foundation for Children v Canada* [2004] 1 SCR 76 at para 48 (The court dismissed a claim that a law permitting reasonable force to be used against children by parents sanctioned 'cruel and unusual punishment'. In addition, the Supreme Court held that force by parents could never amount to 'treatment' as they were not part of the state — and the Charter only applies to state action — and that force exercised by teachers could only qualify as 'treatment' if they were employed by the state.)

the law governing — or to instances of — domestic violence or child abuse. However, given our thesis that the primary purpose of FC s 12 is to ensure that the emancipatory powers of the state that may be used to enhance human freedom are not simultaneously used to dominate or exploit citizens, we would hesitate to extend FC s 12's reach too readily to private violence where the text does not expressly invite such a reading.

(ii) Cruel, inhuman and degrading

Differentiating between the three qualifying adjectives in FC s 12(1)(e) — cruel, inhuman and degrading — is no easy task. And it is made no easier by the preference of our courts to find that the treatment complained of satisfies all three definitions. In *S v Williams*, Langa J articulated this preference as follows:

Whether it is necessary to split the words of the phrase and interpret the concepts individually is a matter which would largely depend on the nature of the conduct sought to be impugned. It may well be that, in a given case, conduct that is degrading may not be inhuman or cruel. On the other hand, other conduct may be all three.²⁵³

The *Williams* Court, while grudgingly acknowledging the distinct meaning of the three terms, then notes that each generation will refract the terms 'cruel, inhuman and degrading' treatment through the lens of the social mores of the time. FC s 12(1)(e) analysis, the Court held, requires that the standards for cruel, inhuman and degrading treatment be 'objectively . . . articulated and identified, [with] regard being had to the contemporary norms, aspirations, expectations and sensitivities of the . . . people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilised international community'.²⁵⁴ This objective standard does not, however, mean that public opinion serves as the benchmark for determining when punishment or treatment is 'cruel, inhuman and degrading'. As Chaskalson P made abundantly clear in *Makwanyane*:

Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication.²⁵⁵

(aa) Dignity

Before we turn to the differences in the meaning of the three words, it is

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important to emphasize what they have in common: the denial of dignity.²⁵⁶ As Ackermann J wrote in *Dodo*: '[w]hile it is not easy to distinguish between the three concepts 'cruel', 'inhuman' and 'degrading', the impairment of human dignity, in some form and to some degree, must be involved in all three.'²⁵⁷ Dignity, as a right, a value and an ideal, reminds us that '[h]uman beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they

253 *Williams* (supra) at para 25.

254 *Ibid* at para 22 quoting *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmS), 86l.

255 *Makwanyane* (supra) at para 88.

ought to be treated as ends in themselves, never merely as means to an end.²⁵⁸ FC s 12(1)(e)'s dignity concerns are not, however, limited to purely instrumental, and often brutal, uses of state power. FC s 12(1)(e), like FC s 12(1)(d), recognizes that certain forms of treatment and punishment diminish not only the humanity of the person subjected to the cruel, inhuman or degrading treatment or punishment, but also offend the dignity, that is, 'the humanity of those who carry it out'.²⁵⁹ And, as with FC s 12(1)(d), FC s 12(1)(e) engages the dignity of society as a whole. Here, the state must not simply ensure that the bar is not set too low; it has a duty to raise the bar.²⁶⁰

The Constitution has allocated to the State and its organs a role as the protectors and guarantors of those rights to ensure that they are available to all. In the process, it sets the State up as a model for society as it endeavours to move away from a violent past. It is therefore reasonable to expect that the State must be foremost in upholding those values which are the guiding light of civilised societies. Respect for human dignity is one such value; acknowledging it includes an acceptance by society that '... even the vilest criminal remains a human being possessed of common human dignity'.²⁶¹

The state must model what it means to treat others with dignity.²⁶²

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- 256 For a full discussion of how dignity has influenced the Court's construction of FC s 12(1)(e), see Woolman 'Dignity' (supra) at § 36.4(c)(iii). In utilizing dignity as a tool to determine violations of FC s 12(1)(e), we must of course be mindful of the general rule that it is a violation of a more specific right that indicates a violation of dignity, not the other way round. See *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at para 35. However, FC s 12(1)(e) is not subsumed by dignity and the specific circumstances to which it draws our attention do indeed give independent content to our understanding of dignity.
- 257 *Dodo* (supra) at para 35. See also *Furman v Georgia* 408 US 238, 272-73 (1972) ('The true significance of [cruel and unusual] punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded.' (Brennan J)).
- 258 *Dodo* (supra) at para 38 (footnote omitted). For a more comprehensive account of the Court's dignity jurisprudence, and, in particular, the notion that individuals must be treated as ends-in-themselves, see Woolman 'Dignity' (supra).
- 259 *Makwanyane* (supra) at para 314 (Mokgoro J).
- 260 See *Makwanyane* (supra) at para 222 (Langa J) quoting Brandeis J in dissent in *Olmstead v United States* 277 US 438, 485 (1928) ('Our Government is the potent, the omni-present teacher. For good or for ill, it teaches the whole of our people by its example.')
- 261 *Williams* (supra) at para 77 quoting *Furman v Georgia* (supra) at 273 (Brennan J). See also *Makwanyane* (supra) at paras 57, 88 (Chaskalson P), 229 (Langa J) 311, 314 (Mokgoro J) and 328 (O'Regan J).
- 262 In *S v Makwanyane* a number of the judges linked the concept of protection of dignity in the realm of punishment to *ubuntu*. See *Makwanyane* (supra) at paras 130-31 (Chaskalson P), 223-27 (Langa J), 237-45 (Madala J), 263 (Mahomed J) and 307-09 (Mokgoro J). The 'dominant theme' of *ubuntu* is 'that the life of another person is at least as valuable as one's own thus, heinous crimes are the antithesis of *ubuntu*. Treatment that is cruel, inhuman or degrading is bereft of *ubuntu*. *Makwanyane* (supra) at para 225 (Langa J). For more on *ubuntu* and its application in South Africa, see D Cornell & K van Marle 'Interpreting Ubuntu: Possibilities for Freedom in the New South Africa' (2006) 6 *African Human Rights LJ* (forthcoming); D Cornell 'A Call for a Nuanced Jurisprudence' (2004) 19 *SA Public Law* 661.

(bb) Cruel

'Cruelty' implies some form of intentional or wilful conduct by the perpetrator — a specific and callous disregard for the suffering — physical or psychological — of the victim.²⁶³ Neither 'inhuman' nor 'degrading' conduct require this intention. So, while the state's negligent failure to provide adequate prison facilities due to a lack of resources may constitute inhuman or degrading treatment, it cannot be deemed cruel.²⁶⁴

(cc) Inhuman

While the absence of intention distinguishes 'cruel' from 'inhuman', cruel treatment will generally be found to be inhuman. A similar hierarchy exists between inhuman and degrading.

In *Tyrer v United Kingdom*, the European Court of Human Rights had to decide whether the caning of a boy three times by a police officer as punishment for an assault was 'inhuman' or 'degrading'. Relying on an earlier decision in *Ireland v United Kingdom*, the ECHR found that 'the suffering occasioned must attain a particular level before a punishment can be classified as "inhuman"'.²⁶⁵ It found that that threshold had not been crossed, but that the caning was still 'degrading'.²⁶⁶ Mohamed J's judgment in *Makwanyane* supports the proposition — implicit in *Tyrer* — that 'inhuman' treatment refers to 'treatment' of others as if they were 'not' human — a thing, a tool or an animal. 'Degrading' treatment refers to the very human, if subjective, experience of humiliation.²⁶⁷

(dd) Degrading

Punishment or treatment is 'degrading' if it causes 'feelings of fear, anguish and inferiority capable of humiliating and debasing [the victims] and possibly breaking

263 See *Williams* (supra) at para 24 (Langa J quoted, without comment, the following definitions of 'cruel' or 'cruel treatment': 'causing or inflicting pain without pity' (*The Oxford English Dictionary*); 'wilfully caus(ing) pain without justification . . . intention of causing . . . unnecessary suffering' (*R v Mountain* 1928 TPD 86, 88); 'deliberate act causing substantial pain and not reasonably necessary in all the circumstances' (*Hellberg v R* 1933 NPD 507, 510).)

264 'Intention' here is meant in the broad sense to include *dolus directus*, *dolus indirectus* and *dolus eventualis*.

265 *Tyrer* (supra) at para 29. The suffering required for a practice to qualify as 'inhuman' need not cause physical injury. See *Ireland v UK* (supra) at para 167 ('The five techniques . . . caused, if not actual bodily injury, at least intense physical and mental suffering . . . and also led to acute psychiatric disturbances . . . [and] therefore fell into the category of inhuman treatment'.)

266 *Tyrer* (supra) at para 35.

267 Mohamed J was the only judge in *Makwanyane* to specifically find that the death penalty was *inhuman* punishment. *Makwanyane* (supra) at para 281 ('In my view, it also constitutes *inhuman* punishment. It invades irreversibly the humanity of the offender by annihilating the minimum content of the right to life protected by s 9; by degrading impermissibly the humanity inherent in his right to dignity; by the inevitable arbitrariness with which its objective is implemented; by the continuing and corrosive denigration of his humanity in the long periods preceding his formal execution; by the inescapable denial of his humanity inherently involved in a sentence which directs his elimination from society.')

their physical or moral resistance.¹²⁶⁸ However, these feelings must go beyond those ordinarily caused by a criminal conviction or punishment. Were the subjective

responses of shame associated with every conviction or with every punishment to qualify as 'degrading', all convictions and all punishments would be prima facie unconstitutional. That could hardly have been the intent of the drafters.²⁶⁹

The European Court has suggested that a finding of degradation will turn on such objective factors as 'the nature and context of the punishment, the manner and method of its execution, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim'.²⁷⁰ But such factors offer little insight into why the Court found the 'birching' of a 15-year-old boy on his bare buttocks by a policeman at a police station to be degrading, while it concluded that the 'slippering' of a 7-year-old pupil with a rubber-soled gym shoe by his headmaster in his office was not.²⁷¹

(b) Judicial doctrines

(i) Inherently impermissible

(aa) Physical punishment

Some practices are inherently 'cruel, inhuman or degrading'. In *S v Williams*, Langa J characterized corporal punishment as follows:

The severity of the pain inflicted is arbitrary, depending as it does almost entirely on the person administering the whipping. Although the juvenile is not trussed, he is as helpless. He has to submit to the beating, his terror and sensitivity to pain notwithstanding. Nor is there any solace to be derived from the fact that there is a prior examination by the district surgeon. The fact that the adult is stripped naked merely

268 *Ireland v UK* (supra) at para 167.

269 See *Williams* (supra) at paras 40–41 referring to *Tyrer* (supra) at para 30. The *Dilworth* High Court found that being arrested and forced to appear in court violated FC s 12(1)(e). Ordinarily, arrest and a court appearance do not amount to degrading treatment. However, where the police, the prosecutor or another party knew of the person's innocence and still acted in a manner that led to his arrest, then such action, it seems, may constitute a violation of FC s 12(1)(e).

270 *Costello-Roberts* (1985) 19 EHRR 112 at para 30; *Tyrer* (supra) at para 30.

271 Compare *Tyrer* (supra) at para 30 (Birching violates ECHR) with *Costello-Roberts* (1985) 19 EHRR 112. The *Costello-Roberts* majority, without much explanation, held that 'slippering did not reach the requisite 'level of severity''. Ibid at paras 31–32. The *Costello-Roberts* minority focused on the 'ritualised' 'official' and 'formalised' character of the punishment, the lack of adequate parental consent and that corporal punishment was being progressively outlawed throughout Europe. Ibid at 137–38. See also *Campbell & Cosans v United Kingdom* (1980) 3 EHRR 531 (European Commission holds that attending a school that permits corporal punishment does not amount to degrading treatment.) See also *Williams* (supra) at para 90 and *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 1998 (12) BCLR 1449 (CC) at paras 44–47 (Sachs J considers the degrading impact of corporal punishment in schools as part of the s 36 analysis to determine the justifiability of a religious groups claim for exemption from a state ban on corporal punishment. Interestingly, Sachs J held that there was a difference between corporal punishment administered in the 'detached and institutional environment' of a school and that meted out in the 'intimate and spontaneous atmosphere of the home'. Ibid at para 49.)

accentuates the degradation and humiliation. The whipping of both is, *in itself*, a severe affront to their dignity as human beings.²⁷²

Corporal punishment would therefore violate FC s 12(1)(e) irrespective of the crime or the person upon whom it was imposed.²⁷³

(bb) Imprisonment

Whether life imprisonment constitutes cruel, inhuman and degrading treatment has not yet been addressed directly by the Constitutional Court. However, implicit in the Court's finding in *Dodo* is the conclusion that mandatory life sentences are not necessarily incompatible with FC s 12(1)(e).²⁷⁴

On the other hand, there is good reason to believe that the Constitutional Court would confirm — if given the opportunity — the Supreme Court of Appeal's conclusion in *S v Bull* that a life sentence without the possibility of parole would always violate FC s 12(1)(e).²⁷⁵ The *Bull* Court found, in a manner consistent with the position in other jurisdictions, that the possibility of release offered by parole enabled a prisoner to retain his dignity.²⁷⁶ However, the mere possibility of parole alone does not immunize a life sentence from constitutional challenge. The sentence, in addition, had to take in to account whether the body that grants parole would exercise its discretion 'fairly, justly and responsibly' and whether the parole board's failure to do so would be reviewable by a court.²⁷⁷

In *Nkosi*, similar logic drove the Supreme Court of Appeal to conclude that a 'Methuselah sentence' — a sentence of such duration that the accused has no hope of release before death — was cruel, inhuman and degrading.²⁷⁸ Again, the absence of any possibility of parole reduced the prisoner to a mere signal in a larger system

272 *Williams* (supra) at para 45 (our emphasis). See also *S v Petrus & Another* [1985] LRC (Const) 699; *S v Ncube*; *S v Tshuma*; *S v Nchlovu* 1988 (2) SA 702 (ZS); *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmS). For a discussion of *Williams* and other corporal punishment cases, see D van Zyl Smit 'Sentencing and Punishment' 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 49, § 49.2(d)(ii).

273 Similarly, although slightly less emphatically, the *Makwanyane* Court held that the death penalty is innately cruel, inhuman and degrading. The Court identified five main reasons for this finding: the inherent arbitrariness of imposing the death penalty; the failure to respect the victim's dignity; the finality of death; the unequal effect on the poor and other marginalised or unpopular members of society; and the suffering during the long wait for execution. Didcott J's denunciation of the death penalty was more emphatic: 'every sentence of death must be stamped, for the purposes of [IC] s 11(2), as an intrinsically cruel, inhuman and degrading punishment.' *Makwanyane* (supra) at para 179.

274 *Dodo* (supra) (The Court upheld legislation requiring mandatory minimum life sentences for certain crimes.)

275 See *S v Bull & Another*; *S v Chavulla & Others* 2002 (1) SA 535 (SCA) at para 23; *S v Nkosi & Others* 2003 (1) SACR 91 (SCA) at para 9.

276 See *S v Tcoeib* 1993 (1) SACR 274 (Nm); 45 BVerfGE 187 (1977). See also Van Zyl Smit (supra) at § 49.2(d)(iv).

277 See van Zyl Smit (supra) at § 49.2(d)(iv) citing *S v De Kock* 1997 (2) SACR 171, 211h (T).

of social control and thereby failed to recognize that the prisoner still retained some measure of dignity.

The Constitutional Court too has suggested that the imprisonment of an habitual offender for an indeterminate period of time — a span that could potentially exceed the length of the prisoner's life — is cruel, inhuman and degrading.²⁷⁹ Although the Court ground its holding primarily on the gross disproportionality reflected in the imposition of such a sentence on a non-violent offender, it noted that

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[t]he indeterminacy of the sentence also exacerbates the cruel, inhuman or degrading nature of the punishment on the grounds that the maximum period of incarceration remains at all times unknown to the prisoner and the period of his/her incarceration is dependent on the Executive. This is, no doubt, the cause of considerable torment. I therefore conclude that to sentence a person to what may potentially constitute a life-long imprisonment, infringes the right of such person not to be subjected to cruel, inhuman or degrading treatment or punishment.²⁸⁰

(cc) Other forms of punishment

Other forms of punishment may well offend FC s 12(1)(e). For example, Chief Justice Warren, writing for a plurality of the US Supreme Court in *Trop v Dulles*, found that expatriation as a punishment was 'cruel and unusual' despite the absence of physical harm:

There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. In short, the expatriate has lost the right to have rights.²⁸¹

Expatriation, banishment or other severe forms of shunning might fall foul of FC s 12(1)(e) because such actions also constitute 'statements' that deny the inherent dignity or humanity of the offender.²⁸² Similarly, forms of punishment designed to humiliate publicly an offender may be found degrading in terms of FC s 12(1)(e).

278 *Nkosi* (supra) at para 9.

279 *S v Niemand* 2002 (1) SA 21 (CC), 2002 (3) BCLR 219 (CC) at para 26.

280 *Niemand* (supra) at para 26.

281 356 US 86, 101-102 (1958)(footnotes omitted). But see *Perez v Brownell* 356 US 44 (1958)(Court holds that expatriation for voting in foreign elections is not unconstitutional. However, the Supreme Court's finding was not based upon the Eighth Amendment's limits on cruel and unusual punishment, but on the legitimate exercise of the legislature's powers.)

282 See *August & Another v Electoral Commission & Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 17 (While considering the statutory disenfranchisement of particular class of prisoners, Sachs J observed that membership in, and continued participation in, the political community is an essential dimension of human dignity: 'The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity.')

(ii) Proportionality²⁸³

(aa) Gross disproportionality and mandatory minimum sentences

The most developed body of FC 12(1)(e) jurisprudence holds that a punishment 'grossly disproportionate' to the crime is cruel, inhuman and degrading. In *S v Dodo*, the Constitutional Court was asked to consider the constitutionality of new

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mandatory minimum sentence legislation²⁸⁴ that required the imposition of life sentences for certain forms of rape and murder. The sentences were not, however, truly mandatory. A judge could depart from the mandatory minimum if 'substantial and compelling circumstances' justified a lesser sentence. The *Dodo* Court began its consideration of FC s 12(1)(e) by emphasizing the centrality of human dignity to any determination of sentence:

To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformative effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.²⁸⁵

While 'mere disproportionality' would partially deny an offender's humanity, it would not meet the threshold for a finding of unconstitutionality. Only a sentence 'grossly disproportionate' to the offence²⁸⁶ infringes FC s 12(1)(e).²⁸⁷ The question in *Dodo* was whether the mandatory minimum sentencing scheme reflected in the legislation compelled courts to impose grossly disproportionate sentences.

In *S v Malgas*, the Supreme Court of Appeal had interpreted the phrase 'substantial and compelling circumstances' — the linchpin for escaping the imposition of the mandatory minimum — to mean that

283 For a comprehensive discussion on proportionality in sentencing, see van Zyl Smit (supra) at § 49.2(c).

284 Criminal Law Amendment Act 105 of 1997 ('CLAA').

285 *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC) ('*Dodo*') at para 35.

286 See *Dodo* (supra) at para 37 (Offence in this context 'consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.')

287 Ibid at para 39. Ackermann J emphasized that although the standard of gross disproportionality was essentially the same as that applied in Canadian and American courts, South African courts need not agree with the application of that standard in other jurisdictions.

[i]f the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.²⁸⁸

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Ackermann J, writing for the *Dodo* Court, agreed that the *Malgas* court's gloss on the CLAA granted courts sufficient discretion to fashion a sentence that did not cross the threshold of 'gross disproportionality'. As a result, the challenged sentencing provisions in the CLAA were deemed constitutional.²⁸⁹

But what about mandatory minimum sentencing requirements that grant the courts no discretion to impose a lesser sentence? The sentence would then have to be evaluated against the nature of the offence prescribed. But, as both the *Dodo*

288 2001 (2) SA 1222 (SCA) at para 25. The Supreme Court of Appeal placed the following gloss on the challenged CLAA provisions:

A Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2). Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

B Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

C The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

D The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.

E In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole

F If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

G In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided.

ibid.

289 See *Dodo* (*supra*) at para 40.

Court and the *Malgas* Court note, the appropriateness of the sentence turns on both the nature of the offender and the circumstances of the offence.

In Canada, the Supreme Court originally adopted the 'most innocent possible offender' test when asked to consider the constitutionality of mandatory minimum sentencing requirements that deny courts the discretion to impose lesser sentences. If the minimum sentence would be grossly disproportionate for this hypothetical 'most innocent possible offender', the entire section would be deemed unconstitutional. For example, in *R v Smith* a minimum sentence of seven years for importing narcotics would have to be tested against a young person returning to Canada with her 'first joint of grass'.²⁹⁰ The Supreme Court found this sentence to be grossly disproportionate. The Supreme Court of

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Canada's position meant that almost all legislation containing minimum mandatory sentences that eliminated judicial discretion would be found to be grossly disproportionate.²⁹¹

The Supreme Court of Canada has twice retreated from this position. It first supplanted the 'most innocent possible offender' test with the 'reasonable' hypothetical offender most likely to 'arise in day-to-day life'.²⁹² More recently, it dispensed with its 'reasonable' hypothetical offender test entirely. In *R v Morrisey*²⁹³ and *R v Latimer*,²⁹⁴ the Court overturned departures from mandatory minimum sentences by the trial court. In both cases the offender fitted the description of the 'most innocent offender'. And yet, the Supreme Court upheld the mandatory minimum sentences on the grounds that they reflected the State's commitment to the right to life and to the denunciation of all forms of killing. As Peter Hogg notes, *Morrisey* and *Latimer* cannot be reconciled with *Smith*.²⁹⁵ Hogg suggests that the Court simplify matters by creating a constitutional doctrine that asks only whether

290 [1987] 1 SCR 1045, 1053.

291 See Hogg (supra) at 50-4-50-6. See also *R v Goltz* [1991] 3 SCR 485, 531 ('*Goltz*') (McLachlin J dissenting).

292 *Goltz* (supra) at 516 (In upholding a law imposing a mandatory seven-day jail term for driving a car, the majority rejected the trial court's and the minority's reliance on a hypothetical 'Good Samaritan', and held that a genuine good samaritan could rely on a defence of necessity.)

293 [2000] 2 SCR 90 at para 46 (The accused had been drinking with a friend in a cabin. He tried to jump onto a bunk bed while holding a loaded gun. He fell. The gun went off and killed his friend. The trial court refused to apply the 4-year statutory minimum sentence for culpable homicide. The Supreme Court upheld the minimum sentence on the grounds that it served 'principles of general deterrence, denunciation and retributive justice'.)

294 [2001] 1 SCR 3 at para 86 (The applicant's daughter suffered from a severe form of cerebral palsy. When the applicant heard that many operations would be required to prevent his daughter's condition from deteriorating, the applicant decided to end her life. He was convicted of second degree murder. The trial court exempted the applicant from the mandatory sentence — life without parole for 10 years. A unanimous Supreme Court overturned the trial court and upheld the mandatory sentence on the grounds the sentence 'represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values'.)

295 Hogg (supra) at 50-10.

the sentence is grossly disproportionate for the specific offender a court finds before it.²⁹⁶

What approach is the South African Constitutional Court likely to adopt? The Court has regularly affirmed the doctrine of objective unconstitutionality. This doctrine states that 'the validity or the invalidity of any given law is not contingent upon the circumstances (say, the timing) of the case, or, more specifically, the parties to the case.'²⁹⁷ While the doctrine of objective unconstitutionality is

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outcome neutral, or at least not outcome determinative, it ought to tilt the Court toward the acceptance of some variation on the 'most innocent offender' test.

(bb) Gross disproportionality and indefinite incarceration

In *S v Niemand*, the Constitutional Court applied the 'grossly disproportionate' test to the indefinite incarceration of habitual criminals. Mr Niemand had been declared a habitual criminal but had only committed crimes of dishonesty, not violence.²⁹⁸ A rule of 'practice' limited the term for such offenders to 15 years. But no statutory limit existed on the length of imprisonment. In addition, although the habitual offender would come up for parole after seven years, the courts possessed no oversight powers with respect to the parole board's decisions. Given that this arrangement left the prisoner 'at the mercy of the executive',²⁹⁹ the *Niemand* Court was asked to consider whether the punishment was grossly disproportionate. Madala J, writing for the Court, held that while

[I]f imprisonment for crimes such as murder and rape may be proportional to the heinous nature of the crimes the imposition of life imprisonment, in the guise of an indeterminate sentence, for an habitual criminal who is neither violent nor a danger to society . . . is a different matter. That sentence is grossly disproportionate to the length of the imprisonment merited by such offences and as such constitutes a violation of s 12(1)(e) of the Constitution.³⁰⁰

The *Niemand* Court cured the constitutional defect by reading in words to set the maximum period of incarceration at 15 years.³⁰¹

296 Hogg (supra) at 50-10. Hogg bases his approach on McIntyre J's dissent in *Smith* – a court should only consider the offender before it – and Arbour J's concurrence in *Morrisey* – a four-year minimum sentence was not disproportionate for this offender although it might be disproportionate for some future offender.

297 S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, 31-50. See, eg, *De Reuck v Director of Public Prosecutions*, WLD 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC); *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 20.

298 *Niemand* (supra) at para 5.

299 *Ibid* at para 13.

300 *Ibid* at para 25.

301 *Ibid* at para 33.

(c) Extra-territorial application³⁰²

The prohibition on cruel, inhuman and degrading punishment has, and, considering current trends in international terrorism and international criminal law, will likely in future, raise the issue of the application of the Bill of Rights outside South Africa's borders. In *Mohamed*, the Constitutional Court held that the South African government could not extradite or deport a person to a country where he was likely to face the death penalty. This decision should also extend to include any practice that South African courts determine violates s 12(1)(e). Although not strictly concerned with extra-territorial application, the decision in *Mohamed* should be welcomed as recognizing and enforcing South Africa's obligation of non-refoulement under the Convention Against Torture.³⁰³

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Much less encouraging is the Court's holding in *Kaunda*.³⁰⁴ *Kaunda* concerned a claim by a group of South African citizens held in Zimbabwe that the South African government had a constitutional duty to intervene on their behalf to try to secure their extradition back to South Africa, or at the very least to secure an assurance that they would be well treated and not sentenced to death. In refusing all the claimed relief, the majority of the Court held that the Bill of Rights does not apply outside of South Africa.³⁰⁵ If taken to its logical conclusion, the majority would permit the state to run a torture camp as long as it was located outside South African borders and its inmates never set foot in South Africa.

In contrast, the minority recognized that

[a]s a general principle . . . our Bill of Rights binds the government even when it acts outside South Africa, subject to the consideration that such application must not constitute an infringement of the sovereignty of another state.³⁰⁶

This view gives appropriate weight to both the interests of the individual and the need for international comity,³⁰⁷ and will hopefully persuade a future majority of the Constitutional Court to reconsider its position.

302 For a detailed account of the extra-territorial application of the Bill of Rights, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.6.

303 Article 3 of the Convention reads: 'No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'

304 *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) ('*Kaunda*').

305 *Ibid* at para 37 ('The bearers of the rights are people in South Africa. Nothing suggests that it is to have general application beyond our borders.')

306 *Ibid* at para 229.

307 The rationale for the majority's decision can probably be traced back to the confusion of two separate issues: (a) the application of the Bill of Rights to state conduct and persons beyond our borders; and (b) the influence of the Bill of Rights on foreign legal systems. The majority seems to believe that the two are inextricably linked, while the minority correctly recognizes that the two issues are logically distinct. See Woolman 'Application' (*supra*) at § 31.6.

40.8 FC s 12(2): bodily and psychological integrity

The structure of FC s 12(2) is, as we noted in the introduction, somewhat confusing. It guarantees a general right to 'bodily and psychological integrity'. It then elaborates upon that general guarantee by providing for the right to make decisions concerning reproduction (FC s 12(2)(a)), the right to security in and control over the body (FC s 12(2)(b)), and the right to be free from coercive medical and scientific experiments (FC s 12(2)(c)). While FC ss 12(2)(a) and (c) look like specific instances of FC s 12(2)'s general guarantee, FC s 12(2)(b) tests our ability to give distinct meaning to 'bodily and psychological integrity', on the one hand, and 'security in and control over the body', on the other. In order to avoid violating the constitutional canon of surplusage, we must interpret 'bodily and psychological integrity' to mean something over and above 'security in and control over' the body.

(a) Bodily integrity

When asked to consider, in *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others*, whether a law criminalizing sodomy unfairly

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discriminated against homosexuals, the Constitutional Court stated that all of its efforts to explicate our basic law are informed by the recognition that '[t]o understand "the other" one must try, as far as is humanly possible, to place oneself in the position of "the other"'.³⁰⁸ 'It is easy to say' the *NCGLE I* Court continued

that everyone who is just like 'us' is entitled to equality. Everyone finds it more difficult to say that those who are 'different' from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy.³⁰⁹

FC s 12(2) recognizes — at a minimum — that each *physical body* is of equal worth and is entitled to equal respect.³¹⁰ This reading of FC s 12(2) means that bodily integrity affords the individual somewhat more protection than the entitlement — found in FC s 9(3) — not to be discriminated against on the grounds of disability.³¹¹ Moreover, FC s 12(2)'s commitment to bodily integrity requires more than mere tolerance of a myriad of diverse bodies. We would suggest that FC s 12(2) can be read to impose a duty on the state to ensure that every 'body' is able to participate fully in society.³¹² This conception of bodily integrity also goes further than the largely negative protection afforded by FC s 12(2)(b).

Hoffmann v South African Airways gives us some indication of how FC s 12(2) might shape such a duty to ensure that every 'body' is able to participate fully in

308 *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 22.

309 *NCGLE I* (supra) at para 22 quoting with approval Cory J in *Vriend v Alberta* [1998] 1 SCR 493 at para 69.

310 See S Woolman 'Dignity' 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 36, § 36.2(b) (Identifies 'equal concern and equal respect' as one of the five 'definitions' of dignity that the Constitutional Court employs.)

society. Hoffmann applied to the South African Airways (SAA) for employment as a cabin attendant. Despite SAA's own finding that he was professionally and physically capable of discharging the duties of cabin attendant, Hoffmann was denied employment because of his HIV-positive status.

Hoffmann contended that that SAA's refusal to employ him violated FC s 9(3)'s prohibition on unfair discrimination.³¹³ The Constitutional Court agreed. It held that SAA's behaviour was constitutionally repugnant because it excluded Hoffmann from participation in society on account of the condition of his body.³¹⁴ SAA's conduct amounted not only to unfair discrimination: it also constituted, at least implicitly, an assault on Hoffmann's body integrity.³¹⁵ It is this type of recognition of the inherent worth of all bodies lies at the care of FC in s 12(2)'s guarantee of bodily integrity.

(b) Psychological integrity

While the three subsections of FC s 12(2) give 'bodily integrity' concrete content, the same cannot be said for 'psychological integrity'. Given the paucity of case-law on the meaning of the term, the following ruminations remain speculative at best. In short, 'psychological integrity' as a self-standing right necessarily goes beyond the protection afforded by 'bodily integrity' and provides fortification from undue stress or shock.³¹⁶

311 FC s 12(2) creates the basis for an independent challenge that will be informed by, but not entirely determined by, the rights to dignity and to equality. More importantly, perhaps, a FC s 12(2) enables litigants to challenge the stigma that attaches to the cultural construction of their bodies (and some illness or disfigurement) without having to argue that they are 'disabled'. See *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) at para 28 (Court holds that refusal to employ a person because of their HIV status constitutes unfair discrimination. Ngcobo J avoided addressing the question of whether HIV-positive status amounted to a disability for the purposes of FC s 9(3). Indeed, the applicant had pressed the point that that his FC s 9 challenge was grounded not in a claim regarding disability but from the affront to his dignity that flowed from the social marginalization associated with his HIV status.)

312 As one of the authors has noted elsewhere, dignity requires the commitment of political community to the provision of that level of material goods necessary for all persons — irrespective of their talents or limitations — to 'pursue a meaningful and comprehensive vision of the good life as they understand it.' Woolman 'Dignity' (supra) at 36-68 citing A Sen *Development as Freedom* (1999) 75.

313 For a general discussion on the FC s 9 see B Goldblatt & C Albertyn 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2006) Chapter 35.

314 Hoffman (supra) at para 38 ('The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason they enjoy special protection in our law. People who are living with HIV must be treated with compassion and understanding. We must show ubuntu towards them. They must not be condemned to 'economic death' by the denial of equal opportunity in employment.')

315 The Court's finding on this score is somewhat undermined by its conclusion that the position would probably have been different if Hoffmann's CD4 count was so low that he would be unable to perform his duties.

316 The FC s 12(2)'s right to psychology integrity will often overlap with the rights to dignity and privacy. See, generally, S 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;

Psychological integrity already receives comprehensive protection in our common law in the form of delictual damages for 'emotional shock'.³¹⁷ Courts award such damages for a broad array of psychological trauma: the pain associated with a mother learning of her son's death;³¹⁸ the deleterious emotional effects of parents

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discovering that their babies had been swapped at birth;³¹⁹ or the suffering of a person disfigured by acid during a medical examination.³²⁰

FC s 12(2)'s guarantee of psychological integrity also reinforces aspects of the *actio iniuriarum*'s protection against insults and invasion of privacy. For example, in *NM v Smith*, the plaintiffs' HIV status had been revealed in the biography of a well-known politician.³²¹ The plaintiffs argued that this non-consensual revelation undermined their psychological integrity and caused them emotional harm. The High Court agreed. It wrote:

[B]ecause of the ignorance and prejudices of large sections of our population, an unauthorised disclosure [of a person's HIV status] can result in social and economic ostracism. It can even lead to mental and physical assault.³²²

D 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 38.

317 See, generally, J Neethling, JM Potgieter & PJ Visser *Law of Delict* (4th Edition, 2001) 290-95.

318 *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA)(The plaintiff's son had been killed in an accident caused by the negligent driving of the insured. She successfully claimed damages for the distress and grief she suffered when she was informed of his death.) See also *Majiet v Santam Ltd* [1997] 4 All SA 555 (C)(Mother discovered son's body in the street after he had been negligently knocked down by another driver); *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A)(The plaintiff suffered severe psychological trauma after witnessing his brother being involved in an accident.) Even the threat of harm to a loved one could be actionable. See *Els E v Bruce*; *Els J v Bruce* 1923 EDL 295 (Defendant threatened to harm plaintiff's husband); *Boswell v Minister of Police* 1978 (3) SA 268 (E)(Defendant untruthfully told the plaintiff that he had shot and killed the plaintiff's cousin.) In Canada, an application to place a child under state protection is considered an affront to the parents' psychological integrity. Their psychological integrity is protected by the Canadian Charter's s 7 guarantee of 'security of the person'. See *New Brunswick v G.(J.)* [1999] 3 SCR 46 (Court ordered that the parents be represented by state-funded counsel to ensure that the procedure was compatible with the principles of fundamental justice); *Winnipeg Child and Family Services v KLW* [2000] 2 SCR 519 (Apprehension of a child in need of protection — but without a warrant — constitutes a prima facie breach of the parents' security of the person, but did not, ultimately, infringe the principles of fundamental justice because the parents were entitled to a post-apprehension hearing.)

319 *Clinton-Parker v Administrator, Transvaal*; *Dawkins v Administrator, Transvaal* 1996 (2) SA 37 (W) (Both couples claimed emotional damages from the hospital after discovering after two years that their babies had been swapped at birth.)

320 *Gibson v Berkowitz* 1996 (4) SA 1029 (W)(Defendant had negligently used undiluted acid to take cancer swabs of the plaintiff's vagina. The plaintiff received damages for emotional and psychological suffering as well as physical harm.)

321 [2005] 3 All SA 457 (W).

322 *Ibid* at para 46.2.

FC s 12(2) does meaningful and independent work here because the damage done is not to the plaintiff's FC s 10 right to dignity or her FC s 14 right to privacy: they sustain damage from the emotional and psychological stress caused by the disclosure of their status to their family, friends and community.

In *Media 24 v Grobler*, the Supreme Court of Appeal was seized with a claim that employers are liable for failing negligently to protect their workers from sexual harassment.³²³ The Court specifically mentioned the effect of harassment on the psychological integrity of the victim in upholding the direct liability of the company for failing to protect its employees from harassment by co-workers.³²⁴

Constitutional protection of psychological integrity must, however, have limits. In Canada, the Supreme Court held that the stress induced by the unreasonable delay of a government entity in addressing a complaint could breach a person's right to psychological integrity.³²⁵ However, that same delay, in the South African context, is unlikely to occasion a breach of FC s 12(2).

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40.9 FC s 12(2)(a): decisions concerning reproduction³²⁶

The right to bodily integrity or control over the body would seem broad enough to embrace the protection of reproductive decisions. Why then does the Final Constitution explicitly mention the right to 'make decisions concerning reproduction'?

One reason might be to avoid the well-known doctrinal difficulties that American courts have experienced as a result of the *Roe* Court's location of a judicially-created right to abortion in another judicially-created right to privacy.³²⁷ The specific

323 *Media 24 Ltd v Grobler* 2005 (6) SA 328 (SCA)(The SCA quoted with approval a finding of the Industrial Court that 'The victims of harassment find it embarrassing and humiliating. . . . The psychological effect on sensitive and immature employees, both male and female, can be severe, substantially affecting the emotional and psychological well-being of the person involved.')

324 *Ibid* at para 67 citing with approval *J v M Ltd* (1989) 10 ILJ 755, 758A-D (IC)(The Court recognized that prolonged sexual harassment could severely affect the 'emotional and psychological well-being of the person involved'.)

325 *Blencoe v British Columbia* [2000] 2 SCR 307 (Several complaints of sexual harassment had been lodged against the applicant, a former cabinet minister, at the Human Rights Commission. The Commission had taken almost three years to finalize the complaint. The majority found that state-induced psychological stress could impair the right to security of the person, but that the impairment in this case was not severe enough to warrant such a finding. In addition, the stress experienced by the applicant was not primarily caused by the delay. The Court also noted that Canada possessed sufficient administrative law remedies to address the matter.)

326 For a general discussion of reproductive rights in the Final Constitution, see M O'Sullivan 'Reproductive Rights' 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 37, § 37.5 (O'Sullivan deals specifically with the relationship between freedom and security of the person and reproductive rights.)

327 This drafting decision by the Constitutional Assembly possesses the added benefit of meeting a host of feminist critiques levelled against viewing reproductive freedom in terms of privacy rights. See, eg, C Neff 'Woman, Womb, and Bodily Integrity' (1991) 3 *Yale Journal of Law and Feminism* 327, 327-28 (Argues that a right-to-privacy-based balancing test has led to an alarming trend in

recognition of reproductive freedom may have been intended to leave the courts very little room to outlaw abortion, while still permitting the drafters to avoid responsibility for expressly reaching that conclusion in the constitutional text. That said, the primary motivation is probably symbolic. It recognizes that some of the most devastating and socially entrenched forms of physical (and psychological) oppression and exploitation relate to reproduction and sexuality. FC s 12(2)(a) serves to draw South African courts' attention to that specific form of denial of bodily integrity.

(a) Abortion

In *Christian Lawyers Association v National Minister of Health*, Mojapelo J recognised that FC s 12(2)(a) read with FC s 12(2)(b) creates a 'constitutional right to termination of pregnancy'.³²⁸ The *Christian Lawyers II* Court held both that the challenged

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provisions of the Choice on Termination of Pregnancy Act ('Choice Act')³²⁹ are constitutional and that any attempt by the legislature to enact law making abortion *per se* a crime would be deemed constitutionally infirm.³³⁰

The argument around abortion is therefore more likely to turn on the extent to which the state can limit a woman's right to abortion.³³¹ The Choice Act currently places a number of limitations on the 'right to an abortion'. Abortions are permitted

American constitutional law toward permitting the state to intercede on behalf of its interest in a foetal life. Neff contends that the right to privacy is not a meaningful concept for a woman if it allows the state to sever, conceptually, the woman from her womb and to 'represent its contents as a separate and identifiable interest'. Neff anticipates the South African solution to this problem and argues such a problem does not arise if reproductive rights are grounded in a right to bodily integrity.) Indeed, the Supreme Court of Canada deployed the more general but related right to 'security of the person' in s 7 of the Charter to strike down restrictions on abortion in *R v Morgenthaler (No 2)*. *R v Morgenthaler (No 2)* [1088] 1 SCR 30.

328 *Christian Lawyers Association v National Minister of Health & Another* 2005 (1) SA 509 (T), 518, 2004 (10) BCLR 1086 (T) ('*Christian Lawyers II*'). (The applicant challenged the constitutionality of statutory provisions that permitted women under the age of 18 to have abortions without the consent of and without consultation with their parent or guardian. The court upheld the legislation.) *Christian Lawyers II* affirms the position of McCreath J in *Christian Lawyers I* that a foetus does not have a right to life and that FC s 12 is in no way limited by any interests the foetus might have. *Christian Lawyers Association & Others v Minister of Health & Others* 1998 (4) SA 1113 (T), 1998 (11) BCLR 1434 (CC) ('*Christian Lawyers I*'). Pace *Roe*, the 'right to an abortion' belongs to the pregnant woman, and not to the doctor performing the abortion. See *Nourse v Van Heerden* 1999 (2) SACR 198 (W) ('No constitutional rights of the applicant were identified which were violated by his having been restricted as to the circumstances and conditions in and on which he could procure abortions.' Since doctors are not the beneficiaries of such rights, the *Nourse* court rejected the doctor's claim that illegal abortions performed prior to the promulgation of the Interim Constitution were, post-1994, now legal.)

329 Act 92 of 1996.

330 *Christian Lawyers II* (supra) at 518 ('In a sense therefore the Constitution not only permits the Choice on Termination of Pregnancy Act to make a pregnant woman's informed consent the cornerstone of its regulation of the termination of her pregnancy, but indeed requires the Choice Act to do so. To provide otherwise would be unconstitutional.')

331 See O'Sullivan (supra) at § 37.12.

'on request' until 12 weeks into the pregnancy. After 12 weeks of gestation, the foetus may still be terminated — but only in limited circumstances up to 20 weeks.³³² After 20 weeks, termination is permitted only if there is a risk of injury or death.³³³ An abortion thus becomes steadily more difficult to procure as a pregnancy progresses.³³⁴

These limitations on FC s 12(2)(a) and (b) rely on two forms of justification. The first form of justification emphasizes the escalating risk of abortion to the mother over the course of the pregnancy.³³⁵ In a society that permits a broad array of risky and unnecessary activities every day — from sky-diving and bungee-jumping to body-piercing and plastic surgery — the argument from 'risk' smacks of a particularly pernicious form of paternalism. For the legislature to decide in advance that pregnant women may not 'risk' second and third trimester abortions denies them the agency we easily grant the rest of the population over a broad domain of more dangerous and less socially relevant conduct, including many

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other kinds of medical procedures.³³⁶ In so doing, it risks turning women into 'foetal incubators'.³³⁷ The second form of justification emphasizes the dignity interest of the political community in the life of the foetus. The High Court in *Christian Lawyers I* firmly rejected the proposition that a foetus possesses any rights — let alone the

332 An abortion between 12 and 20 weeks is permitted if:

- (i) the continued pregnancy would pose a risk of injury to the mother's physical or mental health; or
- (ii) there exists a substantial risk that the unborn child would suffer from severe physical or mental abnormality; or
- (iii) the pregnancy resulted from rape or incest; or
- (iv) the continued pregnancy would significantly affect the social or economic circumstances of the mother.

Choice Act s 2(1)(b).

333 The exact circumstances are:

- (i) would endanger the mother's life; or
- (ii) would result in a severe malformation of the unborn child; or
- (iii) would pose a risk of injury to the unborn child.

Choice Act s 2(1)(c).

334 On limitations generally, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

335 See *Roe v Wade* 410 US 113 (1973). A majority of the US Supreme Court held that the state had an interest in the life and health of both the woman and the foetus. In the first trimester, neither interest was sufficiently compelling to justify regulation or prohibition. By the second trimester, the interest in the woman's health was sufficiently compelling to justify regulation. The interest in the foetus' well-being only became compelling in the third trimester. In the third trimester, the state could justify regulation or even prohibition of abortion as long as it did not threaten the life of the woman.

right to dignity — under the Final Constitution.³³⁸ However, the *Christian Lawyers II* Court,³³⁹ and authors elsewhere in this work, recognize that the state, and the broader political community, may have a 'detached', as opposed to a derivative, dignity interest in the regulation of abortion.³⁴⁰

(b) Sterilization

The Sterilisation Act³⁴¹ defines sterilization as 'a surgical procedure performed for the purpose of making the person on whom it is performed incapable of procreation, but does not include the removal of any gonad'.³⁴² Any person over the age of 18 may be sterilized with their consent.³⁴³ Those persons below the age of 18 may only be

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- 336 For similar arguments against the prohibition of late term abortions, see T Kushnir 'It's My Body, It's My Choice: The Partial-Birth Abortion Ban Act of 2003' (2004) 35 *Loyola University Chicago Law Journal* 1117; R Oliveri 'Crossing the Line: The Political and Moral Battle over Late-term Abortion' (1998) 10 *Yale Journal of Law and Feminism* 397. See also *Stenberg v Carhart* 530 US 914 (2000) (Five member majority invalidates statute prohibiting partial-birth abortion because it did not provide a health exception for the woman and constituted an 'undue burden' on a woman's right to choose a particular procedure. The Choice Act does possess a health exception.)
- 337 Neff (supra) at 350 ('From the moment a pregnant woman decides that she does not want to carry the pregnancy to term, from the moment she ceases voluntarily to participate in the pregnancy, it becomes a pregnancy against her will and a significant bodily intrusion. This bodily intrusion is, in effect, state action to commission the womb for use as a fetal incubator. The state has entered the woman's body, seized control, and established an adversarial relationship between the woman and her womb.') See also JJ Thomson 'A Defense of Abortion' (1971) 1 *Philosophy & Public Affairs* 47. Thomson employs the hypothetical situation of a famous violinist being permitted to use the reader's kidneys for dialysis as an intuition pump to designed to force the reader to reconceive the relationship between a woman and the foetus inside her. We discuss this intuition pump at length in the context of FC s 13's prohibition of forced labour. See S Woolman & M Bishop 'Slavery Servitude and Forced Labour' 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 64, 64-3.
- 338 *Christian Lawyers I* (supra) at 1123. While one of the authors has roundly criticized McCreath J's reasoning in *Christian Lawyers I*, the outcome remains sound. See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.3(a)(iii).
- 339 *Christian Lawyers II* (supra) at 527E.
- 340 See M O'Sullivan 'Reproductive Rights' 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 37, § 37.2 citing R Dworkin *Life's Dominion: An Argument about Abortion and Euthanasia* (1993); S Woolman 'Dignity' 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 36, § 36.4(c)(ii)(Woolman contends that it remains possible to take the state's interest in pre-natal life seriously without concomitantly undermining a woman's right to dignity and her ability to secure an abortion.)
- 341 Act 44 of 1998.
- 342 Sterilisation Act s 1.
- 343 Sterilisation Act s 2(2).

sterilized if a failure to do so would put their life or health at risk.³⁴⁴ Persons with diminished mental capacity may be sterilized without their consent under certain limited circumstances.³⁴⁵

Despite recent amendments to the Sterilisation Act intended to increase the protection afforded to persons with diminished mental capacity,³⁴⁶ the provisions permitting their sterilization remain controversial.³⁴⁷ Indeed, recent decisions in other jurisdictions suggest that even our new and improved Sterilisation Act may be the subject of future constitutional challenges.

In *Re Eve*, the Canadian Supreme Court rejected an application by a mother to have her disabled twenty-four-year-old daughter sterilized.³⁴⁸ The Court emphasized both the permanent negative psychological impact sterilization would have on the daughter and the manner in which non-consensual sterilization re-inforced the marginalization of disabled persons.³⁴⁹ The Court also rejected the argument that Eve would be unsuitable for parenthood. It found instead that

mentally incompetent parents show as much fondness and concern for their children as other people. Many, it is true, may have difficulty coping with the financial burdens

344 Sterilisation Act s 2(3)(a).

345 Sterilisation Act s 3. The statutory requirements include: consent by a parent, guardian spouse or curator (s 3(1)(a)); the recommendation of a panel of a psychiatrist or medical practitioner, a psychologist or social worker and a nurse after considering various prescribed criteria (s 3(1)(b) read with s 3(2)); and that the person be incapable of making, now or in the future, their own informed decision about contraception or sterilisation or of fulfilling the parental responsibility associated with giving birth (s 3(1)(c)).

346 Sterilisation Amendment Act 3 of 2005.

347 For an excellent exposé on the sterilisation of mentally incapable people, see K Savell 'Sex and the Sacred: Sterilization and Bodily Integrity in English and Canadian Law' (2004) 49 *McGill LJ* 1093. Savell argues that how one views non-consensual sterilization depends largely on the narrative one employs and the conception of the body one adopts. She relates the story of AR, a twenty-five-year-old mentally disabled man who had been castrated without his consent at the request of his mother. A local official took exception to the castration and instituted action against the mother. In describing how the perception of the mother's actions depends on how one narrates the story, Savell writes:

When a commentator agreed that AR was a subject in need of control in his own and others' interests, the legal action taken against his mother seemed unjust and unfair. Conversely, when a commentator was concerned about the implications for society of allowing castration to control individual members, the legal action taken against AR's mother seemed just.

Ibid at 1123. The determination may also turn on how society constructs AR's body:

Where AR's body was constructed as threatening precisely because it could not be contained sexually, castration was viewed as a means of achieving integrity and, therefore, order at the level of the individual and the social body. Conversely, where AR's body was constructed as emasculated and lacking integrity as a result of having been castrated, castration was viewed as a violation of the individual body and a threat to social cohesion.

Ibid at 1095.

348 *E (Mrs) v Eve* [1986] 2 SCR 388, 31 DLR (4th) 1 ('Eve').

349 *Eve* (supra) at para 80.

involved. But this issue is a social problem, and one, moreover, that is not limited to incompetents.³⁵⁰

By contrast, the House of Lords permitted a similar application in *Re B*.³⁵¹ The Law Lords were at pains to emphasize that

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[T]his case is not about sterilisation for social purposes; it is not about eugenics; it is not about the convenience of those whose task it is to care for the ward or the anxieties of her family; and it involves no general principle of public policy. It is about what is in the best interests of this unfortunate young woman and how best she can be given the protection which is essential to her future wellbeing so that she may lead as full a life as her intellectual capacity allows.³⁵²

The House rejected the applicant's distinction between therapeutic sterilization and non-therapeutic sterilization.³⁵³ It grounded its conclusion, instead, in what it believed to be in the best interests of the person whose sterilization was at issue.³⁵⁴

The virtue of the Canadian approach is that it recognizes that persons with diminished mental capacity retain their right to 'bodily integrity'.³⁵⁵ The vice of the House of Lords' approach is that it reinforces the cultural construction of the disabled person as outside the body politic.³⁵⁶

As things now stand, the Sterilisation Act grants a properly composed panel significant latitude when determining whether sterilization is appropriate. However, to the extent that the Act permits the panel to authorize sterilisation when it is not medically necessary, it clearly infringes FC s 12(2)(a) and faces, to our minds, the rather difficult task of justifying this grant of authority without palpable evidence that forced sterilization is a medical or a public health necessity.

(c) Contraception

Any law that impaired the ability to secure contraception would limit FC s 12(2)(a) and would have to be justified in terms of FC s 36.³⁵⁷ Such a legislative restriction seems unlikely in our current political climate.

350 Ibid at para 84.

351 *Re B (a Minor) (Wardship: Sterilisation)*(1987) [1988] 1 AC 199, [1987] 2 All ER 206 (HL)('Re B').

352 *Re B* (supra) at 212.

353 Ibid at 204 and 205.

354 According to Savell, the finding in *B* and subsequent cases in the United Kingdom were underwritten by three primary justifications: 'the risk of pregnancy, the trauma of pregnancy and childbirth, and the unfitness of the woman to parent. In each of these [three] categories, norms of sexual behaviour and reproductive responsibility function to produce the learning disabled woman as marginal and, therefore, in need of sterilization for her own protection.' Savell (supra) at 1129. Savell also notes that, thus far, the English courts have only allowed sterilisation of women. Ibid.

355 See § 40.8(a) supra.

356 See M Nussbaum *Frontiers of Justice: Disability, Nationality and Species Membership* (2006).

However, many private, mainly religious, institutions prohibit the use or the sale of contraceptives amongst their members or on their premises. In the United States, the use of contraceptives in Catholic hospitals and their distribution at

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schools has led to litigation.³⁵⁸ As one of the authors argues elsewhere in this work, the ability of private religious groups to control the use of contraception — such as the day after pill — will turn both on the extent to which the institution controls the distribution of public goods (ie, a public hospital) and the extent to which members of the particular religious community have agreed to be bound by the tenets of that faith.³⁵⁹

40.10 FC s 12(2)(b): security in and control over one's body

FC s 12(2)(b) creates a sphere of individual inviolability with two components. 'Security in' and 'control over' one's body are not synonymous. The former denotes the protection of bodily integrity against physical invasions by the state and others. The latter guarantees the freedom to exercise autonomy or the right to self-determination with respect to the use of one's body.

(a) 'Security in'

In the two most direct applications of FC s 12(2)(b), two High Courts found that the surgical removal of a bullet from a suspect for the purposes of a police investigation was a limitation of the the suspect's right to bodily integrity.³⁶⁰ The two courts differed, however, as to whether the invasion constituted a justifiable limitation in terms of FC s 36.³⁶¹

357 American jurisprudence is particularly useful in this regard. See *Griswold v Connecticut* 381 US 479 (1965)(Law prohibiting any use of contraceptives unconstitutional); *Eisenstadt v Baird* 405 US 438, 442 (1972)(Prohibition on use by unmarried couples only unconstitutional); *Carey v Population Services International Inc* 431 US 678 (1977)(Law prohibiting distribution of contraceptives unconstitutional). For an excellent evaluation of American 'sexual freedom' cases, see D Cruz 'The Sexual Freedom Cases'? Contraception, Abortion, Abstinence and the Constitution' (2000) 35 *Harvard Civil Rights-Civil Liberties Law Review* 299. See also R Wyser-Pratte 'Protection of RU-486 as Contraception, Emergency Contraception and as an Abortifacient under the Law of Contraception' (2000) 79 *Oregon Law Review* 1121.

358 Many Catholic hospitals refuse to provide the 'morning-after pill' to rape victims. As the history of RU486 in the US suggests, while the pill is generally considered a contraceptive, some do view this form of it as an abortifacient. See H Skeeles 'Patient Autonomy versus Religious Freedom: Should State Legislatures Require Catholic Hospitals to Provide Emergency Contraception to Rape Victims?' (2003) 60 *Washington and Lee Law Review* 1007; T Fujikawa Lee 'Emergency Contraception in Religious Hospitals: The Struggle between Religious Freedom and Personal Autonomy' (2004) 27 *University of Hawaii Law Review* 65.

359 S 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. See also S Woolman & I Currie 'Community Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2006) Chapter 58.

360 See *S v Xaba* 2003 (2) SA 703 (D), 708H ('Xaba'); *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654, 658H (C)('Gaqa').

The High Court in *Gaqa* found that the Criminal Procedure Act³⁶² did contemplate the removal of a bullet.³⁶³ In light of this law of general application, Desai J concluded that, since the proposed operation presented a minimal risk to the suspect and the

suspect was accused of murder, society's interest in the suspect's trial, and potential conviction, outweighed the suspect's interest in bodily integrity.³⁶⁴

The High Court in *Xaba* managed to avoid the manifold errors in *Gaqa*'s limitations analysis by rejecting this decision's reading of the CPA. Southwood AJ instead interpreted the CPA in a manner that did not grant the police the power to authorize a surgical intervention.³⁶⁵ Given the absence of 'law of general application', the *Xaba* Court held, the suspect's FC s 12(2)(b) right could not be justifiably limited in terms of FC s 36.

The conflicting decisions in *Gaqa* and *Xaba* reflect judicial uncertainty with regard to the exercise of police power in such cases. As Southwood AJ noted in *Xaba*,³⁶⁶ the legislature would be well advised to draft an amendment to the CPA that brings greater clarity to the matter.³⁶⁷

361 On limitations, see, generally, S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

362 Act 51 of 1977 ('CPA').

363 *Gaqa* (supra) at 657H-658C (Both the power to 'search' in CPA s 27 and the power to ascertain distinguishing features in CPA s 37 were held, on a purposive interpretation, to allow the police to carry out the operation.)

364 *Gaqa* (supra) at 659. The High Court quoted with approval the following dictum from *Winston v Lee*. 470 US 753 (1985)(Brennan J):

The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure. In a given case the question whether the community's needs for evidence outweighs the substantial privacy interests at stake is a delicate one, admitting of few categorical answers.

On the meaning of 'law of general application', see Woolman & Botha 'Limitations' (supra) at § 34.7.

365 In *Xaba*, Southwood AJ first considered CPA s 27. The section only entitled a 'police official' to conduct a search. This power could not be delegated. In fact, the CPA prohibited a police official from taking a blood sample and could therefore hardly be interpreted to allow the much more invasive procedure at issue here. In addition, the ordinary meaning of 'search' did not include surgery. *Xaba* (supra) at 712G-713D. Southwood then considered CPA s 37(1)(c). CPA s 37(1)(c) gives the power to take 'necessary steps' to determine distinguishing 'marks, features or characteristics'. Section 37 allocates responsibility to medical practitioners to aid police officials with an array of procedures, including the taking of blood samples. CPA s 37(2)(a). According to Southwood AJ, this allocation of responsibilities did not embrace more invasive procedures as the surgical removal of a bullet. Ibid at 713G-714E.

366 Ibid at 714F-G.

367 Such an amendment, whatever its form, would not, however, answer the question of when police intrusion into a suspect's bodily integrity is justified under FC s 36.

Where the 'invasion' is more subtle than the extraction of a bullet, an equally subtle approach to FC s 12(2)(b) analysis is warranted. As Lawrence Tribe notes:

it is important to have a way of talking about these matters in which the intrusion caused by the police officer who gently shoves a person back to clear the way for an ambulance, for example, does not amount, even potentially, as an invasion of privacy or personhood.³⁶⁸

In short, not every action by the state or another party that involves touching another person's body warrants constitutional scrutiny. In *S v Huma*, the High Court had the following to say about the mandatory taking of fingerprints:

The process of taking one's fingerprints does not, in my view, constitute an intrusion into a person's physical integrity. No physical pain of any kind accompanies this process. By comparison, the taking of a blood sample constitutes more of an intrusion into a person's physical integrity than the mere taking of one's fingerprints. When a blood sample is taken the skin is ruptured and it is accompanied by a small element of pain. Pain and violation of a

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person's physical integrity are also associated with corporal punishment and other forms of punishment. By comparison, in my judgment, the taking of fingerprints is on par with the mere taking of a photograph, which does not, in my view, violate the *physical integrity of a person*.³⁶⁹

Non-trivial invasions of bodily integrity that attract constitutional scrutiny occur most frequently in the context of law enforcement investigations. For example, a suspected drug courier may be subjected to a cavity search. A suspected drunk driver may be required to undergo a breathalyzer test or provide a blood sample for analysis. Unsolicited bodily invasions that cross the threshold for constitutional scrutiny have occurred in several other contexts and jurisdictions.³⁷⁰

Given that non-trivial invasions of bodily integrity will still occur rather frequently in the context of law enforcement, our courts will be obliged to develop criteria for distinguishing justifiable invasions from unjustifiable invasions. US case law offers the following set of rough and ready guidelines:

- (1) A decision to invade bodily integrity must follow established procedures and not be arbitrary. For example, body searches require at least reasonable suspicion.
- (2) Where possible, a deliberate invasion of bodily integrity must be preceded by a hearing — even if the hearing is only informal.³⁷¹
- (3) The principles of necessity and proportionality should be observed.³⁷² An intrusion must avoid inflicting unnecessary physical pain or anxiety. It must not run the risk of disfigurement or injury to health.

368 *American Constitutional Law* (2nd Edition, 1988) 1330.

369 *S v Huma* 1996 (1) SA 232 (W), 236I–237B.

370 In the US, for example, challenges to compulsory vaccination programmes and to the fluoridation of water have received the courts' attention. See *Jacobsen v Commonwealth of Massachusetts* 197 US 11 (1905); *Dowell v City of Tulsa* 348 US 912 (1955).

371 Tribe (*supra*) at 1332.

(b) 'Control over'

FC s 12(2)(b)'s right to exercise 'control over' one's body flows from the general liberal principle that freedom consists, in part, in the ability to 'fram[e] the plan of our life to suit our own character'.³⁷³ However, such freedom may conflict with both well-grounded and ill-founded beliefs of a majority of the population — and its representatives — about ways of being in the world deemed deleterious to the health and the well-being of all of its citizens.

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FC s 12(2)(b) assumes that individuals are capable of taking decisions that are in their own interests and of acting as responsible moral agents. Any political decision that limits such autonomy constitutes a prima facie affront to FC s 12(2)(b).

It is worth noting that both FC s 12(2)(b) and legitimate limitations on its exercise are protected by the same underlying principle: mutual concern and mutual respect for others. If we are genuinely concerned with and respectful of the lives of our fellow citizens, then we must respect the life choices they make at the same time as we express concern about whether such choices are good for them. Should their preferred way of being in the world entail putting coke up their nose (rather than drinking it from a glass), refusing life-saving blood transfusions for their children on religious grounds, or continuing to smoke in the face of incontrovertible evidence of its dangers, then the commonweal may be justified in passing laws that interfere with the 'bodily control' of citizens who wish to smoke, do coke or allow their children to die. However the recognition of a constitutional right to bodily autonomy in an open society means that we must minimize paternalistic forms of intervention in others' lives.³⁷⁴

Our case law is, however, replete with examples of court's upholding paternalistic limitations on bodily self-determination. For example, while declaring unconstitutional a law that prohibited sodomy, Heher J offered the following observation:

There are undoubtedly some acts which are so repugnant to and in conflict with human dignity as to amount to perversion of the natural order. Bestiality seems to me to be an obvious example of an independent unnatural offence which justifies this categorisation.³⁷⁵

372 *Winston v Lee* 470 US 753 (1985)(Surgical removal of a bullet from a suspect to determine its origin violates due process where the state has substantial evidence of the origins of the bullet from another source.)

373 JS Mill *On Liberty* (1859) Introduction.

374 See Tribe (supra) at 1371-72:

In a society unwilling to abandon bleeding bodies on the highway, the motorist or driver who endangers himself [by not wearing a helmet or seatbelt] plainly imposes costs on others. His choice to risk a range of possible injuries, instead of certain death, in one respect strengthens society's case for regulating him; the social and economic cost of caring for the motorist who suffers an accident is likely to be considerably greater than the cost of burying the terminally ill patient who refuses extraordinary measures to prolong his life.

375 *National Coalition for Gay and Lesbian Equality & Others v Minister of Justice & Others* 1998 (2) SACR 102, 127d-f (W), 1998 (6) BCLR 726 (W).

The High Court in *S v M* followed Heher J's lead and rejected equality, freedom and privacy-based constitutional challenges to laws prohibiting bestiality.³⁷⁶ As a matter of legal strategy, the accused erred by relying upon the prohibition on arbitrary deprivation of freedom in FC s 12(1)(a) rather than the right to control over the body in FC s 12(2)(b).³⁷⁷ However, the *S v M* court's findings in relation to both FC s 12(1)(a) and FC s 9(3) make it clear that it would have reached a similar conclusion with respect to a challenge brought under FC s 12(2)(b).³⁷⁸

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The Constitutional Court has not yet been asked to consider the meaning of FC s 12(2)(b). However, its decision in *S v Jordan* suggests that the Court may not be especially sympathetic to uses of the body that it, and the majority of South Africans, find morally repugnant.³⁷⁹ *Jordan* concerned the constitutionality of legislative provisions outlawing prostitution and brothel-keeping. The applicants' challenge was based on the rights to equality, privacy, dignity, freedom and security of the person and freedom of trade. The majority found, without much difficulty, that '[t]he Act pursues an important and legitimate constitutional purpose, namely to outlaw commercial sex.'³⁸⁰ Sachs and O'Regan JJ's dissenting judgment is, somewhat ironically, more troubled by how we construct the idea of control over the body. The body is not, so they tell us,

something to be commodified. Our Constitution requires that it be respected. We do not believe that s 20(1)(aA) can be said to be the cause of any limitation on the dignity of the prostitute. To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. The very nature of prostitution is the commodification of one's body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by s 20(1)(aA) but by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.³⁸¹

As one of the authors has noted elsewhere, all of us, Constitutional Court judges included, commodify our bodies by receiving money for our labour.³⁸² To invidiously distinguish prostitutes from Constitutional Court justices in terms of the stigma that

376 *S v M* 2004 (3) SA 680 (O).

377 *Ibid* at paras 20-22.

378 *Ibid* at paras 17-19 and 22.

379 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC) ('*Jordan*').

380 *Ibid* at para 15. The *Jordan* Court offers (in a footnote) four justifications for this assertion: (1) prostitution breeds crime; (2) prostitution exploits women; (3) prostitution leads to child trafficking; (4) prostitution promotes the spread of disease. Both the applicant and the amicus had argued that these ills would be better solved by decriminalisation. According to the majority, the legislature's justification for the criminalization of prostitution ought not to be second-guessed by the Court. *Ibid* at n11. Of course, the interrogation of the legislature's purpose in passing a law that impairs the exercise of a fundamental right is an essential feature of limitations analysis. See S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34, § 34.8.

381 *Jordan* (*supra*) at para 74.

attaches to their profession is to confuse commodifying with moralizing. And, it would seem to us, the Court is guilty of the latter.³⁸³

Jordan — when viewed through the lens of FC s 12(2)(b) — reminds us that the right to bodily autonomy is concerned — not with the welfare of the individual — but with the preservation of individual integrity. 'The value of autonomy', according to Ronald Dworkin,

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derives from the capacity it protects: the capacity to express one's own character — values, commitments, convictions and critical as well as experiential interests — in the life one leads. Recognizing an individual right of autonomy makes self-creation possible. It allows each of us to be responsible for shaping our lives according to our own coherent or incoherent — but in any case, distinctive — personality. It allows us to lead our own lives rather than be led along them, so that each of us can be, to the extent a scheme of rights can make this possible, what we have made of ourselves. We allow someone to choose death over radical amputation or a blood transfusion, if that is his informed wish, because we acknowledge his right to a life structured by his own values.³⁸⁴

However, as we all know, illness, age or mental incompetence may result in the wholesale absence of individual autonomy. In such instances, where the decision would have been a matter of autonomous choice, courts and other parties may be asked to intervene on the afflicted person's behalf. A court may be approached for an order that a mentally incompetent person undergo surgery to remove a kidney in order to save the life of a sibling.³⁸⁵ A court may be approached for an order declaring that a hospital may legally terminate life support for a patient in a persistent vegetative state.³⁸⁶ Where the court substitutes its own judgment for that of the 'afflicted' person, it must remain mindful that FC s 12(2)(b)'s right to bodily self-determination requires such substitution to emphasize the importance of the 'afflicted' person's bodily integrity:

On the one hand, Anthony Bland is alive and the principle of the sanctity of life says that we should not deliberately allow him to die. On the other hand, Anthony Bland is an individual human being and the principle of self-determination says he should be allowed to choose for himself and that, if he is unable to express his choice, we should try our honest best to do what we think he would have chosen. We cannot disclaim this choice because to go on is as much a choice as to stop. Normally we would unquestioningly assume that anyone would wish to live rather than to die. But in the extraordinary case of Anthony Bland, we think it more likely that he would choose to put an end to the humiliation of his being and the distress of his family. Finally, Anthony Bland, is a person to whom respect is owed and we think that it would show greater

382 See S 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, § 44.3(c)(x).

383 See N Fritz 'Crossing Jordan: Constitutional Space for (Un)Civil Sex' (2004) 20 *SAJHR* 230.

384 R Dworkin *Life's Dominion* (1993) 225.

385 *Strunk v Strunk* 445 SW 2d 145 (1969).

386 *Airedale NHS Trust v Bland* [1993] 1 All ER 821.

respect to allow him to die and be mourned by his family than to keep him grotesquely alive.³⁸⁷

Even prior to the enactment of the Final Constitution, South African law already gave partial recognition to the right to control over the body in the context of

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euthanasia. The court in *Clarke v Hurst* granted an application for an order allowing the discontinuance of artificial feeding of a plaintiff who was in a persistent vegetative state and who had signed a document expressing his wish that he not be kept alive by artificial means.³⁸⁸ While this holding constitutes an important recognition of bodily autonomy, it is unclear how much further our courts would be willing to go with respect to the right to die.

The ability of a court to substitute its own judgment for that of an 'afflicted' person will often be controversial. In *Hay v B*, a doctor made an urgent application to the High Court for permission to give an infant a life-saving blood transfusion.³⁸⁹ The parents had refused to allow the transfusion because, as Jehovah's Witnesses, their faith prohibited it. Despite FC s 15's guarantee of freedom of religion and the law's general acknowledgement of the parental right to act on behalf of a child, the *Hay* court held that the interests of the child were always paramount,³⁹⁰ and that its right to life should be protected.³⁹¹ It granted the application.³⁹²

387 *Airedale NHS Trust v Bland* [1993] 1 All ER 821, 854d-g (Hoffmann LJ). See also The South African Law Commission *Discussion Paper 71: Euthanasia and the Artificial Preservation of Life* (1997). The Commission concluded that an individual's clear expression of a wish not to have her life prolonged by medical means should be respected. The expression of such a wish could take the form of a direction (sometimes called a 'living will') that should one ever suffer from a terminal illness and as a result be unable to make or to communicate decisions concerning one's medical treatment or its cessation, any medical treatment that one receives should be discontinued and that only palliative care should be administered. Where a patient is in a vegetative state and unable to express this wish a court should possess the power to authorize the termination of life-prolonging procedures.

388 1992 (4) SA 630 (D).

389 2003 (3) SA 492 (W).

390 *Ibid* at 494I-495A relying on FC s 28(2). See, generally, A Friedman & A Pantazis 'Children's Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 47, § 47.10.

391 *Hay v B* (supra) at 495C-D ('His right to life is an inviolable one. This is a right that is capable of protection. It is in the best interests of baby R that this right be protected. He will live as a human being, be part of a broader community and share in the experience of humanity. I am alive to the fundamental beliefs espoused by the first and second respondents. I respect their private religious beliefs. However, in the present matter, the evidence establishes that their beliefs negate the essential content of the right in question.') See also M Pieterse 'Life' 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 39, § 39.4.

392 In the pre-constitutional decision of *Phillips v De Klerk* a Jehovah's Witness himself refused a blood transfusion for injuries sustained in a car accident. Unreported decision of the TPD (March 1983) discussed in SA Strauss *Doctor, Patient and the Law: A Solution of Practical Issues* (3rd Edition, 1991) 29-36. The responsible doctor successfully obtained an urgent order permitting him to give the transfusion against the patient's wishes. After he had recovered, the patient approached the High Court for an order overturning the earlier decision. Esselen J granted the order, holding that a competent adult was entitled to refuse treatment that went against his religious convictions.

40.11 FC s 12(2)(c): subjection to medical and scientific experiments

FC s 12(2)(c) requires a litigant to prove two distinct elements.³⁹³ First, she must demonstrate that the conduct complained of constitutes a medical or scientific experiment. Secondly, if it does, she must show that there was an absence of informed consent.

(a) Medical or scientific experiment

Although both the National Health Act and FC s 12(2) afford a high degree of protection to any act that infringes a person's bodily integrity, FC s 12(2)(c) still requires that one demonstrate that a given procedure falls within the definition of an 'experiment'. Such a showing is of particular importance given that FC s 12(2)(c) is the only non-derogable FC s 12(2) right — as determined by FC s 37 — and that its non-derogability may be taken into account when a court considers the 'nature of right' in terms of FC s 36.

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When then does an activity qualify as a medical or scientific experiment? Although we are easily outraged by the notorious experiments performed by Nazi doctors during WWII³⁹⁴ and the equally repugnant investigations carried out by US army doctors on US soldiers during the Cold War — the Tuskegee syphilis

393 Currie & Woolman (supra) at 39-47; Currie & De Waal (supra) at 310.

394 See G Annas & M Grodin (eds) *The Nazi Doctors and the Nuremberg Code: Human Rights in Experimentation* (1992) 97-99 ('Nazi Doctors'). The one positive result to come out of those experiments is the Nuremberg Code. The Code was created by the Nuremberg tribunal as part of the judgment convicting the Nazi doctors. The code stands as the first, and still the principle, international document condemning medical experimentation and enshrining informed consent.

experiment³⁹⁵ and the testing of the effects of radiation³⁹⁶ and hallucinogens³⁹⁷ — such conduct amount to acts of barbarism dressed up in medical gowns. They also tend to deflect our attention way from the fact that, as the World Medical Association notes in its Declaration of Helsinki, '[m]edical progress is based on research which ultimately must rest in part on experimentation involving human subjects.'³⁹⁸ FC s 12(2)(c) alerts us to threats to personal integrity that flow from everyday medical research and treatment.

Most ethical guidelines for medical research draw a distinction between 'therapeutic' or 'clinical' research where the main aim is treating or diagnosing a patient, and 'non-therapeutic' research where the goal is 'purely scientific'. The Declaration of Helsinki only requires full informed consent for 'non-therapeutic' research. In the context of clinical research, physicians are given almost complete discretion to decide when consent is necessary.³⁹⁹ This grant of discretion is justified

395 From 1932 to 1972, four hundred black men suffering from syphilis were deliberately left untreated so as to better understand the effects of the disease. The men did not know about the project, and many did not know that they had syphilis. They thought they were receiving standard medical care. See, generally, JH Jones *Bad Blood: The Tuskegee Syphilis Experiment* (2nd Edition, 1993); J Katz 'The Consent Principle of the Nuremberg Code: Its Significance Then and Now' in Annas & Grodin *Nazi Doctors* (supra) at 230.

396 See *Jaffee v United States* 663 F 2d 1226 (3rd Cir 1981)(The plaintiff and some of his fellow soldiers were forced to stand in the Nevada desert without any protection while a nuclear device was exploded nearby. The plaintiff was ultimately unsuccessful. A majority of the court held that soldiers could not sue the government for injuries suffered 'in the course of activity incident to service'. The dissenting judges characterized the incident as a serious violation of internationally established human rights and that no law should allow the government to evade liability for such violations.) See also G Annas 'The Nuremberg Code in US Courts: Ethics versus Expediency' in Annas & Grodin *Nazi Doctors* (supra) at 209. An even more disturbing experiment occurred in Cincinnati between 1960 and 1971. Eighty-eight cancer patients were subjected to radiation treatment as part of research for the military. The patients were not told that they were part of an experiment or of the deleterious effects of the procedure. The treatment shortened all of their lives. When the experiment eventually came to light, the families of the victims instituted a class action suit against the hospital. See *In re Cincinnati Radiation Litigation* 874 F. Supp. 796 (SD Ohio 1995)(District Court accepted the plaintiffs contention that they had a right to bodily integrity and that the experiments potentially violated that right.) See also M Hawk 'The Kingdom of Ends': *In Re Cincinnati Radiation Litigation* and the Right to Bodily Integrity' (1995) 45 *Case Western Law Review* 977.

397 The infamous MKULTRA project began in 1953. It involved 200 researchers at 80 institutions. The researchers would administer drugs, including LSD, to members of the armed forces to try to counter the 'brainwashing techniques' used against America soldiers in the Korean War. At least two people died during these experiments and many suffered from severe mental and physical illness as a result. When this project came to light, a freedom of information suit was filed to discover the names of the participating institutions. See *Central Intelligence Agency v Sims* 471 US 159 (1984). See also *United States v Stanley* 107 S Ct 3054 (1987)(Stanley had volunteered to test protective clothing for chemical warfare. During the tests he was secretly given LSD. The hallucinations caused by the LSD led to his divorce and eventual discharge from the army. Stanley sued the army for compensation. In what Annas has described as an 'extraordinarily technical and abstract decision', Justice Scalia held that to allow Stanley to sue would be an unjustifiable intrusion into 'military discipline and decision-making'. See also Annas (supra) at 212-15. Justice O'Connor, in a strongly worded dissent, argued that the project was so deplorable and so far outside the bounds of the 'military mission' that the US Constitution, read with the Nuremberg Code, necessitated compensation. *Ibid.*

398 Preamble to the Declaration of Helsinki (2000) WMA 52nd Assembly, available at www.wma.net/e/policy/17-c_e.html (accessed on 15 March 2006).

on the grounds that doctors know best what is in the patient's interest. (As we shall see, the South African Medical Research Council takes a somewhat stricter line.)

In *X v Denmark*, medical professionals tested the fine line between experimentation and treatment.⁴⁰⁰ The European Commission for Human Rights had to decide whether a doctor's use of a new model of pincers in an accepted procedure for sterilization amounted to an experiment. The dispute arose because subsequent to the sterilization operation the woman operated upon fell pregnant. The Commission found that a standard sterilization procedure could not be classified as experimentation and that the use of the new pincers did not alter this conclusion.⁴⁰¹

In this instance, South African law may be ahead of international scientific conventions. Our law does away with the sometimes illusory distinction⁴⁰² between

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therapeutic conduct and non-therapeutic conduct by requiring all medical interventions to be subject to the same degree of informed consent. FC s 12(2)'s implicit distinction between 'normal' therapeutic medical interventions and medical experiments continues to possess meaningful content because the basic law ultimately determines the validity of ordinary law. It may well be the case that the standard of informed consent for 'all' medical interventions — experimental or not — is far too low. If that is so, then FC s 12(2)(c) can be used to raise the bar with

399 The following provisos apply to clinical research: 'In the treatment of the sick person, the physician must be free to use a new diagnostic and therapeutic measure, if in his or her judgment it offers hope of saving life, re-establishing health or alleviating suffering.' Part II, art 1. 'The potential benefits, hazards and discomfort of a new method should be weighed against the advantages of the best current diagnostic and therapeutic methods.' Part II, art 2.

400 *X v Denmark* Application Number 9974/82 (1983) 32 *Decisions and Reports* 282. See N Jawayickrama *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (2002) 351-352 (For a discussion of *X v Denmark*.)

401 The Medical Research Council offers the following 'rule of thumb' for distinguishing between clinical practice and research: 'consider the 'intent' of the clinician — if the intent is to apply information to others, or to present it at a scientific meeting, or submit it for publication or for a higher qualification — in other words, to contribute to generalisable knowledge — this is research.' Medical Research Council *Guidelines on Ethics for Medical Research: General Principles* (4th Edition, 2002) available at <http://www.sahealthinfo.org/ethics/ethicsbook1.pdf> (accessed on 14 August 2006) ('MRC Guidelines') 2.4.1.3.

402 Mason Meier criticizes this distinction specifically with reference to HIV experiments in developing countries conducted by multinational pharmaceutical companies: 'investigators see these trials as research, whose purpose is to provide generalizable knowledge that may help others. On the other hand, most individuals suffering with AIDS see these trials as therapy, whose primary purpose is to benefit them.' B Mason Meier 'International Protection of Persons Undergoing Medical Experimentation: Protecting the Right to Informed Consent' (2002) 20 *Berkeley Journal of International Law* 513, 537. This difference in perspective allows physicians to

artificially create less stringent informed consent requirements simply by labelling an activity 'therapeutic.' This 'therapeutic illusion' permits physicians to use non-consensual subjects under the superficial guise that the research would, in some undefined sense, benefit the subject or those with similar characteristics.

Ibid at 537-38 (footnotes omitted). A related problem is that researchers often select under-developed communities to conduct their research specifically because of the lower level of knowledge and the lack of treatment alternatives. The Medical Research Council requires researchers to prove the necessity of conducting the research in the vulnerable community and to prove some benefit to the community from the study. See MRC *Guidelines* (*supra*) at 7.1.3.8.

respect to experiments. Or the standard may only be too low with regard to experimentation. In all such instances, FC s 12(2)(c) retains its purchase.⁴⁰³ We would therefore agree with Van Wyk that 'experiment' in FC s 12(2)(c) should be read to include all forms of research,⁴⁰⁴ therapeutic and non-therapeutic,⁴⁰⁵ that in some way invade the bodily integrity of the subject.⁴⁰⁶

FC s 12(2)(c) also refers to 'scientific' experiments. Tests that may be covered by this term include placing people under extremely stressful conditions in order to measure their response.⁴⁰⁷ As a result, some academics argue that FC s 12(2)(c)

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requires the state to impose the same degree of care and the same degree of consent as is demanded for medical experiments. For example, welfare activists in the United States challenged a state rule that denied additional assistance to parents who conceived children while on welfare.⁴⁰⁸ They contended that the rule constituted a form of experimentation designed to determine whether welfare recipients would alter their behaviour in response to particular kinds of incentives. Such a reading is not only strained — it is unworkable. All laws — from tax regulations to traffic violations — constitute forms of social control designed to constrain behaviour. If the state alters its policy — and the law — in response to the behaviour of the citizenry, then all law becomes an ongoing experiment. That would make all law subject to FC s 12(2)(c). The drafters of the Final Constitution could not

403 Van Wyk contends that 'experiment' in FC s 12(2)(c) should be read to include all forms of research, therapeutic and non-therapeutic, that invade the bodily integrity of the subject. Were that so, MRC *Guidelines* (supra) at 2.1.2 and 2.1.3 would fail van Wyk's test: 'Research is a systematic investigation, including research development, testing and evaluation designed to develop or contribute to generalisable knowledge. Any activity aimed at obtaining knowledge affecting a person in any way, and which is additional to ordinary clinical practice, is to be regarded as research.' Van Wyk (supra) at 17–18. However, Van Oosten argues that 'experiment' should include only non-therapeutic treatment that includes some risk. P van Oosten 'The Law and Ethics of Information and Consent in Medical Research' (2000) 63 *THRHR* 5. See also S Strauss 'Clinical Trials Involving Mental Patients: Some Legal and Ethical Issues' (1998) 1 *South African Practice Management* 20 (FC s 12(2)(c) only proscribes 'purely experimental' or non-therapeutic procedures.) The authors differ on this point. Stu Woolman acknowledges that his disability sometimes requires his physicians to employ non-standard modes of treatment. He is alive because of such treatment, but would be loath to describe his doctor's ministrations as experiments. Michael Bishop prefers to cast the net of experimentation as wide as possible to ensure maximum patient protection against medical abuse and neglect.

404 A decent definition of research is offered in the MRC *Guidelines* (supra) at 2.1.2 and 2.1.3: 'Research is a systematic investigation, including research development, testing and evaluation designed to develop or contribute to generalisable knowledge. Any activity aimed at obtaining knowledge affecting a person in any way, and which is additional to ordinary clinical practice, is to be regarded as research.'

405 Van Wyk (supra) at 17–18 (Argues that there are three possible interpretations of 'experiment': a) any research; b) only non-therapeutic research; and c) only research that amounts to cruel, inhuman or degrading treatment. She argues that both a literal reading and a value based interpretation of FC s 12(2)(c) point to the first possibility.) But see Van Oosten (supra) (Argues that 'experiment' should include only non-therapeutic treatment that includes some risk); S Strauss 'Clinical Trials Involving Mental Patients: Some Legal and Ethical Issues' (1998) 1 *South African Practice Management* 20 (FC s 12(2)(c) only proscribes 'purely experimental' or non-therapeutic procedures.)

406 There are some forms of research, for example testing samples that were taken in the course of ordinary medical practice or compiling data from existing records, that involve no separate interference with the subject and therefore no invasion of their integrity. These would not be prohibited by FC s 12(2)(c). See Van Oosten (supra) at 16.

have possibly imagined that all South African law would be so subject and that the implementation of each law would require the informed consent of each member of our polity.

(b) Informed consent

Informed consent provides both substantive and procedural protection to subjects of experimentation.⁴⁰⁹ It ensures that subjects are treated with dignity⁴¹⁰ and that they retain the capacity to make decisions that may be contrary to the desire or the interests of the persons offering them a form of therapeutic treatment.⁴¹¹

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As we have already noted, a substantial body of law already outlines the content of informed consent. The most recent contribution to this body of law is the National Health Act ('NHA').⁴¹² According to the NHA, consent is only 'informed' if the health care user, at the time of consent, possesses the following forms of knowledge:

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- 407 The two best-known examples of such social experimentation are the Milgram Experiment and the Stanford Prison Experiment. The Milgram Experiment tested how individual participants reacted to commands to inflict what the individual participant believed to be increasingly powerful electrical shocks on another. However, the other participant in the experiment was an actor and no shocks were inflicted. The majority of participants obeyed commands to inflict the maximum possible shock. See S Milgram *Obedience to Authority; An Experimental View* (1974). The Stanford Prison Experiment tested the reaction of a group of volunteers placed in a mock 'prison' and then separated into 'guards' and 'prisoners'. The guards became increasingly violent and the prisoners progressively more emotionally disturbed. The experiment, initially planned for two weeks, ended after six days because of the terrible state of the 'mock' prison conditions and its inhabitants. See C Haney, WC Banks & PG Zimbardo 'Interpersonal Dynamics in a Simulated Prison' (1973) 1 *International Journal of Criminology and Penology* 69. Both experiments press the envelope of what we might consider constitutionally-protected experiments in terms of FC s 12(2)(c). However, it is not the participants lack of knowledge about the experiment that could result in the constitutional impairment. The gold standard of double-blind, placebo-controlled experimentation relies upon participant and doctor ignorance. An argument could be made in which such experiments counted as impairments of FC s 12(2)(c), but were deemed justifiable — in terms of the MRC Guidelines — under FC s 36.
- 408 *CK v Shalala* 883 F Supp 991 (DNJ 1995)(Claim failed on the basis that the law — even if characterized as an experiment — did not pose a danger to the plaintiffs' well-being.)
- 409 Mason Meier (supra) at 515.
- 410 According to Jonas 'only genuine authenticity of volunteering can possibly redeem the condition of thinghood to which the subject submits.' H Jonas 'Philosophical Reflections on Experimenting with Human Subjects' (1969) 98 *Daedalus* 219, 240 as cited in Mason Meier (supra) at 515. Recent MRC *Guidelines* (supra) amplify these two basic principles: (1) 'autonomy (respect for the person — a notion of human dignity); (2) beneficence (benefit to the research participant); (3) non-maleficence (absence of harm to the research participant); (4) justice (notably distributive justice — equal distribution of risks and benefits between communities)'. No one of these four principles has priority over another. Application of the MRC guidelines requires researchers and ethics to exercise good judgment. Guideline 1.3.1. FC s 12(2)(c) can embrace these four principles but will ultimately privilege autonomy as the basis of informed consent as the most central principle.
- 411 See R Delgado & H Leskovic 'Informed Consent in Human Experimentation: Bridging the Gap Between Ethical Thought and Current Practice' (1986) 34 *UCLA L Rev* 67, 91; E Gordon 'Multiculturalism in Medical Decision-making: The Notion of Informed Waiver' (1996) 23 *Fordham Urban LJ* 1321, 1328 as cited in Mason Meier (supra) at 515.
- 412 Act 61 of 2003.

- (a) her own health status, except in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to her best interests;
- (b) the range of diagnostic procedures and treatment options generally available;
- (c) the benefits, risks, costs and consequences generally associated with each option; and
- (d) her right to refuse health services and the implications, risks, obligations of such refusal.⁴¹³

Informed consent does not merely require that the patient be informed of the salient risks and options but that he 'appreciates and understands what the . . . purpose of the [experiment] is'.⁴¹⁴ Furthermore, information alone is not sufficient if the person is unable to act meaningfully and freely on that information.⁴¹⁵ In *C v Minister of Correctional Services*, a prisoner's privacy suit succeeded because the state had permitted an HIV test to be taken without his informed consent.⁴¹⁶ The

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413 NHA s 7(1)(3) read with NHA s 6(1). This knowledge should be given to the user in a language that she understands and in a manner appropriate for her level of literacy. NHA s 6(2). For more detail on exactly what information a practitioner or an experimenter must be provide, see van Oosten (supra) at 27-28.

414 *C v Minister of Correctional Services* 1996 (4) SA 292 (C). See also *Christian Lawyers Association v Minster of Health & Others* 2005 (1) SA 509 (T), 516F-517B, 2004 (10) BCLR 1086 (T) ('*Christian Lawyers II*') (The Court cited with approval the dictum of Innes CJ in *Waring & Gillow Ltd v Sherborne* 1904 TS 340, 344 that informed consent requires 'that the risk was known, that it was realised, and that it was voluntarily undertaken. Knowledge, appreciation, consent — these are the essential elements; but knowledge does not invariably imply appreciation, and both together are not necessarily equivalent to consent.' Mojapelo J went on to outline the meaning of each of these requirements:

The requirement of 'knowledge' means that the woman who consents to the termination of a pregnancy must have full knowledge 'of the nature and extent of the harm or risk'.

The requirement of 'appreciation' implies more than mere knowledge. The woman who gives consent to the termination of her pregnancy 'must also comprehend and understand the nature and extent of the harm or risk'. The last requirement of 'consent' means that the woman must 'in fact subjectively consent' to the harm or risk associated with the termination of her pregnancy and her consent 'must be comprehensive 'in that it must 'extend to the entire transaction, inclusive of its consequences'.' (citations omitted.)

Ibid at 515F-516B.

415 See Van Oosten (supra) at 29 (Consent must not only be informed but also free and voluntary, clear and unequivocal, comprehensive and revocable.) The right to revoke consent at any time is central to any construction of informed consent. Unfortunately, financial inducements to participate in experiments tend to attract disproportionately larger percentage of poorer subjects. Poverty acts a powerful incentive to consent to activities for many participants. See MRC *Guidelines* (supra) at 9.13 (Specifically limits the payment of research participants.)

416 The court considered the Department's compliance with pre-determined departmental regulations defining informed consent. However, the principles articulated by the High Court reflect generally accepted practice regarding HIV testing. *C v Minister of Correctional Services* (supra) at 301D.

prisoner had twice been informed that the test was for HIV and other sexually transmitted diseases and that he had the right to refuse. Despite these efforts, the court found that the prisoner had still not been given *informed* consent because (a) the information had not been divulged in private or individually and (b) the prisoner had not been given sufficient time to consider whether to refuse the test.⁴¹⁷

Similarly, if a person is given the opportunity to participate in a trial for an HIV treatment, but is not offered alternative means of treatment, then the duress that attends such a decision makes it difficult to say that she has given informed consent. That said, we do not, as yet, possess adequate medical responses to many illnesses. In such instances, the duress that attends consent may be preferred to the absence of experimental protocols that offer some possibility of a cure.

Similarly vexed questions of duress and consent attend the question of whether a doctor can withhold information from a patient regarding a potential risk if the doctor knows that the patient is likely to refuse what the doctor considers the best course of treatment?⁴¹⁸ Ackermann J, writing for a full bench of the Cape High Court in *Castell v De Greef*, held that the doctor, no matter how well-motivated, was not entitled to do so:

It is clearly for the patient to decide whether he or she wishes to undergo the operation, in the exercise of the patient's fundamental right to self-determination. A woman may be informed by her physician that the only way of avoiding death by cancer is to undergo a radical mastectomy. This advice may reflect universal medical opinion and may be, in addition, factually correct. Yet, to the knowledge of her physician, the patient is, and has consistently been, implacably opposed to the mutilation of her body and would choose death before the mastectomy. I cannot conceive how the 'best interests of the patient' (as seen through the eyes of her physician or the entire medical profession, for that matter) could justify a mastectomy or any other life-saving procedure which entailed a high risk of the patient losing a breast. Even if the risk of breast-loss were insignificant, a life-saving operation which entailed such risk would be wrongful if the surgeon refrains from drawing the risk to his patient's attention, well knowing that she would refuse consent if informed of the risk. It is, in principle, wholly irrelevant that her attitude is, in the eyes of the entire medical profession, grossly unreasonable, because her rights of bodily integrity and autonomous moral agency entitle her to refuse medical treatment. It would, in my view, be equally irrelevant that the medical profession was of the unanimous view that, under these circumstances, it was the duty of the surgeon to refrain from bringing the risk to his patient's attention.⁴¹⁹

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417 *C v Minister of Correctional Services* (supra) at 304C-E.

418 See I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 310; Van Oosten (supra) at 24; I Currie & S Woolman 'Freedom & Security of the Person' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) 39.6(d)(ii).

419 1994 (4) SA 408 (C) ('*Castell*'). It is worth comparing this pronouncement by Ackermann J with his equally expansive construction of liberty in *Ferreira*. The correctness of *Castell* was questioned by the Supreme Court of Appeal in *Broude v McIntosh* 1998 (3) SA 60 (SCA). Although it did not overrule *Castell*, the *Broude* court worried that a 'surgical intervention of a medical practitioner whose sole object is to alleviate the pain or discomfort of the patient, and who has explained to the patient what is intended to be done and obtained the patient's consent to it being done, should be pejoratively described and juristically characterized as an assault simply because the practitioner omitted to mention the existence of a risk considered to be material enough to have warranted disclosure and which, if disclosed, might have resulted in the patient withholding consent.' *Ibid* at 67J-68A.

The *Castell* Court determined that for informed consent to exist a patient must be informed of all 'material' risks. A risk is material if:

- (a) a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it; or
- (b) the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it.⁴²⁰

This decision represents a welcome shift from medical paternalism to patient autonomy.⁴²¹ This new standard for informed consent — based upon the notion of the reasonable patient and not the reasonable doctor — seems to us to be consistent with FC s 12(2)'s commitment to bodily integrity.

(c) Persons unable to consent

But what of those who are unable to consent? Can one ever perform experiments on them?⁴²² Both Van Oosten and Strauss have argued that FC s 12(2)(c) specifically refers to the subject's own consent. Assume then that children and the mentally handicapped cannot be experimented upon without limiting FC s 12(2)(c).⁴²³ The question then would be whether any law that permits such experimentation can be justified in terms of FC s 36. The limitations analysis will turn largely upon whether the experiment is therapeutic or non-therapeutic. It will be much easier to justify research that has immediate potential benefit for the patient than research that has no or only remote possible benefits in the future.

However, the banning of all non-therapeutic research on a class of people will inevitably turn them into 'research orphans'.⁴²⁴ Moreover, such a bright-line rule would preclude meaningful research into specific childhood diseases or mental disorders. Thus, experimentation that may be beneficial to the class to which the subject belongs — if not the subject herself — could be a justifiable limitation under FC s 36. The therapeutic value of the research and the level of risk

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involved will be important, but not decisive factors in determining the justifiability of any such experimentation. Legislation already permits proxy consent for therapeutic interventions on children⁴²⁵ and the mentally ill.⁴²⁶ National ethical guidelines exist

420 *Castell* (supra) at 428 F-G.

421 See Van Oosten (supra) at 24 ('[T]he undeniable inherent potential of abuse of research subjects renders a stricter adherence to the informed consent requirement necessary in medical research than standard practice.')

422 For a summary of classes of person who may not be able to consent, and a brief exposition of the law regulating consent on their behalf, see Van Oosten (supra) at 15-21.

423 In the context of children, it will likely only be those children who are in fact unable to provide informed consent, rather than those who fall under a set age, that will not be permitted to engage in experimentation. See *Christian Lawyers II* (supra)(Court upheld legislation permitting girls under the age of 18 to receive abortions. The court accepted that it was the subjective capacity of the child to provide informed consent, not her age, that was necessary to allow an abortion.)

424 J Burchell 'Non-Therapeutic Medical Research on Children' (1978) 95 *SALJ* 193, 196.

for conducting non-therapeutic research on those unable to consent.⁴²⁷ It should be borne in mind that ultimately, it is the courts, not medical research boards, that have the final say on the constitutionality of any medical research.

The apparent justifiability of experiments on persons who cannot consent is still subject to one important proviso. The specific refusal of the incompetent — no matter what the grounds — must always be honoured.⁴²⁸

425 Section 39(4) of the Child Care Act distinguishes between various classes of children. Act 74 of 1983. Children under 14 cannot consent to any form of medical treatment and they can be treated only with proxy consent from their legal guardian. Children aged between 14 and 18 may consent to treatment but not to operations. Only 18-year-olds may consent to any form of medical intervention. The treatment can include experimentation.

426 The new Mental Health Act allows interventions if consent is granted by a spouse, next of kin, partner, associate, parent or guardian. Act 17 2002 ('MHA'). It does not, however, seem to allow any non-therapeutic experimentation on mentally ill patients. People may be submitted to 'involuntary care, treatment and rehabilitation' which 'means the provision of health interventions to people incapable of making informed decisions due to their mental health status and who refuse health intervention but require such services for their own protection or for the protection of others'. MHA s 1. No provision of the Act allows experimentation.

427 South African Medical Research Council *Guidelines on Ethics for Medical Research* (1993). The guidelines allow therapeutic research if there exists only 'minimal risk'. 'Minimal risk' is defined as a small chance of a trivial reaction or an extremely remote possibility of serious harm or death. Non-therapeutic research (and therapeutic research on incompetent subjects) may be conducted only if there is a 'negligible risk'. Negligible risk is defined as risk 'equal to the probability and magnitude of physical or psychological harm that is normally encountered in the daily lives of people in a stable society or in the routine performance of physical or psychological examination or test'. Both Van Wyk and Van Oosten claim that the *Guideline's* definition of minimal risk is not in line with international practice. See Van Wyk (supra) at 11 and 22; Van Oosten at 12.

428 MRC *Guidelines* (supra) at 5.1 (Research can only be conducted on an incompetent with their assent. 'Assent implies a willingness that does not necessarily carry the greater understanding and legal implications that are generally understood by "consent".')