This peer-reviewed book, *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa*, contains a number of contributions about the role of the highest ('apex') courts in Brazil, India and South Africa, in giving effect to the generous group of rights recognised by the aspirational constitutions of these three countries. It is the result of a collaborative research project between researchers in the three countries, involving academics, human rights activists and a judge.

The aim of the book is to provide starting points for a horizontal South-South-South 'trialogue' about transformative constitutionalism. While not laying claim to provide a comprehensive comparison of every important aspect covered in each of the three Constitutions, the book focuses on selected thematic areas, including gender, socio-economic rights, land rights and the role of civil society.

The book is edited by a scholar from each of the regions (Oscar Vilhena, Upendra Baxi and Frans Viljoen).

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PART A: INTRODUCTION AND CONCEPTUALISATION

INTRODUCTION

Oscar Vilhena Vieira, Upendra Baxi and Frans Viljoen

1 Introduction

This book is about how apex courts in Brazil, India and South Africa are meeting the challenge of implementing the generous group of rights recognised by the aspirational Constitutions of these three countries. We use the term 'apex courts' to refer to the courts in countries that have the final say on constitutional matters: in Brazil, the Supreme Court (*Supremo Tribunal Federal*, or STF); in India, the Supreme Court; and in South Africa, the Constitutional Court. The differences between the constitutions, apex courts and legal cultures of these three countries are numerous and significant, threatening to render any attempt at comparison suspect, if not useless. However, in our view, they also share a number of features that allow for a productive comparative analysis. All three countries chose to depart from the past – a past of colonialism, apartheid or military regimes – through a constitutional process. These processes resulted in bold constitutional documents that not only aim at regulating the distribution of power, the organisation of a system of representation, and the definition of individual rights, but which also aspire to establish a new political and moral foundation for each society. The three Constitutions are ambitious normative documents. During their existence, these Constitutions have been able to establish relatively stable democratic systems, which occupy key positions in their respective regions. The three apex courts became pre-eminent by adjudicating hard cases in the exercise of their constitutional role. This is not to say that these courts' activities are not ambiguous or subject to criticism. Yet, they personify a new world-wide wave of constitutional adjudication.

These three countries (together referred to as the IBSA countries or, following the alphabetical sequence, the BISA countries) also share common problems, namely, the challenge of overcoming poverty, discrimination and inequality and promoting equal access to good quality education, health and housing programmes. In this sense, they share the challenge of implementing ambitious constitutional promises, especially the universalisation of human

rights entrenched in their own constitutions and in the international human rights treaties ratified by these states. Apex courts are certainly not the only actors involved in this process. However, they are in a pivotal position that deserves scholarly attention.

This research project took place against the background of the IBSA Dialogue Forum, formalised between India, Brazil and South Africa, and launched through the adoption of the 'Brasilia Declaration' on 6 June 2003. On the political plane, IBSA brings together three large pluralistic, multicultural and multiracial societies from three continents as a purely South-South grouping of like-minded countries, committed to inclusive sustainable development, in pursuit of the well-being for their peoples and those of the developing world. Its creation recognised the necessity for countries of the South to counter their geo-political marginalisation. The principles, norms and values underpinning the IBSA Dialogue Forum are participatory democracy, respect for human rights, the rule of law and the strengthening of multilateralism.

In the sphere of rights, there has been a very wide gap in the three countries between the stated law and its fruition by the majority of the people. There has been an enormous difficulty to implement rights promised by law, for historical, political, economic and institutional reasons. Constitutional courts are fundamental to the implementation of rights. First, they have the power to make final binding judgments over rights issues. Second, they tend to occupy – albeit with some formal differences – the position of the highest institution of appeal in the judicial branch, and are therefore responsible for monitoring rights implementation in all other national judicial organs. Third, they are empowered to constrain the legislative and executive branches when these branches threaten through their action or inaction the rights protected by the Constitution.

By comparing the Constitutions and constitutional jurisprudence of the apex courts of three leading countries in the south (Brazil, India and South Africa), this work also aims to contribute towards a shift in the focus of those engaged in constitutional analysis in these three countries. It is anticipated that this shift would, on the one hand, see the gradual questioning of the traditional and long-standing north-south axis of comparison (comparing countries in the south with, for example, Germany, Canada, the United States and the United Kingdom), and the exploration of the potential of a south-south axis of comparison. On the other hand, the work also aims to bridge the often too rigid divide between 'common law' and 'civil law' countries, even in the south.

The book is the result of a collaborative research project between researchers in Brazil, India and South Africa, involving academics, human rights activists and a judge from these countries. Three meetings, which brought together researchers from the three countries, took place in 2007 and 2008, in Oxford (4-5 May 2007, under the aegis of the Centre for Brazilian

Studies, University of Oxford), in New Delhi (28-29 April 2008, organised by the NALSAR University of Law, Hyderabad and the Law and Society South Asia Network)) and Pretoria (13-14 December 2008, organised by the Centre for Human Rights, University of Pretoria).

Papers were subsequently subjected to peer review and were reworked for publication. A few contributions were prepared for this publication specifically and had not been presented as part of the project. The project's first objective was to understand the role of the apex courts in Brazil, India and South Africa in the promotion and protection of human rights, through a comparative assessment of legal and political strategies, judicial precedents and institutional designs that have impacted on issues related to constitutional and human rights in BISA. Findings were deduced from the perspective of legal academics, as well as civil society and public interest law organisations in their court-related interventions. The second objective was to provide the legal profession, fundamental rights centres and pro bono institutes with a comparative array of legal decisions and strategies so that lessons can be learnt and shared, with the ultimate goal of improving the practice of human rights.

It is correct that a literature on comparative constitutional law and works on the transformative role of constitutions already exists. At least three important precursors of this book are R Gargarella *et al* (eds) *Courts and social transformation in new democracies: An institutional voice for the poor?* (2006); V Gauri & DM Brinks (eds) *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (2010), and R Hirschl *Towards juristocracy: The origins and consequences of the new constitutionalism* (2004). These books were extremely important in the development of new concepts and methodologies. *Courting social justice: Judicial enforcement of social and economic rights in the developing world* was particularly innovative in analysing the sources of and variation in social and economic rights litigation, explaining why actors are now turning to the courts to enforce social and economic rights, measuring the aggregate impact of litigation in each country, and assessing the relevance of the empirical findings for legal theory.

Still, this work is unique in a number of ways. First, rather than engaging in a comparison between the three legal regimes, at the macro level, it focuses on particular aspects of the constitutionalism, and looks into the way in which the three states deal with that particular issue. It is the first book that provides a comprehensive comparison of the Constitutions and apex courts of these three countries, in particular. Second, while the South African and even the Indian experience have received much consideration from the comparative academia, less attention has been paid to the Brazilian case, probably as a consequence of language barriers. Third, while the comparisons are drawn with a view to providing insights and deepen understanding of the three systems, the work also adopts a critical stance to comparative research, showing an acute awareness of the pitfalls of comparative 'methodologies'.

None of the books mentioned above undertakes a horizontal country comparison, at the micro level, between jurisdictions. It contains separate essays on different countries, which cumulatively make up the comparative element. This book, we believe, is unique and different in that it compares various aspects of the work of the apex courts in the three countries 'horizontally', which is drawing comparisons between the three countries. Although the focus of the book is also on 'transformation', a broader view of transformation, reaching beyond socio-economic rights and concerns, is adopted in the book.

In the research project, as in the book, each aspect of constitutionalism is as far as possible viewed from the three country perspectives, making for a potentially insightful 'trialogue' on each specific right or thematic issue.

2 Structure of the book and summaries of Chapters

The book is organised in six parts.

Part A (Chapters 1-4) provides a background to the project from which this book results. It also contains two essays, with replies, on the two main crosscutting concerns of the work: the concept of 'transformative constitutionalism' and a reflection on the methodology and possibilities of 'legal/ constitutional comparison'.

In **Chapter 1**, Upendra Baxi outlines possible readings of transformative constitutionalism, drawing from the different experiences of the Brazilian, Indian and South African Constitutions. In the first part, Baxi reveals transformative constitutionalism as a bridge in a post-colonial scenario, placing post-liberal constitutions within an 'ethics of transformation' marked by the idea of a 'constitutional insurgency', identifying such movements related to constitution-making with Antonio Negri's notion of 'multitude'. In the second part, Baxi adopts a materialistic/structural reading of the transformative nature of constitutions as a space of mediation 'among the ruling classes, the state, and the ruled classes' regarding the fairness of distribution of primary goods, such as equality and liberty. Furthermore, in the third part, Upendra Baxi notes that transformative constitutionalism must 're-organise both memory and forgetfulness'. Accordingly, the BISA project, Baxi argues, articulates the idea of transformative constitutionalism not only as an institutional development through constitutions, but rather as 'a redemptive potential construed in terms of effective implementation of human rights, especially the social and economic rights'. Placing civil and political rights within this framework of social and economic rights, in the three jurisdictions, according to Baxi, makes the case for the post-liberal nature of the transformative constitutionalism in the aforementioned countries.

In **Chapter 2**, Theunis Roux, in a reply to Upendra Baxi's contribution, disagrees with the 'fundamental premises of Prof Baxi's argument'. First, Roux criticises Baxi's account of the bridge as a metaphor for transformative constitutionalism and, second, he argues against the idea that post-colonial constitutions, like those of Brazil, India and South Africa, mark a conceptual break with Western individualist approaches to human rights, and a corresponding affirmation of the strength of the multitude in those countries. Regarding the first issue, Roux highlights that other scholarly works have better understood the nature of transition, citing works by Ginsburg, Klug, Meierhenrich and Hirschl. In relation to the second issue, of post-liberal constitutions, Roux argues that the '1996 South African Constitution is best viewed as a working through of the liberal tradition in the particular historical circumstances of South Africa'. Furthermore, Roux argues that liberalism as an evolving theory, is not inherently conservative, and can therefore be transformative. In this sense, he fundamentally disagrees with Baxi's view of transformative constitutionalism as a post-liberal endeavour.

In **Chapters 3 and 4**, the book reflects on appropriate methodologies towards the nature of comparative constitutional law.

In **Chapter 3**, Conrado Hübner Mendes sketches the theoretical significance, the practical hurdles and the political risks that surround the dialogue between constitutional courts. The author outlines the bases of this dialogue, both from a normative and a methodological perspective or, in his words, in accordance with 'the ethics and the mechanics of comparative constitutional law'. In relation to the 'ethics', Mendes postulates three principles that can generally answer the question of 'why to compare?', namely: 'self-understanding'; 'self-improvement'; and 'mutual co-operation'. Regarding the 'mechanics', Mendes highlights the descriptive and the evaluative difficulties that underlie the question of 'how to compare?' and warns against two risks: 'descriptive myopia' and 'normative naiveté'. Subsequently, Mendes adds to the ethics and mechanics a third perspective: the 'geopolitics of comparative constitutional law'. In this respect, he considers the danger of using comparative practices as a means for power struggle and points out the challenge of mitigating that risk. Finally, Mendes puts forward the ideal of a 'global constitution of rights', a cosmopolitan aspiration for the give-and-take of reasons between constitutional courts.

In **Chapter 4**, Henk Botha comments on Mendes's account of the ethics, mechanics and geopolitics of comparative constitutional law with reference to South Africa's experience in constitutional comparativism. Botha argues that comparative constitutional law is situated at the intersection of two communities – the national and the global – both of which are contingent, unstable and as yet incomplete. Accordingly, the engagement with the foreign 'other' through comparative constitutional law can be helpful in broadening the constitutional imagination and in facilitating a confrontation with those differences that are internal to the national community. In South

Africa, the greatest danger facing comparative constitutionalism is not that the self may be assimilated to the foreign other, but that comparative law may lose its capacity to broaden the constitutional imagination and to facilitate a confrontation with those differences that are internal to the national community.

In **Part B (Chapters 5-8)**, the Constitutions and apex courts of the three countries are introduced. The role of international law in the three countries is also considered, as an issue of overarching interest. These chapters provide the background against which the particular rights and specific themes in Part C and D are discussed.

In **Chapter 5**, Oscar Vilhena Vieira describes the Brazilian constitutional framework, focusing on the constitutional text itself as well as on the functioning and jurisprudence of the Brazilian STF. In the first part of the chapter, Vieira outlines the foundations of the 1988 Federal Constitution, describing its fundamental constitutional principles; its Bill of Rights which contains both civil and political as well as social and economic rights; and its general rights framework, in particular how rights apply with immediate effect, and how rights can be expanded (by the recognition, for instance, of implicit rights) or restricted. In the second part of the chapter, Vieira describes the Supreme Court of Brazil and its three main functions, namely, its role as a constitutional court, as a specialised court and, finally, as a court of last resort. Vieira discusses the Court's functioning, its composition as well as its position within the Brazilian political system. In general, Vieira argues that the current Constitution, conceived amid the transition to democracy, established a system where the Supreme Court plays a prominent role due to the prolific charter of rights and the increasing number of political actors that engage with the Court in the constitutional debate, although the Court has been notably overloaded with supervising minor governmental issues due to its specialised competence.

In **Chapter 6**, Shylashri Shankar presents an introduction to the Supreme Court of India. In relation to the badge of 'progressive' or 'transformative', often assigned to the Supreme Court of India, Shankar argues that a 'review of cases demonstrates that despite increasing judicialisation, the involvement in politics of India's higher judiciary, particularly the Supreme Court, is marked by a balancing act between supporting government actions and holding the executive accountable for its performance'. In this sense, due to their prudence, the legitimacy of India's Supreme Court judges, according to Shankar, is fourfold, being based on 'laws; institutional norms/experience/ rules; political preferences; and public concerns that may constrain or expand the menu of choices'. With this in mind, Shankar notes the negotiator role of high court judges, mediating the political sphere and the ideals of the public.

In **Chapter 7**, Wessel le Roux details the structure and jurisprudence of the South African Constitutional Court, situating it within the post-apartheid scenario 'as an instrument of participatory democracy'. First, Le Roux reveals

the background against which the Court operates, influenced by a process of rationalisation of the judicial power and by the demise of apartheid's principle of parliamentary sovereignty replaced by a constitutional democratic system, in which the Court has played a central role. Second, Le Roux details the inclusion of socio-economic rights in the Constitution, and traces how the Court has sought to 'ameliorate the conditions of systematic poverty'. Third, the author outlines the basic structure and composition of the Constitutional Court, with special emphasis to the appointment procedure of the Court. Fourth, Le Roux presents the jurisdiction of the Constitutional Court, both as an appeal court in constitutional matters as well as a remedial court, in order to locate it in relation to the other branches of the South African political system. Finally, the author reveals by whom, when and how the Court can be accessed. Within this overall analysis of the Court, Le Roux understands the Court as one of the key institutions of participatory democracy.

Chapter 8, co-authored by Frans Viljoen, Juana Kweitel and Ranbir Singh, deals with the issue of international human rights law in domestic adjudication in the BISA countries. After introducing several scholarly theories regarding incorporation into the domestic level of international law, the authors discuss four main issues in each of the jurisdictions: (i) The constitutional status of international human rights which introduces the issue of hierarchy of international law; (ii) the process of adoption of treaties and their incorporation into the municipal legal system; (iii) international law as an interpretative tool; and, finally, (iv) the issue whether international law alone offers a basis for a direct remedy before domestic courts. The authors argue that there is an increasing trend by apex courts of referring to international law, fostered in Brazil by recent constitutional changes, which refer to international human rights law; in South Africa, driven by the constitutional imperative to 'consider' international law; and in India motivated by the reference at the level of the Supreme Court to several international treaties in recent decisions. Yet, in all three jurisdictions, there is a general lack of knowledge amongst judges of international law that must be addressed in order to ensure that international norms play a more pronounced role before the domestic adjudicatory bodies.

Part C (Chapters 9-24) presents the core of the comparative research, with thematic comparisons of specific rights in the three countries. The specific rights or thematic issues covered are gender, sexual minorities, religion, health and livelihood, land, and social movements and apex courts.

Chapters 9-11 debate gender and constitutional courts, drawing from the experiences of the three countries under study.

In **Chapter 9**, Daniela Ikawa analyses the Brazilian Supreme Court from a gender perspective. Women's rights were originally conceived of as oppositional to patriarchy. As such, according to the author, those rights were and are mainly grounded on a binary perception of gender inequality,

that is, on the antagonism between men and women. On the one hand, a binary perception of inequality strengthens the position of women, as it universalises the demands of the group as one set of demands. On the other, a binary perception hides the positions of those women who do not necessarily fit the reference implicitly adopted by the feminist movement in its inception: the reference of a high or middle class white heterosexual woman. In her chapter, Ikawa questions the binary approach in the analysis of two main cases on women's rights recently decided by the Brazilian Supreme Court: the *Maternity Leave* case and the *Abortion* case. Such analysis will point to the need to extend the Supreme Court's role in protecting women's rights, by adopting a non-binary perspective of gender inequality with a focus on race and poverty. With that, the article returns to the intersections between gender, race and poverty raised by Sandy Fredman in her contribution on gender discrimination in South Africa.

In **Chapter 10,** Indira Jaising maps the trajectory of the Supreme Court in respect of gender justice along three distinct yet overlapping post-independence phases. In the first phase, the Court was influenced by pre-constitutional modes of delivering justice, and only responded to formal equality. In its second phase, the Court was marked by the emergence of a decisive break within the British adversarial mode of dispensing justice and a shift in the focus from civil and political rights to socio-economic rights. In the third, the Court often upheld legislation on the ground that it would further the agenda of liberalisation and privatisation. It also became aware of international law, resulting in some benefits for women, in that it focused attention on substantive equality. This overview indicates that, while the Court is willing to address issues faced by women in the public domain, the Court is reluctant to address the issues of the rights of women in what is perceived to be the private domain, namely, family, marriage, divorce, inheritance and guardianship. Considering that laws relating to the private domain have a disparate impact on women, women continue to be subjected to unequal laws in these matters. The Court has circumvented the issues of discrimination either by paying homage to the legislature or by interpreting statutes to mitigate the discriminatory aspects of personal laws. While affirmative action in the matter of employment and education in favour of women has come to stay and has been recognised as a dimension of the right to equality, there is still no understanding of the impact of discriminatory laws in the private sphere.

In **Chapter 11,** Sandra Fredman argues that the South African Constitution is rich in transformative potential. At the same time, in the context of a new democratic order and an expressly activist political sphere, the South African Constitutional Court has been acutely aware of the delicate balance between appropriate deference and interventionism in achieving the transformational ideal. In the context of gender, according to Fredman, the fault-lines of transformation have proved particularly challenging. The cases analysed in her contribution demonstrate that the Court is capable of directly challenging patriarchy within marriage and property ownership. At the same time, the

analysis reveals a significant divergence between formal and substantive conceptions of equality in the different cases. Particularly disturbing is the easy resort to formal, liberal notions of choice, autonomy and equality in its response to gender-based cases in the most complex of fields. In this regard, Fredman argues that the Court has unnecessarily abdicated its proper role in these cases. This is not to say that the Court should substitute its decision for that of the legislature. Instead, according to the author, it should fearlessly insist on accountability and justification from the state, which should be required to produce a thorough, evidence-based set of reasons for any prima facie discrimination. In this way, the Court can facilitate and strengthen deliberative democracy, without usurping the functions of the legislature.

Chapters 12-14 present a comprehensive analysis on sexual minorities in each of the three BISA countries.

In **Chapter 12**, Thiago Amparo and Samuel Friedman reflect on the transformative nature of the recent jurisprudence on sexual orientation by the Brazilian Supreme Court. On 5 May 2011, the Brazilian STF decided unanimously that article 1723 of the Civil Statute, which establishes civil unions between men and women, should be interpreted as also including same-sex unions. In this chapter, the authors argue that the STF approach to recognition of sexual minorities' rights is based on a delicate equilibrium between bold rights protection and deference to democratic legitimacy. In other words, while the decision represents a curious moment in the Court's reading of sexual freedom, similar to South Africa and India, the decision relied on a reluctant legislature and lower courts to fill the normative gap, which may delay or even altogether undermine the effects of the decision.

In **Chapter 13**, Arvind Nairran argues that there is a paradigm shift from social morality to constitutional morality in India. In order to demonstrate this shift, the author presents the story of Nowshirwan Irani 'who was persecuted in Sind in the year 1932, for having a consenting relationship with Ratansi', considered by Nairran, 'a subaltern Oscar Wilde'. This case related to section 377 of the Indian Penal Code, dealing with non-procreative sexual acts, according to the author, is 'emblematic of the ethical and moral poverty of the judicial discourse' with the use of language such as 'animal-like' to describe homosexual acts. Further in his contribution, Nairran presents the *Naz Foundation* case decided by the Delhi High Court in 2009, which excluded the application of section 377 to consensual intercourse between adults in private. Narrain provides a compelling description of the court proceedings that led to the decision, including the use of comparative constitutional law (including South African case law) as well as the judicial reading of public morality. At the core of the chapter, Narrain details the concept of 'constitutional morality', from the Hart-Devlin debate to the Naz Foundation decision or, in other words, from the idea of homosexuality as an issue of 'private immorality' to the view that it 'goes to the heart of the meaning of the freedoms guaranteed under the Indian Constitution'. Finally, Narrain compares the *Naz Foundation* case with South African and Brazilian decisions

on same-sex rights, highlighting that all those decisions 'focus on love and intimacy as a signifier of LGBT lives' and on the 'basic values of the Constitution'. He further argues that those judicial statements show 'historical sensitivity to national histories of oppression'. The author ends the chapter in a sober note, noting the still long road to social transformation for LGBT people.

In **Chapter 14**, Jaco Barnard-Naudé argues that the inclusion of 'sexual orientation' as a ground of presumed unfair discrimination in the equality provisions of the South African Constitution paved the way for significant advances in the achievement of freedom for those who find themselves outside of the heterosexual and heteronormative hegemony in South Africa. Arguing that South Africa has been, compared to Brazil and India, at the forefront of legal developments in this area, this chapter tracks and considers these developments, arguing that any evaluation of these developments should not lose sight of the fact that they both challenge and acknowledge – although they do not necessarily accept or celebrate – the disciplinary power of the heteronormative hegemony that prevails in post-apartheid South Africa. The chapter concludes with a consideration of the societal challenges that sexual minorities continue to face amidst legal transformation.

Chapters 15-17 are dedicated to the issue of religion and constitutional courts.

In **Chapter 15**, Eloísa Machado de Almeida discusses two issues related to religious freedom in Brazil: (a) the constitutional framework relating to religious freedom as defined by the Constitution of 1988; (b) the potential influence of South African cases in future Brazilian jurisprudence. In relation to the first issue, Almeida presents the history of Brazilian constitutionalism, where there was, until the Republic, recognition of an official religion, as well as a certain degree of freedom granted to the private exercise of religion. As far as the Constitution of 1988 is concerned, the author argues that this legal document establishes a secular state, where 'firstly, it is forbidden for the Brazilian state to promote any religious practice; on the other hand, the State is also forbidden to hinder the exercise of religion'. Furthermore, the author reveals the lack of comprehensive jurisprudence, in the apex constitutional court in Brazil, regarding religious freedom, although certain decisions were already taken and several others are still pending. That is why, she argues, the South African cases are likely to influence future Brazilian jurisprudence on religious freedom, in particular 'regarding the centrality and relevance of conflicting religious practices, as well as to which extent the genuine nature of a person's faith is constitutionally relevant'.

In **Chapter 16**, Shylashri Shankar points to the danger associated with courts exercising their interpretive powers in multi-cultural societies with transformative constitutions, namely, that judges may be drawn into adjudicating issues that force the state into the realm of religious freedom. India's legislature and the judiciary face the problem of where the boundaries

of state secularism ought to be drawn and are drawn, and who ought to determine these boundaries in India. She warns that judgments could become idiosyncratic, and depend more on the judge's personal predilections rather than on deep principles, and suggest that it may be impossible to develop such principles in matters of faith.

In **Chapter 17**, Mtende Mhango compares two Consitutional Court cases, *Prince* and *Pillay*, in the light of the history of religious freedom under the apartheid government of South Africa, when laws were inclined towards Christian religious values. He points out that this preference was not completely eradicated with the new constitutional dispensation. Mhango further discusses the current interpretation of freedom of religion under the South African Constitution by examining the decisions of the Court in *Prince* and *Pillay*, and their impact on human rights and the transformative agenda of the South African society.

Chapters 18-20 are concerned with the justiciability of the right to health and to a livelihood from a comparative constitutional perspective.

In **Chapter 18**, Octavio Ferraz reflects on the issue of the right to health in South Africa and Brazil. In his chapter he argues that the dilemma between usurpation and abdication that courts inevitably face when they are called upon to adjudicate constitutionalised socio-economic rights is indeed a real and intractable one. He tries to substantiate his conclusion with a comparative analysis of the socio-economic rights jurisprudence of the South African and Brazilian courts, particularly in the field of the right to health, which currently stand on opposite sides of the 'justiciability spectrum'. While the South African reasonableness approach is seen as too deferential and abdicative of the judiciary's role in protecting rights, the Brazilian individually-enforceable rights approach is deemed to be too intrusive as it leads to the usurpation of the prerogative of elected representatives to define how the limited resources of the state should be allocated amongst unlimited social needs. He further argues that the emerging co-operative constitutionalism theories, which try to apply the institutional dialogue theories of judicial review to socio-economic rights adjudication, do not solve the dilemma. They are currently largely procedural, and therefore liable to the same charges of abdication levelled against the reasonableness approach of the South African Constitutional Court. However, should they become more substantive, they would certainly attract the criticism of usurpation currently levelled at more assertive courts such as the Brazilian STF. Finally, he concludes that the dilemma might be unsolvable until either a more stable consensus on what socio-economic rights entail emerges or the expectation that rights necessarily imply strong judicial remedies gradually wanes.

In **Chapter 19**, Amita Dhanda replies to Octavio Ferraz with an analysis of the Indian Supreme Court. She addresses the issue of what the role of the courts in relation to the right to health is. Dhanda argues that the Indian Supreme Court does not fit strictly into Ferraz's typology of abdication and usurpation,

because this Court has swung between activism and restraint in its decisions regarding a wide spectrum of health issues. Later, the author analyses several aspects of the jurisprudence of the Indian Supreme Court in relation to health, including medical treatment for accident victims, emergency services, health entitlements of government servants, treatment facilities at mental hospitals and health treatment of prisoners. Dhanda concludes that the Indian jurisprudence is 'better understood when placed on a continuum of activism and restraint', taking note that the role of the courts are determined by the situation at stake, considering that 'co-operative constitutionalism allows courts to give [a] voice to those issues and interests which have been marginalised in the political system'.

In **Chapter 20**, Danie Brand, subsuming the right to health case into a broader preoccupation with 'livelihood rights', investigates how the South African Constitutional Court was shaped by concerns for its institutional competence, legitimacy, integrity and security. He shows that these concerns have informed the Court's approach to the adjudication of livelihood rights, citing the example of its tendency to avoid ordering structural relief. As he points out, this approach contrasts with that of the Indian Supreme Court, which has been much more prepared to retain a role in the enforcement of its own orders. Brand also identifies incoherence in the South African Court's approach to mediate the tension between the interests of particular litigants and the broader collective interest. He conludes that the Court's record in livelihood rights cases can best be described as adequately responsive to the practical problems it has faced in specific cases, but lacking in a unifying, overarching substantive vision of the nature of livelihood rights and the purpose of the Court's involvement with them.

Chapter 21 presents a comprehensive comparison on the right to land in the three jurisdictions. In his chapter, Vinodh Jaichand asks whether there should be an analogous approach of developing countries to the issue of land, land reform and housing arising from the imbalances in their societies. In comparisons between Brazil, India and South Africa, reflecting on the development of the rights arising from land, Jaichand analyses the historical background, the development of constitutional and human rights in those countries, mainly through a scrutiny of the case law of the respective apex courts in each country. He seeks to find parallels that might be apparent in various legal arguments or in the jurisprudence. The laws and constitutions that protect or permit the taking of property in the public interest for land reform have been legally challenged which result in long delays in implementing any policy to address the imbalance. Furthermore, Jaichand argues that this socio-legal analysis reveals more commonalities on approaches than appears at first sight in the three countries.

Chapters 22-24 discuss the social basis of the transformative constitutionalism, by focusing on the relation between social movements and apex courts in Brazil, India and South Africa.

In **Chapter 22**, Marcela Vieira and Flavia Annenberg describe the involvement of social movements and civil society organisations in some of the cases of great social impact that have been decided or are on the agenda of the Brazilian Supreme Court. In Brazil, social movements and civil society organisations do not have constitutional standing to bring cases directly to the Supreme Court. However, there are means to participate in the constitutional litigation. The chapter focuses on the presentation of *amicus curiae* briefs and participation in public hearings carried out by the Court. The cases briefly demonstrate that civil society organisations and social movements have played an increasingly activist role before the Brazilian Supreme Court. The prominent role of the Court in the Brazilian political system as a privileged arena of public deliberation, and the great importance of the cases on the agenda of the Court, contributed to the recognition by civil society organisations and social movements of the importance of the judiciary as a locus of political action and guarantor of rights. These mechanisms of participation are ways to democratise access to the highest court in Brazil and to pluralise the constitutional debate, by broadening the means of participation of civil society in the decisions of Supreme Court. However, the level of institutionalisation and technical expertise required to act before the Supreme Court imposes difficulties for social movements, thus inhibiting them from participation in this arena. In most cases, the demands of social movements are brought to the judiciary through or in close collaboration with civil society organisations in view of the fluid and informal nature of these movements. The increase in participation ultimately also generates more legitimacy for the judgments of the Supreme Court. However, the authors argue the substantial effects of this pluralisation should be, over time, perceived in the reasoning of the justices in their opinions, with eventual reception of the arguments presented by the amici curiae and the participants of public hearings.

In **Chapter 23**, Arun Thiruvengadam assesses the shift in the approach of the Indian Supreme Court to issues of human rights and Public Interest Litigation (PIL) in two pivotal periods of the Court's history: first, the period starting in the late 1970s; and second, trends witnessed since the early 1990s. After first describing the 'conservative turn' of the Indian judiciary, he responds to calls made by some progressives to abandon the courts as sites of intervention in view of their hostility to progressive causes in recent years. He urges progressives to increase, rather than abandon, engagement with the law and the courts. Thiruvengadam argues that the problem does not lie with PILs but with the expansive powers assumed by judges. Thiruvengadam asserts that the Indian judiciary should abandon what he terms as the 'command and control' approach to PILs, where judges, not the litigants, control the process. His suggestion is that courts should instead embark on forging a facilitative approach to the adjudication of public interest matters, where the emphasis is on enabling all possible stakeholders to contribute meaningful inputs. He further argues that if PILs are to have any significance for the marginalised sections of Indian society, the focus should be on building a network of organisations, coordinating action between various stakeholders and

adopting a bottom-up approach to litigation that seeks to bring about social change.

In **Chapter 24**, Tshepo Madlingozi analyses the interaction between the South African Constitutional Court and social movements, focusing on four cases where social movements decided to add constitutional litigation to their range of actions which 'by definition rely on extra-institutional mobilisation and direct action'. In his piece, Madlingozi analyses three cases: *Treatment Action Campaign*; the *Merafong Demarcation Forum* and *Abahlali base Mjondolo*. The author argues that most of the constitutional claims of social movements seek to challenge the 'government's neoliberal macro-economic policy'. Madlingozi concludes by highlighting that, although social movements often adopt illegal tactics and are sceptical regarding the Court, they have made use of the Court in order to foster public sympathy for their cases, including with reference to rights language, and as a way to fight against official intimidation. In addition, social movements have accepted the authority of the Court by referring to its judgments in extra-legal activities. Finally, the author reveals that in most of the cases social movements rely on other organisations, particularly legal NGOs, who have the necessary funds to carry out a constitutional litigation.

The two contributions in **Part D** are reflections arising from the comparative work, and address two issues of emerging importance in an increasingly globalised and globalising world, namely, citizenship and the responsibility of non-state actors. While the authors of these contributions do not engage in a methodical comparison of the three countries, they also rely on the work of the apex courts of some of the three countries.

In **Chapter 25**, Sam Adelman addresses the question of 'what kind of hospitality we owe the alien other, the stranger, the refugee or asylum seeker, the non-citizen'; in other words, what the basis of granting rights is, which touches on the question of sovereignty and citizenship. In his chapter, Adelman tests the idea of global citizenship with reference to the jurisprudence of the South African Constitutional Court on socio-economic rights. First, Adelman argues that citizenship has exceeded the national limits due to the 'greater mobility (for some) both literally and virtually, the emergence of a global civil society and the aterritorial nature of global markets'. In this sense, citizenship is in 'flux'. Second, Adelman considers that in modern state systems there lies a tension between hospitality (from a Kantian tradition) and sovereignty. He argues that there is still resistance to free movement of people, in spite of the 'neoliberal orthodoxy that demands free movement of commodities and information'. Furthermore, Adelman concludes that the South African Constitutional Court has been progressive in extending socio-economic rights to non-citizens (in particular, refugees), despite the limited resources available, exposing the challenges of seeing citizenship and rights beyond national boundaries.

In **Chapter 26**, David Bilchitz argues that, if we take rights seriously, we cannot focus our attention only on the obligations of states. In particular, Bilchitz focuses on the actual and potential impact that corporations can have on fundamental rights, which, Bilchitz argues, calls for a legal response. Bilchitz first considers initiatives at the international level to address corporate obligations in relation to fundamental rights. The history of such initiatives demonstrates a dialectic between the ideal of creating more binding obligations and the reality of only voluntary responsibilities being acceptable to corporations and some powerful states. Furthermore, Bilchitz contends that the latest developments in this area – the Special Representative of the Secretary General's Framework and Guiding Principles – suffer from three crucial shortcomings: a lack of binding obligations in law, an approach that focuses upon the duties of states which are often too weak effectively to regulate large corporations, and a minimalist understanding of corporate obligations which focuses only upon the avoidance of harm. All three of these problems are of particular concern for developing countries, which are often particularly adversely affected by the power of corporations. Finally, Bilchitz provides a framework for comparative analysis of domestic laws regarding corporations, ending with a critical engagement with the South African system. He shows that South Africa still lacks an adequate translation of constitutional norms into concrete measures of a legislative and judicial nature in relation to such matters as the fiduciary duties of directors, the 'corporate veil', financial reporting and the liability of corporations for human rights abuses beyond South Africa's borders.

In **Part E**, **Chapter 27** Justice Zak Jacoob of the South African Constitutional Court, who attended two of the three conferences hosted as part of the project, provides 'judicial reflections' on the essays in the book and the project as a whole.

The main 'lessons learnt' and insights gained, from the perspective of the three participating countries, will be highlighted in the concluding part: **Part F**, **Chapter 28**.

3 Limitations of this book

Two inherent limitations to this volume should be identified at the outset.

The first relates to the thematic scope of the work. Clearly, this book does not lay claim to providing a comprehensive comparison of every important aspect covered in each of the three Constitutions. By its very nature, then, the book is eclectic, as it focuses on selected thematic areas. These thematic areas cover selected aspects of the three Constitutions that are of particular importance to transformation, such as gender, socio-economic rights, land rights and the role of civil society.

The second relates to the temporal scope of the work. Most of the contributions published here were initially prepared as conference papers, and were delivered quite some time ago. These papers were subsequently reworked, but have not necessarily been updated to incorporate the most recent relevant developments. The book should therefore not be approached with the expectation of finding a comprehensive updated survey of constitutional law in a particular country, but rather as reflecting the core approach to a particular issue and a discussion of aspects potentially informing comparative insights.

A further caveat is that the book does not represent a series of neat, systematic or comprehensive horizontal comparisons between the three countries. Given that very few of the contributors were (or are) intimately familiar with the constitutional dispensation of a country other than their own, such an approach was not feasible in all instances. While some of the contributions provide an explicit trialogue (either by one author dealing with all three apex Courts (Jaichand), or by three authors explicitly engaging with the views of author authors on a particular theme (Amparo and Friedman; Nairran and Barnard-Naudé, on the issue of sexual minority rights)), in other instances it is left to readers to draw their own comparative insights and conclusions.

4 Acknowledgments

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CHAPTER 1

PRELIMINARY NOTES ON TRANSFORMATIVE CONSTITUTIONALISM

Upendra Baxi

> There must, however, be agreement at any rate on some basis for an understanding of transformative constitutionalism. I would suggest that the Epilogue, also known as the postamble, to the interim Constitution provides that basis. The Epilogue describes the Constitution as providing: 'a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.' This is a magnificent goal for a Constitution: to heal the wounds of the past and guide us to a better future. For me, this is the core idea of transformative constitutionalism: that we must change. But how must we change? How does the society on the other side of the bridge differ from where we stand today?

Justice Pius Langa, Prestige Lecture delivered at Stellenbosch University on 9 October 2006.

> The political is the horizon of the revolution, not terminated but always continued, by the love of time. Every human drive in search of the political consists in this: in living an ethics of transformation through a yearning for participation that is revealed as love for the time to constitute … The dynamic, creative, continual, and procedural constitution of strength is the political … the expression of the multitude and the continual creation of a new world of life remains its fundamental element. To take away this element from the political means to take away everything from it; it means to reduce it to pure administrative and diplomatic mediation, to bureaucratic and police activity – that is, exactly to that against which constituent power, as the origin of the political, continually struggles to emerge in order to emerge as strength … [T]he routine of unchanged repetition [constitutes] … the effects of dead labour, perverse inversions of constituent power, and cannot be used [to] define the political.
>
> Between 1968 and 1979, our generation has seen the love for time oppose any and all manifestations of being for death. The movement of the multitude has expressed its strength everywhere, with that extraordinary massive force that does not indicate its possible exceptionality but its ontological necessity.

> Is what is awaiting us a history of freedom? I would be foolish to say so, confronted as we are by the horrid mutilations of that constituted power continues to inflict on the ontological body of human freedoms and by perpetuating negation that the unbreakable series of freedom, equality, and strength, of the multitude posed in contrast … It is our task to accelerate this strength and recognise its necessity in the love of time.

Antonio Negri *Insurgencies: Constituent power and the modern state* (1999).

> On the 26th January, 1950, we are going to enter into a life of contradictions. In politics, we shall be recognising the principle of one man one vote one value. In our social and economic life, we shall, by reason of economic structure continue to deny [this principle.] How long shall we continue to live this life of contradiction? If we continue to deny it for long, we will do so by putting our democracy in peril.

Bhim Rao Ambedkar, Constituent Assembly Debates, vol XIX at 979.

1 The romantic transformation of the transformative

These three quotes assign a world historic meaning to the making and interpreting of postcolonial constitutions. Thus, Antonio Negri, with all possible caveats, still regards these articulations as heralding an uncertain promise of the 'future' history of freedom. Justice Pius Langa expresses this in a typical South African constitutional idiom of the crossing of a 'bridge'. Speaking to the Indian Constituent Assembly on 14 August 1947, Jawaharlal Nehru announced the moment of Indian independence as articulating 'a tryst with destiny'. Equivalent expressions abound, such as the constitution as a 'cornerstone of the nation' and as a 'charter of social revolution', or even as a 'moral autobiography' of a nation.[1]

For Justice Langa, the Constitution expresses a 'magnificent goal' of the South African transformation. It is to make a deeply-wounded society whole again. The South African Constitution cannot serve this goal without having both a profoundly *diagnostic* (of the past 'wounds') and *therapeutic* character and potential. The diagnostic dimension entails a full understanding of 'a deeply divided society characterised by strife, conflict, untold suffering and injustice'. The therapeutic dimension consists in the making of the interim and the Constitutional Court-certified South African Constitution via popular participation, which shapes the 'future' of a new society. In the originating moment, the constituent power was not transferred to an unelected oligarchy, as is the case with most post-colonial and some post-socialist societies, but articulated a historic movement of popular sovereignty. In this

1 G Austin *The Indian Constitution: Cornerstone of a nation* (1966); U Baxi, '"The little done, the vast undone": Reflection on reading Granville Austin's *The Indian Constitution'* (1967) 9 *Journal of the Indian Law Institute* 323. Incidentally, sec 7(1) of the South African Constitution proclaims the Bill of Rights as the 'cornerstone of democracy in South Africa'.

moment, the Constitution was an element concerned in creating a distinctive constitutional and societal 'we-ness'. In a sense, the making of this 'we-ness' signifies the art and craft of the narrative genera of 'magical realism' of the cathartic process of the Truth and Reconciliation Commission enacting 'responsibility towards memory'.[2]

The metaphor of crossing the bridge is suggestive of a movement from 'where we stand today' – the geography of injustice created by institutionalised state racism. For Justice Langa, the 'transformative' is that movement; yet, 'the society on the other side of the bridge' may remain indiscernible. Perhaps, the other side of the bridge also refers to the north-south divide, aggravated by the current moment of hyperglobalisation imperilling the movement of crossing towards a just South African society and devouring its constitutional values in the orgies of economic rationalism and market fundamentalisms. Perhaps, that 'other side' represents the difficulties of preserving and promoting the élan vital of the original 'transformative' vision. The *ubuntu*-formed 'we-ness' may continue to serve a cathartic and therapeutic notion of constitutional 'we-ness', but it also now remains besieged, at every corner, by the global geopolitics of hyperglobalisation.

The constitution of 'we-ness' emerges differently in Brazil. The 1988 Brazilian Constitution is a successor to as many as seven or eight constitutions – depending on how one distinguishes changes of, as contrasted with changes in, a constitution – starting with the 1824 Imperial Constitution. In particular, it succeeds two major periods of authoritarian rule (1937-1945 and 1964-1985). Neither India nor South Africa had such a rich variety of constitutional forms either to emulate or to discard. In a sense, the 'transformative' here signifies some basic changes in political structures and constitutional cultures. But the 'transformative' also emerges in the pre-ambulatory assertion that speaks to the creation of 'fraternal, pluralist and unprejudiced society, based on social harmony' and the very first article the Brazilian 1988 Constitution constitutionalises the elimination of 'poverty' in the contexts of the rolled-up constitutional values of 'political pluralism'. Further, it locates itself in a wider pan-Latin American solidarity: 'The Federative Republic of Brazil shall seek economic, political, social and cultural integration of the peoples of Latin America, in order to form a Latin American community of nations'.[3] In this, the Brazilian Constitution goes the farthest in terms of constructing (at least normatively) the forms of constitutional 'we-ness'.

Jawaharlal Nehru strove to combine the best (creative) elements that will somehow fuse into an 'organic whole' some forms of 'nationalism and political freedom' and 'social freedom as represented by socialism, which will

2 To invoke here a fecund phrase of Jacques Derrida.
3 Art 4 of the 1988 Brazilian Constitution.

promote a 'classless society'; the removal of 'all invidious social and customary barriers which come in the way of the full development of the individual as well as of any group' constituted the *leitmotif* of Indian constitutionalism.[4] Yet, Dr Bhim Rao Ambedkar, the principal architect of the Indian Constitution, summates (in the third quote above) constitutionalism as a series of contradictions; life *under* a constitution is for him a 'life *of* contradictions'. The contradictions are not just normative or institutional but material (arising from the 'economic structure').

For Antonio Negri, the 'ethic' of constitutional insurgencies is also 'ethics of transformation': 'The political is the horizon of the revolution, not terminated but always continued, by the love of time'. The political signifies the power, strength, and movement of the multitudes. What matters, then, are not contradictions of constitutionalism but forms of 'insurgencies' that characterise life under constitutions. Insurgencies designate constituent power – the making (and remaking) of constitutions. Constitutions as the grammars of the constituted power often tend towards the reduction of the constituent power, thus diminishing the range of the political. If we were to regard constituent power as 'the origin of the political', then the negation of the political by the constituted power invites continual 'struggles' in order to emerge as 'strength'. Negri frames these struggles in terms of the 'massive' and exceptional force of the movement of constituent power which has as its 'fundamental element' the 'continual creation of a new world of life'.

Negri writes exclusively in the registers of Euro-American thoughtways; yet, his narrative would be far more enriched in the experiences of the making of post-colonial/imperial (and now post-socialist) constitutions. The transformative element here goes beyond two kinds of the Holy Trinity and the thousand gifted expositors and epigones – that forever continues to define 'politics' and the 'political' – on the one hand Hobbes, Locke, and Rousseau and on the other hand Freud, Marx and Nietzsche. Anti-colonial and anti-empire constitutional insurgencies enact for example a radical principle of self-determination which confronted colonialism/imperialism/apartheid via a quest for the 'continual creation of a new world of life'. Insurgencies thus invented this principle and inaugurated a new age of human rights, contrary to all the strange talk which still continues to insist on the sole authorship by the 'Western' world of contemporary human rights.[5]

Justice Langa's rhetoric speaks, as do the constitution-makers of India and Brazil, of the transformative in terms of 'the recognition of human rights, democracy and peaceful co-existence and development opportunities'. No context-sensitive reading will ever conflate the history of these phrases with

4 I derive these quoted words respectively from *Seven selected works of Jawaharlal Nehru* 60-61 (1975), and *Four selected works* (1973) 119. See also P Chatterjee *Nationalist thought and the colonial world*: *A derivative discourse* (1976).

5 See U Baxi *The future of human rights* 3rd ed (2008) chap 2 (cited hereafter as Baxi *Future*). See also B Bowring *The degradation of the international legal order? The rehabilitation of law and the possibility of politics* (2008).

some extraordinary and mythical Euro-American claims of authorship of human rights, freedom, rule of law, and good governance because all these 'values' stood harnessed, as a matter of history, to the tasks of colonial, imperialistic, and racist subjection of the 'non-European' peoples. Yet, all this fully said, it also remains the case that postcolonial constitutional elites may also use this rhetoric to mask constitutional *regression*. This regression occurs, as Negri says, in 'the horrid mutilations … that constituted power continues to inflict on the ontological body of human freedoms and by perpetuating negation that the unbreakable series of freedom, equality, and strength, of the multitude posed in contrast'.

2 Transformation and judgment

Transformative constitutionalism presents a distorted lens. Perhaps, asking 'what is transformed and what is left intact' by the acts of making constitutions is a crucial question. Struggles that shape historical change are always born outside the ornate chambers of constituent assemblies; yet, these assemblies lead to writing constitutions in ways in which that which is left 'intact' often overwhelms the elements of transformative vision. In the sections that follow, we pursue aspects of continuity and change in relation to the BISA (Brazil, India, and South African) constitutionalism; for the moment, two prefatory remarks remain necessary.

A remark in K Marx *The eighteenth brumaire of Louis Napoleon* (1852) fully suggests that the 'transformative' may be better grasped by the imagery of constitutions and laws as the 'necessities of class struggle'. This remark made great sense in a previous epoch which grasped the mode of production of the constituted power of the bourgeois constitutions which enacted the rule of capital under the banner of the 'rule of law'. In that epoch, even as the normative core of constitutions marks the '*contract social* between the government and the bourgeoisie', it opens up spaces for critical judgment among the ruling classes. Constitutions thus regarded as the forms of mediation of conflicts between capital and labour become and remain transformative precisely in as far as they tend to become 'a material force', spheres that entail an acknowledgement of both the practical and material labours of *governance* and of *resistance*.

In contrast, today a cultural grasp of 'transformation' remains more privileged. No longer is the 'political' framed in terms of the logic and the dynamic of conflict between those who own the means of production and those who only own their labour-power. Rather, the constitutive core of 'transformative' remains grasped as marking dialectics of 'identity' and 'difference'. In this way relation between the elements of the 'old' and the 'new', begin to be thought (to borrow here the phrase regime of Raymond

Williams) struggles between the dominant, emergent and residual cultures.[6] No longer, then, may we place regard on any distinctive Marxian registers, values as rationalisations of strategic interests; rather, on the plane of normative ethics, constitutional values are 'things' that we *ought* to desire.[7] The discourse of transformation thus invents forms of attribution of desire that all citizens ought to continually fabricate and cherish.

This presents a difficult moment for our present conversation. How does one choose either between a materialist or cultural understanding of the 'transformative'? If the concern is with transforming *constitutional cultures*, how may one differentiate the many different cultures of governance/ domination from other equally varied cultures of constitutional *resistance?* How may one extend the talk about dominant, emergent, or residual cultures to what Michel Foucault names the liberal 'art(s) of governance' in which 'control is no longer just the necessary counterweight to freedom' but 'becomes its mainspring?'[8] How may we in turn proceed to read the art(s) of resistance exemplified by the movements of the dispossessed, disadvantaged, and disenfranchised humans living under the regimes of 'transformative constitutionalism' everywhere in the conditions of the Global South? *Faute de mieux,* the 'transformative' remains then always an affair of contentious politics,[9] all too often triggered by the normative core of postcolonial constitutions but also going beyond this. Rather than speak theoretically to this dimension, I address it below in several BISA-ridden/riven contexts.

3 Reading transformative constitutionalism

If the 'transformative' is the *promise*, it only makes sense in the context of *betrayal*.[10] Our preferred way of reading transformative constitutionalism will always determine our grasp of the promise within the context of betrayal. Comparative constitutional studies (COCOS) alert us to different acts of reading such as the normative, structural, historical, and empirical ways. These descriptors carry different disciplinary histories, which I may indicate here only in a summary way.

6 R Williams *Marxism and literature* (1977). In a sense that matters here, we need to take a step beyond Negri, and proceed to more fully cognise historical articulations of constituent power in the BISA constitutional law regions (hereafter CLR) which must now surely go beyond the archival by Negri of the doctrinal histories of forms of progressively Eurocentric (from Machiavelli to Marx.) If so, how may we proceed to trace different histories of ideas concerning the constitution of 'legal' and 'popular' sovereignties in the exploration of BISA/CLR? Put another way, how may we begin to take even the first tentative steps in grasping the notion of the 'transformative' beyond the 'shores of (European) politics'?

7 J Stone *The social dimensions of law and justice* (1966).

8 M Foucault *The birth of biopolitics: Lectures at the College de France, 1978-1979* trans G Buerchell (2008) 67.

9 See D McAdam *et al* 'To map contentious politics' (1996) 1 *Mobilisation* 17; MP Young 'Reply to Tilly: Contention and confession' (2002) 67 *American Sociological Review* 693.

10 JH Miller '(In)Felicitous speech acts in Kafka's *The trial*' (2000) 4 *Tympanum* http://www.usc.edu/dept/comp-lit/tympanum/4/miller.html (accessed 18 April 2007).

Extending here Goran Therborn's notion, one way of structural reading of constitutions invites us to grasp, in some Marx-like ways, the originary promise in a 'threefold-cornered mediation of relationship between among the ruling classes, the state, and the ruled classes, in which the main problem concerns the strength of the ruled classes'.[11] Constitutional promise and betrayal, on this reading, make best sense as furthering the 'strength of the ruled classes'.

Another kind of structural understanding remains enunciated in less marked ideological terms, speaking to us about the idea of a constitution as furnishing of an 'optimal design' of efficient governance: The constitutional economics type discipline urges us to regard constitutions/constitutionalism talk as primarily concerned with designing, maintaining, servicing, and repairing huge *governance machines*. Put differently, constituted powers as coalitional markets of power and domination manufacturing, as well mediating our grasp of both the *repressive* and *mediating* role and function of the state.[12] In this way, histories of constituent and constituted powers emerge as narratives reading constitutions as state-formative practices, which constitutionalise the 'foundational' as well as 'reiterative' violence[13] in the name of constitutional legality. All this in turn require a grasp of what Marx insightfully named the distinction between the 'force of phrases' and 'force without phrases', or the cohabitation/indwelling of the 'rule of law' and the 'reign of terror'.

Normative/philosophical readings in contrast fully suggest that constitutional arrangements are normative ways of inventing and replenishing social co-operation as promoting a fair and equal distribution of liberty and equality as primary goods.[14] This offers an enormously complex 'moral' reading of constitutions in which the 'constitutional essentials', here following John Rawls, suggest at least the following:

(1) A constitution may not prescribe any 'comprehensive' conceptions of good life, thus respecting lived life forms outside the constitution.
(2) Constitutions thus ought to respect the distinction between the 'reasonable' and the 'rational' state and citizen conduct; that is, what citizens and political actors may consider as 'rational' (in terms of ends-means directed rationality) may not always count as 'reasonable'.
(3) Constitutions ought thus to regard 'justice' not as any 'metaphysical' virtue but rather as an affair of 'overlapping' deliberative 'consensus' or 'pubic will' formations.

11 G Therborn *What does the ruling class do when it rules?* (1978) 181.
12 See U Baxi 'Modelling "optimal" constitutional designs for government structures: Some debutant remarks' in S Khilnani *et al* (eds) *Comparative constitutionalism in South Asia* (2013).
13 J Derrida *Acts of religion* (2002) 228-298.
14 J Rawls *Political liberalism* (1993); FI Michelman 'The constitution as a legitimation contract' (2003) 8 *Review of Constitutional Studies* 101; FI Michelman 'Constitutional legitimation for political acts' (2003) 66 *Modern Law Review* 1.

4) Constitutions ought further in so doing respect an order of minimal 'precommitment', that is display and fructify respect for some 'thin' versions of human rights minimalism contrasted with the 'thick' versions.
5) Constitutions ought also to provide space for autonomous adjudication as actualising the exemplarship of 'public reason'.

We explore further (in Section 5) the pertinence of such acts of reading BISA constitutionalism; doing this requires chasing the meanings of constitutions and constitutionalism.

4 Multitudinous constitutionalism

In my previous work,[15] I have identified three 'C's: 'constitutionalism' (C3) in the conventional sense invites attention to the normative theory or ideological core or even the 'spirit' of constitutions; constitutional law is the *official interpretation* (C2) of the text of the constitution (C1). The three 'C's constitute the dialectics of constitutionalism – that is, these pose a number of ideological, normative, and institutional contradictions.

C1 presupposes the idea of a constitution as the basic law which provides for validity of all other norms in the legal order. For the idea of a constitution to exist, there has already to be in place varieties of C3 imagined as an ideological core (certain foundational beliefs). In contrast, normative theory (as noted already in the preceding section) speaks to C3 quite differently in terms of 'constitutional essentials', although implicitly arising from some foundational liberal beliefs concerning a morally decent state and society. At any rate, the explicit ideological core C3 'justifies'/'mystifies' the idea of a constitution variously.

The colonial C3 celebrated a Divine Right to Empire – forms of globally affirmed constituent and constituted power abjectly dominating the non-Euro-American others. The socialist C3 contradicted fully the liberal sacrosanctity of the right to property as a foundation of human freedom and progress, replacing this by vesting ownership of the means of production in the state. The paradigm-warriors of the 'Cold War' ideological formations dared to articulate a near-permanent divide between contending claims of 'making [the] world safe for democracy' on the one hand and on the other fomented the 'wars of national liberation'. Many a form of postcolonial C3 stand enwombed in the killing fields marked the two superpower formations. These forms now stated as post-ideological C3 assume an entirely different form as governance machines in an era of hyper-globalisation with the escalation of a 'second coming' of the primitive accumulation of global capital, in contradiction with the famed advent of a new 'Age of Human Rights'. Further, now emerge, even resiliently, many a Shari'a based

15 See U Baxi 'Constitutionalism as a site of state formative practices' (1999-2000) 21 *Cardozo Law Review* 1183.

postcolonial constitutionalism which today stand confronted with an endless variety of 'embedded liberalisms' (see Section V).

Hans Kelsen offered us a very different way of thinking about the three 'C's, here proposed. His famed, and endlessly still misunderstood utterance that the Basic Norm may have any content was designed to alert us to the reality that for any constitutional legal order to exist, justices, lawyers, and officials need to presuppose the *Grundnorm* as being 'by and large efficacious'. This act of juristic presupposition to ascertain the validity of all other constitutional norms, acts of legislation and executive decisions. During the enormous privilege of my mid-60s three-year long Berkeley conversations, Professor Kelsen explained to me, over and over again, reasons why the distinction between 'validity' and 'legitimation' remained crucial. If the task of a jurist was to demonstrate the normative existence of a constitutional and legal order, there was no choice but to postulate the *Grundnorm*; this did not mean that the questions concerning its justice or legitimacy were thus foreclosed but rather that these had best be addressed by ethics or political philosophy. C3 is important but more decisive remains C2 for the everyday existence and operation of any legal order. Professor Kelsen will reproach me from 'the starry heaven above' for using this Kantian expression and for the further complicated addition of some other 'Cs'.

Understanding the 'transformative' in BISA and related comparative constitutional studies (COCOS) contexts entails further division of C2 beyond the official (or authoritative) interpretation by others. Via C4, I designate practices of non-official interpretation from the learned professions, including public intellectuals and social and human rights movements. C5 designates all persons in a dominant position – 'corporate', 'financial', 'market', and 'consumer' citizens – who especially contest C2 to advance their own strategic interests. C6 comprises interpretive praxes emanating from the voices of human and social suffering of the rightless or the worst–off citizens and persons who claim the human '*right to have rights*'.[16] C6 often stands articulated by communities of resistance – for short here, on the power of social movements and human rights struggles. For C6 interpretive praxes to have any substantial impact on constitutional law (C2) the hospitable figuration of activist justices remains necessary; perhaps, this is best named as a distinctive C7.

At the same time, we also need to consider C8 – the constituted powers to suspend constitutions in a state of within-nation emergency often named as 'armed rebellions', or external threats most poignantly manifest in the contemporary grammars and rhetoric of 'wars on terror'. Cognoscenti may well recall the theory of 'state of exception' as enunciated by Carl Schmitt and

16 This is a favourite notion of Hannah Arendt. See, for a recent analysis, W Hamacher 'The right to have rights (four-and-a-half remarks)' (2004) 103 *South Atlantic Quarterly* 343. See also FI Michelman 'Parsing a "right to have rights"' (1996) 3 *Constellations* 200.

creatively deconstructed by Giorgio Agamben.[17] The eight 'Cs' in their multiplex relationships help, I believe, us chase the complexity and contradiction of the 'transformative' potential of BISA constitutionalism. How then may these multitudinous 'C's embark on a quest to find the ineffable 'spirit' of constitutions beyond spectral reminders of the promises of freedom, justice, and rights articulated initially by constitutional insurgencies? How may we understand, more specifically put, some cotemporary versions of the 'cargo cult' of constitutional preambles which resplendently continue to offer us with a rich Thesaurus-type menu of what it may mean to say 'human' and 'having rights', 'the rule of law', 'people', 'progress' and the 'nation'. To grasp this, we need to return to some elements of 'nostalgia' and 'amnesia'.

5 Nostalgia and amnesia in the itineraries of transformative constitutionalism

For the constitutional transformative to remain, as it were, 'true' to itself, it needs to re-organise both collective memory and forgetfulness. The relationship between memory and history as yet does not fully inform COCOS, outside debates concerning originalism (that is how far the first C2-constitutional interpretation by courts may be guided by the original intent of the constitution-makers). I am here less concerned with this forensic recourse and more with the ways in which constitutions ordain an amnesia of historic wrongs as well as 'the remembrance of things past' (the invention of politically-construed nostalgia) and the relation of all these practices in the BISA contexts. How these may in terms be related to other constitutional experiments and experiences (such as the bicentennial Euro-American transformative constitutionalism forms, the original German Basic Law, the post-national EU constitutionalism, the Israeli and first-ever and world-historic Shari'a constitution enacted by Ayatollah Khomeini) is an aspect I may not explore here.

The transformative imagery in each one of the three BISA constitutionalisms decisively turns back on any nostalgic reinvention of past. Each seeks to affirm the disinvention of the collective past. The Indian constitution-makers decisively repudiated calls to creatively adapt the heritage of syncretic Hinduism; instead and with intense normative rigour they wrestled with some ancient wrongs such as the practices of untouchability, of the Hindu patriarchy, and of agrestic serfdom. Even as the spirit of Ubuntu presides over the making of the South African constitution, this does not revive any pre-colonial visions of 'African' governance, rights, and justice. The Brazil constitutionalism now valiantly seeks, normatively at least, to restore indigenous people's rights as human rights. The anguished labours of the Truth and Reconciliation Commission (TRC) accompanied the

17 See, for a remarkably insightful analysis, GJ Jacobsohn *Constitutional identity* (2010).

endeavour of South African constitution-making. A recent Brazilian government's official report concerning the '[r]ight to memory and the truth', archiving the regime of atrocities during Brazil's two-decade dictatorship, seems to go beyond the histories of Euro-American predation.[18] There is no doubt that devices like truth and reconciliation commissions enlarge public deliberative spheres. Yet it also remains a poignant constitutional global social fact that these also continue to re-silence constitutional insurgencies providing alternate conceptions of rights and justice. Without here attempting to refer to the critiques of these feats, it has to be said that many studies have questioned such feats as a historic appropriation of memory for the ends of governance, and indeed as ethically flawed registers of intersection between lived popular memory of 'past wounds' and the ways of state formative practices of managing these.

In comparison, India lacks similar conceptual or pragmatic equivalents. The question is why the Indian constitutional development has even after six decades so thoroughly continued to organise the oblivion of the Holoucastian histories of the Partition. Neither the celebration of the Golden Jubilee of Indian freedom or of the Indian Constitution, nor the celebration of 50 years of India's premier Indian Law Institute, to constitutionally memorialise this critical event. Indeed, only Indian critical feminist scholarship and acts of literature today speak to this historical memory. Thus, Indian constitutionalism as an ensemble of formative state practices fatefully passes by the 'responsibility to memory'. I say 'fatefully' because the foundational violence of the Indian constitutionalism continues to reiterate itself in Partition-type reiterative 'communal violence'. Would the Indian transformative constitutionalism development have been better off by such acts of public remembrance?

To be sure, the Indian Constitution frontally addresses millennial wrongs such as untouchability; indeed, the Constitution is transformative on this normative register. It is historically the first modern constitution not merely to declare constitutionally unlawful the practice of discrimination on the 'ground of untouchability' (article 17) and of agrestic serfdom described as a human right against exploitation (articles 23 and 24). A unique feature of these provisions consists in the creation of constitutional offences, even to the point of derogation of the design and detail of Indian federalism because article 35 empowers a parliamentary override over the legislative powers of the states within the Indian Union. How may we understand in the Indian case the differential reconstitutions of memories of ancient wrongs as providing the very *leitmotif* of constitutional change compared with the organisation of collective amnesia concerning the Partition Holocaust? Does this question at all matter in any understanding of Indian Constitution now at work?

18 'Seems' because I do not have access to *Direito a Memoria e a Verdade: Comissao Especial SobreMortos e Desaparecidos Politicos* (2006).

True, transformative constitutionalism texts and contexts remain the very last sites for language of love, gift, belonging and care.[19] Instead, as Negri so fully suggests, they proceed to homogenise forms of governmental time both in the construction of *politics* and of the *political.* Thus, even the self-styled transformative constitutional languages and symbols present a conflicted terrain on which peoples' rights to the orders of historic memory stand appropriated by the state-formative practices.[20]

6 Writing human rights into BISA Constitutions: The point of departure

The BISA project constitutes a remarkable pursuit of the politics of human hope. It postulates the idea that constitutions are necessary[21] and desirable,[22] and further that they may, in some contexts of history, carry a transformative burden, character, or potential. By 'transformative', the BISA project signifies not just an orderly enhancement of governance powers directed to fostering national 'development', but rather a redemptive potential construed in terms of effective implementation of human rights, especially social and economic rights. Accordingly, the question of how rights get written into constitutions remains worthy of fuller pursuit in the BISA.

19 See in this regard K van Marle 'Love, law and South African community: Critical reflections on "suspect intimacies" and "immanent subjectivity"' in H Botha *et al* (eds) *Rights and democracy in a transformative constitutionalism* (2003) 231-248.

20 In this context, art V(1) of the Brazilian Constitution thus remains by far the most explicit: 'All power emanates from the people, who exercise it *by means of elected representatives or directly, according to this Constitution*' (emphasis added). In the Indian experience, the Supreme Court proceeded to complicate the personality/identity of *'this Constitution'* via the doctrine of the basic structure and essential features of the Indian Constitution, which Parliament may amend but not without judicial veto or concurrence.

21 COCOS presume that constitutions are necessary because they (a) *articulate* a political identity of nation-peoples into a state within a community or society of states [*The External Dimension*]; (b) provide a blueprint for the articulation of governance apparatuses, powers, and processes [*The Governance Dimension*]; (c) present the sacred Will or the Word of God or articulate the separation of the Church and State [*The Theocratic versus Secular Dimensions*]; (d) enact, overall for some self-dissipative (autopoetic) articulations of communication devices unfolding the doctrine of the 'Reason of the State' [*The Hermeneutic Dimension*]; (e) constitute an encyclopaedic variety of justifications attending to, or providing platforms for, conceptions of monopolisation of means and modes of state/law force monopoly [*The Legitimation Dimension*]; (f) install the modes of enunciation of the orders of production of truths of both politics (the combined and uneven exercises of state/law power and prowess) and of the political (ways of normative evaluation of this politics. One may name this as *The Political Economy Dimension* which, at least implicitly (as also often quite explicitly), carries the full weight of the suggestion that all 'lifeworlds' may best embody forms of life worth deserving that name only as exhausted by constitutions.

22 Constitutions are said to be desirable because these enact across and within-nation discourses concerning forms of restricted/limited governance powers and process/ prowess, because these enact some visions and imageries of governance as somehow also limited by law. Here we enter some political thickets, constructing both some Anglo-American and civil law' jurisdictions articulating the distinction between 'politics' and 'political'.

It will take this essay (even when entirely indispensable for understanding the 'transformative') too far afield to trace the changing notions of being and remaining human and having rights in the three constitutional orderings. Yet, a few general remarks are necessary.

6.1 Different historicities

Different 'human rights' historicities inform the writing of the Indian, South African and Brazilian Constitutions. The way rights get written into C1 varies not just according to the state of the art, that is, normative and institutional developments of international human rights law and jurisprudence, but also on the nature of the struggles for political emancipation. The state of the art stood relatively richly-developed when the Brazilian (1988) and South African Constitutions were composed; in contrast, the Indian Constitution was written almost co-equally with the Universal Declaration of Human Rights (UDHR). The mid-twentieth century CE Indian Constitution is as much a truly inaugural post-colonial constitution as is the South African Constitution towards its end.

While India germinally? invents the distinction between judicially-enforceable civil and political rights and the directive principles of state policy imposing constitutional obligations fundamental to making of state policy and law (an early version of socio-economic rights), South Africa begins a 'long walk to freedom' by collapsing this divide.[23] In each case, the normative break with liberal constitutionalism is remarkable. How may we account for the differences between South Africa and India? Is it the case that the Indian nationalist struggle provides a longer and larger history of commitment to social and economic rights than seems to be the case with South Africa? In a recent reflection, Justice Dennis Davis suggests:

> Until the late 1980s, there had been little thinking in South Africa about the need to include social and economic rights within a constitutional instrument for a democratic South Africa. Because the South African struggle was primarily directed against race-based oppression, was it also the case therefore that it was little concerned with what Albi Sachs named as 'non-racial repression?[24]

Both Sachs and Davis seem to read the struggle against apartheid in terms of the future histories of civil and political rights. This may be true if one reads the history, as Davis puts this, in terms of 'conventional thinking about the role of law in social transformation'. However, the question is whether this is the best or the only reading of the struggle for political emancipation in South Africa.

23 So does, on my rudimentary reading of it, the Brazilian Constitution.

24 DM Davis 'Socio-economic rights: The promise and limitation – The South African experience' in D Barak-Erez & AM Gross (eds) *Exploring social rights: Between theory and practice* (2007) 193.

6.2 Writing post-liberal human rights

The three BISA Constitutions present some important ways of writing of post-liberal human rights. They enshrine thus the collective right to religious belief and practice – Brazilian Constitution, article V(vi); Indian Constitution, articles 25-26; and South African Constitution, section 15. The Brazilian Constitution (article 8) and the South African Constitution (section 23) explicitly recognise the rights of the working classes, including the right to strike. The Indian Constitution in contrast meagrely recognises some of these rights via the effete directive principle (articles 41-43A). If the Indian Constitution overall recognises socio-economic rights via the directive principles of state policy (Part IV), the Brazilian Constitution (chapter 2) and the South African Constitution (sections 27 and 29) enshrine this as judicially-enforceable basic rights.

The South African Constitution remains more explicitly committed to political process rights; sections 24, 32 and 33 further proceed to guarantee respectively the right to the environment, access to information and to 'just administrative action'. In section 8, the South African Constitution goes the farthest in the recognition of the human rights of 'juristic persons' (in the main corporations and business entities).[25]

Each constitution remains specifically articulate concerning the general norm of non-discrimination. The Indian Constitution, as already noted earlier, goes the farthest in enacting a human rights notion that suggests that not only the state but also civil society, here especially meaning the Hindu religious formations, may remain violative of human rights, casting constitutional obligations on the state to reform the dominant religious practices and even thereby the beliefs. The construction of Indian constitutional secularism thus remains a constitutional and political minefield.[26] In contrast, the two other constitutions remain relatively blessed, or at least less distressed, in this regard.

The three constitutions display their post-liberal profile, vividly even when different, in the negotiation of the absolutist libertarian insistence on the sacrosanctity of the rights to private property over the means of production. Section 4 of the South African Constitution fully subjects

25 '(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court – (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1). (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.'

26 See GJ Jacobsohn *The wheel of law: India's secularism in a comparative constitutional context* (2003); R Sen *Legalising religion: The Indian Supreme Court and secularism* with commentary by U Baxi (2007).

compensation for the taking of private property to considerations of 'the public interest' as including 'the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources' in ways that define 'property' as not 'limited to land'. Likewise, articles 5(xii) and (xiii) of the Brazilian Constitution guarantee the right to ownership of property, in so far as it attends specifically 'to its social function'. Article 184 makes it incumbent upon the Republic 'to expropriate for social interest, for purposes of agrarian reform, rural property which is not performing its social function, against prior and fair compensation in agrarian debt bonds further with a clause providing for 'maintenance of real value and redeemable within a period of up to twenty years as from the second year of issue, and the use of which shall be defined in the law'. Article 186 defines the ingredients of social function.[27] In comparison, the enunciation of property rights in article 31 remains normatively inadequate, so much so that the entire burden remains borne by the Supreme Court of India's interpretive odyssey concerning the social function of property rights.

6.3 'Religion' in the writing of rights

Religious traditions and the 'varieties of religious experience' play a crucial role in writing rights and constitutions. One quite explicit concern relates to the construction of state secularity that enables us to distinguish between faith-based constitutions and the 'secular' ones. However, very little originary spaces remain outside Christendom, whether old or new, for any articulation of post-colonial constitutional secularity if the very notion of secularity may be thought of as an off-shoot of the Protestant theological worldview.[28] If so, how then may we proceed to negotiate understandings of the elements of mimesis and originality in the framing of the BISA constitutionalism?

27 'The social function is performed when rural property simultaneously meets, according to the criteria and standards prescribed in the law, the following requirements: (i)rational and adequate use; (ii) adequate use of available natural resources and preservation of the environment; (iii) compliance with the provisions which regulate labour relations; (iv) exploitation which favours the well-being of the owners and workers.' The MST *[Movement Sem Terra*] offers a radical second C2 interpretation of the social function of property. See for a recent analysis FS Vera 'The social function of property rights in Brazil' Paper in the field of Law and Development submitted for the appreciation of the Program Committee of the X Latin American and Caribbean Law and Economics Association (ALACDE) Conference, Buenos Aires on 19-20 May 2006, co-organised by Universidad Torcuato Di Tella and Uiversidad de Buenos Aires http://repositories.cdlib.org/bple/alacde/34 (accessed 17 April 2008). Although Vera is primarily concerned with a possible extension of the law and economic approaches, the landless labour movement complicates any such understanding and the further legislative responses. See in this regard the important contribution by G Meszaros 'MST and the rule of law in Brazil' in M Carter (ed) *Challenging social inequality: The Landless Rural Workers' Movement (MST) and agrarian reform in Brazil* (2013); G Meszaros 'Taking the land into their hands: The Landless Workers' Movement and the Brazilian State' (2000) 27 *Journal of Law & Society* 517; and G Meszaros 'No ordinary revolution: Brazil's Landless Workers' Movement' (2000) 42 *Race and Class* 1.

28 Professor Balganadhara, an Indian philosopher now residing in Belgium, tersely advocates this thesis. See, his contribution, 'The biblical underpinnings of "secular" social sciences' in K Ramaswamy *et al* (eds) *Invading the sacred: An analysis of Hinduism studies in America* (2007) 123.

Conventionally, the liberal secular constitutions are said to proceed from the view that matters of faith belong to the private realm; the state has duties to accord, as much as it can, equal respect for all religions but should itself never be not be faith-based. I say 'said to' because, empirically speaking, many liberal constitutions do not merely institute forms of civic religion,[29] but actually remain permeated by God-talk.[30] Indeed, even as concerns the C2 of the United States, one hears about the distinction between the 'Catholic' and 'Protestant' forms of judicial interpretation.[31] The rights to life and dignity thus, for example, in the United States and Brazil, raise some severe questions for apex adjudication. At the time of writing, the Brazilian apex court is seized with the issue of constitutionality of the legitimacy or otherwise of governmental regulatory reach, for example, over stem cell-based research and commercial application.[32]

While each BISA constitutionalism remains 'multi-religious' in important ways, South Africa and Brazil remain pre-eminently Christian societies shaping some faith-imbued notions of governance, development and rights. In contrast, the Indian case significantly restricts religious freedom of the majority 'Hindu' faith communities by assailing some age-old practices of 'untouchability' in the constitutional idiom of outlawry. The Indian Constitution remains normatively notable for its ways of constitutional criminalisation of these practices (articles 17, 23 and 35). Further, and overwhelmingly its ways of writing human rights remain concerned, given the Partition Holocaust, with a full recognition of collective rights of religious minorities, even when these manifestly conflict with the logics, paralogics and rhetoric of constitutionally-enshrined human rights.

29 An important question in the making of the European Constitution raised concerns about how explicitly its Preamble should recognise that the EU derived its major value impetus from the shared values of Christianity.

30 Thus, the Preamble of the Brazilian Constitution speaks to us thus: 'We, the representatives of the Brazilian people, assembled in the National Constituent Assembly to institute a democratic state for the purpose of ensuring the exercise of social and individual rights, liberty, security, wellbeing, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society, based on social harmony and committed, in the internal and international spheres, to the peaceful solution of disputes, promulgate *under the protection of God*, this Constitution of the Federative Republic of Brazil' (emphasis added). Thus, also, the majestic SAC Preamble concludes: 'May God protect our people'.

31 S Levinson *Constitutional Faith* (1988) 9-53.

32 See Chapter 22 (section 2.1) below. See the Brazilian case *Attorney General of Brazil v Biosecurity Law* ADI 3510. The spokesperson for Connectas Human Rights and the Human Rights Centre (CDH), Oscar Vilhena Vieira, justified the constitutionality of this research, arguing that 'an embryo cannot be legally equated with a person, further positing that the law is very clear in only permitting research with non-viable embryos that have no chance of ever coming to term, noting that their use in medical research will help find cures to preserve the life and human dignity of people suffering from diseases'. Further, he maintained that 'at no point does the Brazilian Constitution address the right to life before birth but rather what it does protect is the right to life of Brazilians "by birth", ie those already born'. Thus, Oscar Vilhena claimed, the Brazilian Constitution 'invalidates the argument for the unconstitutionality of embryonic stem cell research'. See for the diversity of judicial opinions, still put on hold, the recent posting on www.conectas.org.

Faith-based practices everywhere sanction repression of sexual minorities. And as far as I know our BISA narratives manifesting constituent power rarely provide any explicit account of insurgent sexual minorities. At a normative level, the South African constitution provides a singular exception that now plays a distinctive role in Indian C2.[33] Even so, in real life terms, sexual minorities remain oppressed in terms of constitutional and civic cultures.

7 Questions concerning implementation of socio-economic rights

7.1 Implementation: An uncertain promise?

Implementation (efficient and outcome-oriented pursuit of socio-economic goals and rights) is conventionally thought of in terms of structuring of governance institutions and processes. It also entails judicial co-governance at least in so far as apex justices strive to remain true to the spirit of the constitution, which they swear/affirm to uphold, and the declaration of rights. Human rights and social movement actors also at times play a significant role in implementation. Direct self-help popular movements such as occupation of urban and rural land by indigenous and landless peoples disturb the notions of constitutional legality but remain sociologically important in understanding the itineraries of human rights, including socio-economic rights. So do mass movements of political protest directed against special economic zones, which now often encrypt solidarity of global resistance. Perhaps, on a conventional analysis, a limit situation is reached in terms of understanding implementation when people's groups enact violent constitutional insurgencies and even make a claim to the legitimate use of organised collective political violence in the face of state failure or repression. I suggest here rather summarily that that the BISA project needs to take fuller account of the varieties of implementation. To achieve this, we need to move beyond the juridical discourse legalising human rights[34] and move towards fashioning *ethnographies of constitutionalism.*

7.2 Declared and undeclared 'states of exception'

Viewed as state formative practices, the BISA constitutionalisms, also affirm the doctrine of the 'reason of the state'. This in the main means that

33 *Naz Foundation v Government of New Capital Territory of Delhi* Delhi Law Times (2009) 160 277. See, U Baxi 'Dignity in and with *Naz*' in A Narrain & A Gupta (eds) *Law like love: Queer perspectives on law* (2011) 231-252. I remain incompetent to address the Brazil constitution interpretive practices in this regard.

34 U Baxi 'Politics of reading human rights: Inclusion and exclusion within the production of human rights' in S Meckled-Garcia and B Çali (eds) *The legalisation of human rights* (2006) 182-200.

constitutional affirmations of civil and political as well as socio-economic rights at best remain 'contingent necessities' for 'constitutional' governance. Practices of militarised constitutional uses and abuses of the 'emergency' powers, or the powers to declare martial law regimes governance, abound in BISA. These adversely affect the futures of civil and political rights and thus also the progressive realisation of socio-economic rights. Without at all wishing to diminish the 'classical' notion of the state of exception, our comparative BISA deliberation, I suggest, needs to explore the genre of states exception which consist in a series of *undeclared emergencies* on socio-economic rights, and human rights generally. These undermine implementation in an encyclopaedic variety of state action and inaction and accordingly remain the more insidious for the 'transformative' element.

7.3 The external dimension

Leaving aside theorising about 'states of exception', let me exemplify what I mean by undeclared emergencies. The 'external dimension' of a constitution consists in the sovereign treaty-making power of the state. It remains constitutionally immune from adjudicative scrutiny and the wider participative public sphere. This means three things. One, there exist no constitutional limitations on the executive power of lodging reservations or derogations to human rights treaties; for example, the most universally-subscribed Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is thus rife with reservations. Two, no constitutional limitations or no internationally-binding human rights norms and standards (outside of *jus cogens*) may extend to the making of bilateral, regional and multilateral trade and investment treaties. Human rights, both constitutional and international, can thus simply be traded away in acts of global economic diplomacy. Three, the same remains true concerning other agreements with international financial institutions, and bilateral economic aid agreements; as is well-known structural adjustment programmes, debt conditionalities offer the best description there is of undeclared emergencies or hostilities against the SCR. This is now fully in evidence and at work in the 'new economic global constitutionalism',[35] which 'makes room for the regulatory capacity that developed states prefer while disabling measures that the less developed and developing states may require'.[36]

I commend in this context the magisterial study of David Schneiderman, who offers richly-detailed analyses of the ways in which post-liberal writing of human rights stands shattered by the actually existing regimes/forms of bilateral investment treaties (BITS) and multilateral investment treaties (MITS). Schneiderman fully demonstrates 'the potential for conflict between constitutional aspirations in the post-apartheid era and the exigencies of

35 Concerning this, see the valuable study by D Schneiderman *Constitutionalizing economic globalisation: Investment rules and democracy's promise* (2008).
36 Schneiderman (n 35 above) 111.

economic globalisation'.[37] To further generalise this insight, how may we begin to understand the fact that the BISA apex courts remain either constitutionally powerless or unfavourably disposed, as a matter of adjudicatory policy, to subject the treaty-making powers to any strict regime of human rights-based impact scrutiny? What readings of histories or theories justify forms of adjudicative restraint or outright acts of judicial abdication? In this context, further, how may the so-called 'civil society' endeavours remain directed, and carry any prospect of success, to render this power constitutionally responsible?[38]

7.4 The allocation dimension

Undeclared 'states of exception' invite attention to sovereign discretion concerning the allocation of national incomes and resources. How may these if at all, or fully, be subjected to human rights considerations? People's participation in allocative processes, outside the important but limited but important local example in Brazil, is almost everywhere unknown. How far do judges and courts, even when constitutionally obligated to enforce socio-economic rights, go to follow the policy of judicial self-restraint? This important question has been more vigorously addressed in South Africa than in India.

Before I turn to this, I need to mention that, with all the growing sophistication of human rights scholarship, there does not yet exist a format for national budgeting practices, with the result that the discourse becomes a sort of blame game between national legislatures indicted by activist justices and the latter indicted by 'radical' constitutional scholarship. The blame game performs some important rhetorical political functions, without at least on the short term run ameliorating the constitutionally worst-off. The question here is not just about high comparative human rights social theory, which we seem to have in our hands in abundant measure, and the judicial and juridical toolkits/technologies endlessly debated – such as 'reasonableness', 'balancing', 'proportionality', and constitutional cost-benefit analyses. The question rather concerns the development of constitutional economics from a subaltern perspective. This smooth term masks many a diversity because more human rights action groups/ movements exist per square inch compared to the cardinals in the Holy See! Each one of these activist groups remains constituency-specific, even to the point of making the very notion of human rights-based national allocative budgeting incoherent and fully to the advantage of the dominant (ruling) classes. This brief remark runs many a narrative hazard; so let me turn to

37 Schneiderman (n 35 above) 152.

38 See Schneiderman (n 35 above) 185-222. The Columbian situation is worth a moment of contemplation. Following the 'emancipatory' Constitution of 1991, the Columbian Supreme Court,' flexing its constitutional muscle' by a 1996 6:3 majority opinion, actually invalidated the Colombian–UK BIT, only to be speedily reversed by a constitutional amendment. See Schneiderman (n 35 above) 177-179.

some transformative constitutionalism specifics in the South African and Indian contexts.

The paradigmatic (or, if you will, the sub-paradigmatic) performance of the South African Constitution in *Government of the Republic of South Africa v Grootboom*[39] held that, while it 'is essential that a reasonable part of the national housing budget be devoted to [giving effect to this Court order]', the precise allocation is in the first place for national government to decide. Justice Yacoob stipulated that the state had a number of options towards compliance with the Court order: '[T]he precise contours and content of the measures to be adopted' are, he argued, 'primarily a matter for the legislature and the executive'.[40] The small number of South African academics who defend the decision and a large number of its critics seem to remain agreed on one point: resource allocation or housing has not, to put it mildly, improved. This demonstrates that a variety of power games are being enacted here. Constitutional justices 'defer' to the executive; constitutional scholars indict justices at ease with the sovereign power of their scholarly pen; the politics of protest stands riven with specific strategic constituency interests; the executive of the day has the last unconstitutional laugh, as it were, and the constitutionally worst-off experience the misfortune of the French adage 'the more things change, the more they remain the same'. What amidst these power games may survive by the talk of 'transformative constitutionalism'?

One may dare hope that the Indian situation, at first sight, remains a bit different. Social action litigation has led to judicial enunciation of new constitutional and human rights and the Supreme Court has devised various ways and arrangements to monitor implementation, especially via continuing *mandamus* power and process. I may here very briefly refer to the right to education. The Indian Constitution guaranteed via Directive Principle (article 45) free and compulsory education for the young in the age group of eight to 14 years. That was in 1950. The Supreme Court of India in 1993 held that the 'right to education is implicit and flows from the right to life guaranteed by article 21 of the Constitution'.[41] This reinforced human rights and social movement folks to urge an amendment to the Constitution and, in 2002, article 21-A was inserted by the Constitution Eighty-Sixth Amendment. All constitutionally-sincere citizens felt let down by the amendment because, while appearing to enshrine a right to education, all it does is to provide for a right to have an appropriate state law being made providing for education.[42] On my understanding, neither the allocation of the federal or state budgets has significantly improved. This at least led Justice Dalveer Bhandari, in his solo dissent in *Ashoka Kumar Thakur v Union of India*, to insist that

39 2000 (1) SA 46 para 66.
40 Paras 49.
41 *Unni Kishnan, JP v State of Andhra Pradesh* (1993) 1 SCC 645 para 166.
42 Art 21-A says this: 'The state shall provide free and compulsory education to all children of the age of six to fourteen years in such a manner as the state may by law determine'.

'Parliament should fix a deadline' for the implementation of the right to education 'within six months'.[43] It is puzzling that his brethren did not feel any impelling need to share this time limit.

But activist judicial dissent has always in India conveyed human rights signals for the constitutionally-sincere citizens; thus, it is only a matter of time before the Court will be pressed to follow this direction. By way of an important comparative remark, it seems to come to pass that whereas the South African Constitution seems to apply doctrinal constitutional closure to socio-economic rights implementation, the Indian Supreme Court continues to follow a style of on-going civic conversation on the nature and future of the socio-economic rights in India.[44] I do not know, on this register, the state of play for the Brazilian apex court.

The Indian judicial experiment (C2) has been significantly impacted by C4, C5, and C6. This does not of course resolve arguments justifying the sovereign discretion on various grounds, for example, that the representative institutions rather than courts are legitimately entrusted with tasks of monitoring human rights-indifferent policy in the allocation of the federal and state national resources; that courts and justices may not have the requisite skills and competence to 'balance' budgets; and that their role and influence in such matters are best perceived as symbolic, as aiming long-term governance dispositional change rather than instrumental aiming at here – and now – compliance.

Space constraints forbid further development of these arguments and refutations. Even so, worthwhile BISA explorations need to move beyond the horizons of doctrinal closure, addressing further the spaces of contentious constitutional politics, perhaps best grasped further away from indeterminate, fuzzy, and often unproductive debates about the nature and scope of adjudicatory leadership in terms at least that now take us beyond *jurisprudence* to a new demosprudence.[45] The latter takes more seriously the lack of constitutional good faith (more accurately the persistent bad faith) in implementing SER, even as partaking of the element of state sovereignty the best of conscientious' demosprudence' practices may never fully present the worm's eye perspective on the unreality of human rights!

43 2008 (5) SCALE at 271.

44 See for the notion of judicial activism as civic conversation, U Baxi 'The avatars of judicial activism: Explorations in the geography of (In)justice' in SK Verma & K Kumar (eds) *Fifty years of the Supreme Court of India: Its grasp and reach* (2000) 156-209. See further S Fredman *Human rights transformed: Positive rights and positive duties* (2008); SP Sathe *Judicial activism in India* (2001); S Shankar *Scaling justice: India's Supreme Court, anti-terror laws and social rights* (2009); and various contributions by Professor PN Singh under the rubric 'Public interest litigation' in the *Annual Survey of Indian Law.*

45 See L Guinier 'The Supreme Court 2007 term: Foreword: Demosprudence through dissent' (2008) 122 *Harvard Law Review* 4 and especially as concerns the South African Supreme Court, B Ray 'Demosprudence in comparative perspective' (2011) 47 *Stanford Journal of International Law* 111.

The Olympian judicial gods that preside over the fate of human rights remain deeply problematic angelic communities. They may pursue the politics of constitutional hope via the development of a pedagogic role, which consists of the symbolic judicial conduct directed to change governance mindsets. When this may demonstrably fail, how may these forms of new secular divinity proceed? Should justices stand haplessly by or should they move to instrumental judicial action? Should the courts not deploy wisely and well their sovereign contempt powers? Or should they somehow justify judicial bystanderism as the best course of policy?

All I can say here is that when justification of human rights-indifferent, and even hostile, political practices for the allocation of national resources reigns, undeclared states of exception or emergencies stand declared against the constitutionally worst-off. If constitutional scholarship may valiantly rise against constitutional dictatorship that abrogates civil and political rights, should it not respond in an equal measure to the long-term suspension of socio-economic rights? If not, how may we understand the linkages between the communities of justices and of their critics, both in turn severally justifying judicial bystanderism and quite frankly the abdication of constitutional judicial role, power and function?

Danie Brand is right to insist (invoking the phrase regime of the Law and Transformation Programme of the Centre for Applied Legal Studies at the University of the Witwatersrand) that the 'Constitution of South Africa does not say that South Africa's macro-economic policy is the supreme law of the Republic, and everything the government does must necessarily fall in line with this strategy'.[46] This remark also summates the situation in India today. However, what remains manifest here is the state of play and of war between the written and the unwritten C1.[47] The latter entails what I have elsewhere named the 'structural adjustment of judicial activism'.

7.5 The militarised forms of 'constitutional governance'

It is clear that available national resource flows have to be harnessed to some equally insistent needs for military preparedness for territorial self-defence; when close to half the national budget stands dedicated to the armed forces and defence production, further undeclared emergencies against socio-economic rights implementation arise. All that judicial power and forms of adjudication may do here is to ensure corruption-free wise use of such allocation. As far as I know, there exists no normative declared human right to immunity from corruption in high places. Continuing impoverishment thrives precisely on this immunity and impunity. The Indian Supreme Court has had more than its fair share of adjudicative burden in perforating this immunity/impunity; the South African Constitutional Court has had a major

46 Botha *et al* (eds) (n 19 above) 54.
47 Baxi (n 15 above).

opportunity to act on this subject; and although I do not know whether the Brazilian court was thus engaged, it is the case that a popularly elected civilian president was successfully indicted and removed for corruption. How far corruption trials further assist the implementation of socio-economic rights remains an open question, and not only in the BISA.[48]

7.6 Unconstitutional economic 'good governance'

Despite the brilliance of erudite transformative constitutionalism discourse,[49] socio-economic rights have not yet come into existence, or human rights, type enunciation or language that speaks to *economic good governance* in terms of obligations not to aggravate the immiseration of the constitutional have-nots or the worst-off people. With all the profusion of General Comments of the UN human rights treaty bodies, and of the MDG, and the right to development talk, there exists no human right against fiscal and monetary policy regimes. Thus, there is no human right directed against price-rise (inflation) which mocks the smooth languages of the right to affirm, protect and promote socio-economic rights. There is no human right whatsoever against policies and programmes of 'structural adjustment' or 'devaluation' of national currency which ruins the everyday lives of millions of peoples in the global south.

Socio-economic rights depend a good deal on executive policy determinations concerning fiscal and monetary policies and bilateral/ multilateral trade agreements. They also depend on the agencies that shape global social policy, such as the World Bank's poverty alleviation programmes,[50] the MDG plans for action and the various UN development instrumentalities. The relationship between some admirable General

48 I do not here address wider regional human rights-type peacekeeping engagements. Each and every act of constitutionally-based and human rights-friendly regional intervention necessarily, and to some degree, at least, diverts finite global south economic resources for the protection and promotion of the SECR of co-nationals. India's claim to a permanent membership of the UNSC remains partly based on her huge contributions to the UN peacekeeping forces. The case of South Africa, acting independently or in association with the African Union – as recently in Somalia but also elsewhere – provides another instance. I do not know much about Brazil on this register. The general point, however, remains. Whatever we may privilege in TC terms remains impaled on some forms of authentic post-colonial geopolitical solidarities, which in turn diminish the available flow of resources for here-and-now pursuits of the within-nation endeavours to promote and protect the regimes of SECR. Nor may one overlook the defence production and operational costs thus entailed; when these reach any significant proportion of national budgets, the available internal resources of the implementation of SECR remain severely constrained.

49 D Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) and the critical review of this work by OLM Ferraz 'Poverty and human rights' (2008) 28 *Oxford Journal of Legal Studies* 585. I will not here engage his central concluding remark that suggests that some historic developmental differences in the West and the non-West may have a differential pertinence/purchase for the analytic of the 'transformative'.

50 C Tan 'Poverty Reduction Strategy Programmes (PRSPs) as forming the contexts of postcolonial international law and global governance' DPhil thesis, University of Warwick, 2007.

Comments offered periodically by the United Nations human rights treaty bodies and global social policy discourse is far from clear. In many respects global social policy tends to weaken the logic of SR in particular and human rights generally;[51] yet it seems that apex courts in the three countries often conflate this difficult relationship.

8 The role of apex courts

8.1 General questions

While there is general agreement in the BISA (as in most post-colonial and post-socialist constitutionalisms) that apex or constitutional courts have an important role to play in fostering constitutional cultures aimed at strengthening the protection and promotion of human rights, opinions continue to differ concerning how best judicial actors should proceed to accomplish this. I here identify at least six types of related but distinct questions:

(1) *The question of context*: When may justices articulate their role as imposing on them a higher threshold of constitutional responsiveness than the executive or the legislature?
(2) *The question of judicial method or discipline*: How best and within what limits or discipline may the justices articulate such a superogratory or pedagogic role in relation to the co-equal institutions of national governance?
(3) *The question of interpretive limits*: How far should justices deploy their exceptional power of judicial review over executive, administrative and legislative action? Or, with which justifications may they retreat to the closet, as it were?
(4) *The question of effect:* Especially in the field of protection of human rights, how far may the justices be guided by any consideration of the intended and *unintended governance and rights results/impacts?*
(5) *The question of legitimacy:* In what ways may judicial actors pursue self-legitimation of the institutional judicial power, even when the immediate impact may entail some here-and-now denial of the claims of basic human rights? How far does judicial restraint extend (or what emerges in the South

51 U Baxi 'A report for all seasons? Small notes on reading in larger freedom' in CR Kumar & DK Srivastava (eds) *Human rights and development: Law, policy and governance* (2006) 495-514; P Alston 'Ships passing in the night: The current state of the human rights and development debate seen through the lens of the millennium development goals' (2005) 27 *Human Rights Quarterly* 755.

African discourse as 'weak' versus 'strong' form of judicial review)?[52] How may any institutional accommodation thus involve in the short and long runs, contrary to the apperceived end of promoting the legitimacy of the highest adjudicative power?

(6) *The question concerning governance effect:* How may feats of shared adjudicatory policy enhance or weaken governance capabilities, at least in part directed to accomplishing a better, or more secure, future for human rights, including socio-economic rights? Put another way, how far may, or ought justices to go either to aggravate or repair the legitimation deficit of governance? In this context, how far may courts and justices foster or frustrate the rather imaginative reworking of the notion of the state as 'the newest social movement'?[53]

Judicial actors in particular themselves differ *inter se* on these matters; so also do those public actors affected by judicial action and the relatively 'disinterested' communities of academic critics. In part, this also presents an allied question of a socially responsible form of evaluation of justice at work: How may we *judge the judges*? Neither justices at work nor their critics may escape the burdens of political judgment thus imposed, even when working with conceptions of constitutionalism that resist reduction of the 'law' to 'politics'.

I must add a few *caveats* to this even summary enunciation of questions and concerns. First, the structuring of the apex courts and judicial hierarchy matters decisively because this determines who amongst the vast masses of citizens may after all be invested with high judicial power. It is unlikely that members of vulnerable social groups will ever be invested with high judicial power. The Indian Supreme Court has rewritten the Indian Constitution in terms that now endow the Chief Justice of India, acting within a collegium of a few senior justices, with the power to make elevations to High Courts and the Supreme Court. The South African Constitution (section 174) not merely provides for a wider political consultation, but also the device of a national Judicial Service Commission and further remains sensitive to the need to 'reflect broadly the racial and gender composition of South Africa'. Articles 93 to 94 of the Brazilian Constitution proceed very differently indeed in vesting the executive with nominative powers, but in relation to federal judges with a rather piquant requirement in article 94 that mandates that 'one-fifth of the

52 See, eg, DE Hirsch 'A defence of structural injunctive remedies in South African law' (2006) *The Berkeley Electronic Press* http://law.bepress.com/expresso/eps/1690 (accessed July 2007). See also M Swart 'Left out in the cold? Crafting constitutional remedies for the poorest of the poor' (2005) 21 *South African Journal on Human Rights* 215; D Davis 'Socio-economic rights in South Africa: The record of the Constitutional Court after ten years' (2004) 5 *ESR Review* 3; K Pillay 'Implementing *Grootboom*: Supervision needed' (2002) 3 *ESR Review* 1; D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundation for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 25; R Dixon 'Creating dialogue about socio-economic rights: Strong-form v weak-form judicial review revisited' 2007 (5) *International Journal of Constitutional Law* 391; and some further remarkable offerings in Botha *et al* (eds) (n 19 above).

53 B de Sousa Santos *Toward a new legal common sense: Law, globalization and emancipation* (2002) 489 & 492.

seats on the Federal Regional Courts, of the Courts of Appeals of the States and of the Federal District and Territories are formed by members of the Attorney-General's office with over ten years of service', and 'by lawyers of notorious legal knowledge and unblemished reputation, with over ten years of actual professional activity'. 'Notorious' legal knowledge may be a quirky translation but it sits oddly with the possibility of an '*unblemished reputation*'.

Second, no matter how the judiciary is composed, it remains important to engage the composition of the Bar; as Jeremy Bentham long ago memorably said, judicial power is always exercised by the 'judge and the company'. Ways of judicial disposition overall depend on how that 'company' stands constituted. The 'company' operates a seller's market for legal services, limiting of access to rights and justice. I think that the BISA project needs some serious engagement in terms of comparative understanding of the production/reproduction of legal professions. Further in this context, the disruption of professional hegemonies caused by the emergence of the citizen-petitioner and the 'cause' lawyers in BISA forums needs fuller acknowledgment.

8.2 Adjudicatory policy and rights implementation

References in the above questions to 'adjudicatory policy' may surely puzzle on a view that insists that appellate justices ought to decide cases and controversies on the facts and arguments placed before them without predispositions. These are often summarised as an obligation to justice according the law without 'fear' or 'favour'. This is surely an attractive view of constitutional adjudication. However, it remains true that the exercise of judicial power and function entails the development of adjudicatory policy dispositions that evolve over time. A paradigmatic instance of such disposition is known as 'judicial restraint' in all its avatars. Further BISA/ COCOS constitutionalism ethnography studies are needed to ascertain whether such adjudicatory policy serves the cause of socio-economic rights better than a rival disposition often labelled as 'judicial activism'. Besides this, often adjudicatory polices crystallise into legal doctrine: *res judicata, laches, stare decisis,* standing and justiciability*,* for example, which adversely affects socio-economic rights implementation.

The Indian Supreme Court illustrates some new categories, which I have named as juridical activism and restraint. Juridical activism is an adjudicatory policy stance where apex justices expound the ideals of freedom, rights, justice, and development without the instant case necessitating the exposition of such grounds. Such feats of pedagogic or suggestive constitutional jurisprudence have actually, and not in any too-long-a-run sustained judicial activism based affirmations of civil and political, as well as social and economic, rights. In contrast, the Indian practices of juristic restraint adjudicatory policy continue to caveat such feats, urging instead

that judicial reasoning should always mark a concordance with judicial reasoning and result, lest juristic activism be apperceived as marking the 'politics' of adjudication. Space constraints forbid any further elaboration.

The Constitutional Court of South Africa has perhaps gone the farthest in evolving an explicit policy agreement with the country's media, referring to it as the 'Goldstone Concordat, 1993' (named after Justice Goldstone, who on behalf of the judiciary entered into a general agreement with the representatives of the media).[54] Under this, sound and film recording could be made but sound would not be broadcast save for the delivery of judgment and further that the recording should be done in a non-intrusive manner. In a recent case, the South African Constitutional Court[55] more or less affirmed this agreement.[56] It declined to fully pronounce on the media's right of live broadcasting of judicial proceedings generally and the right of the public to know in situations of political corruption in high places. Avoiding a substantive decision, it upheld the power of the Supreme Court of Appeal to determine whatever 'fair trial' constraints may mean.[57] However, as the Brazilian instance shows, adjudicatory policy varies with the hierarchy of courts. 'Some judges agree to most injunction of repossession, but others, in name of "social justice", decide in favour of the squatters'.[58] Yet, the Brazilian Supreme Court 'ordered the state government of Paraná to use public force and have the judicial decision of repossession of a land enforced'. With 'extreme eloquence' the Court ruled against the ending of the 'underlying uncertainty' resulting from 'the non-enforcement of the judicial decision by the state government (and police)' and 'the necessity to guarantee social peace and order, despite the difficulties that the state claimed in enforcing judicial orders against the "invaders" and the tasks of their resettlement'.[59] The issue, it seems to me (seems because I do not have access to the full text of the judgment) here gets transferred to the realm of the institutional integrity of the Court from the mosaic of considerations of human rights and justice otherwise so fully articulated in the Brazilian Constitution.

At first sight, judicial insistence on executive compliance with court orders and directions seems justified in the context of civil and political rights. As a matter of first principle, it is clear that the executive (or even the legislature) of the day may not plead political or resource (financial)

54 *South African Broadcasting Corporation Limited v National Director of Public Prosecutions* 2007 (1) SA 523(CC) para 71.
55 As above.
56 The Court observed (para 71): 'It would seem that the advent of a democratic constitution, technological advances and growing acceptance throughout the world of the power and impact of the electronic media may require this agreement to be reconsidered. The answer, however, is not to treat it as non-existent but rather to renovate and update it. It would be inappropriate for this Court at this stage to prejudge such a process'.
57 See the further analysis by DH Erskine 'Judgments of the United States Supreme Court and the South African Constitutional Court as a basis for a universal method to resolve conflicts between fundamental rights' (2008) 22 *St John's Journal of Legal Commentary* 595.
58 Meszaros (generally, in the works cited at n 27 above).
59 As above.

helplessness in providing for civil and political rights. To authorise such pleading would entail state helplessness to prevent torture, disappearances and barbaric prison conditions. However, the same approach does not quite clearly hold in relation the implementation of the socio-economic rights, as specially revealed in the South African Constitutional Court's judgments. Despite the fact that some socio-economic rights are declared enforceable against the state, the Constitutional Court has shown considerable reluctance in constraining appropriate state action. Indeed, it has overruled state High Courts when they provided for implementation by way of 'structural injunction, notably in the context of right to health and housing and shelter'. On this register, as already noted, the adjudicatory policy, showing a high order of deference to the executive, has indeed resulted in a low order of judicial respect for the constitutionally-guaranteed socio-economic rights. It is clear both from the South African Constitutional Court and the Indian Supreme Court experience that policies of judicial restraint or, more dramatically put, the judicial politics of consensual institutional accommodation of the executive caprice in implementing socio-economic rights leaves the constitutionally worst-off in the same 'original position'.

How may we then understand the dissipation or reconstituting of the transformative character or potential of the transformative constitutionalism? Confidentiality obligations prevent me from naming names, but I may say that I have heard from at least two incumbent justices of the South African Constitutional Court that the current historic moment is not 'ripe' for structural injunctive relief (or continuing *mandamus*-type judicial oversight). The constitutional moment for this happening, it always remains suggested, must await a better future. Likewise their Indian counterparts felt that the time was not ripe for judicial implementation of Directive Principles. For India, however, this time arrived in a radical outburst of judicial populism in the wake of a declared emergency of 1975-1976, and in a later moment of the efflorescence of social action litigation (which in part I was privileged to initiate) during which apex justices not merely transferred Part IV-enunciations into Part III judicially-enforceable rights, but further proceeded to proclaim new basic rights and freedoms not contemplated by the constitution-makers and often against the grain of their expressed determination. It is not clear in rapidly-accelerating hyperglobalising contexts that the South African Constitutional Court has the same stretches of luxurious C2 (and ailed) time as had the Supreme Court of India. Perhaps, the same may remain true for the Brazilian constitutional experience. All this invites attention to Antonio Negri once again: How may apex justices develop love of and for time?

8.3 Rights as 'no more' than policy statements

This is a 'big' jurisprudential and political theory business, indeed. Many careers have been made, for weal or woe, reducing declarations of rights into languages of policy or in asserting their 'trumping' character. It remains

conventionally accepted that civil and political rights signify an order of precommitment, in the sense that these constitute prior restraint on the rules of the political game. As Justice Hidayatullah put this (in the *Sajjan Singh* case), justices ought to worry about converting human rights into 'playthings' of majority.[60] By this he meant the tyranny of political majority; as it however happens in the Indian context rights also became playthings of wafer-thin judicial majorities in the voluminous *Golak Nath and Kesavananda Bharati* discourse. For an Indian reader of the first C2, the noble rhetoric of Justice Madala[61] carries a profoundly poignant ring, when he explicitly states:

> Some rights in the Constitution are the ideal and something to be strived for. They amount to a promise, in some cases, and an indication of what a democratic society aiming to salvage lost dignity, freedom and equality should embark upon. They are values which the Constitution seeks to provide, nurture and protect for the future South Africa.

The slight problem with all this is the following: The 'striving' and salvaging remarks consist of a twofold process. If human rights are no more than policy statements, these remain poor guides to state action. Polices may be made with scant or little regard for human rights. These remain contingent against some articulation of the ontological robustness of the basic human rights. Judicial governance, no matter how differently human rights oriented/ imbued, thus seems to cohabit the same space as demarcated by human rights-neutral, and even unfriendly, ways of governance. Perhaps the varieties of 'C's' is all we have by way of a platform of resistance to forms of judicial collapse in which the pursuit of civil and political rights remains entirely distanced from that of socio-economic rights. Via the reduction of the languages of human rights into those of mere policy-statements what stands achieved is the structural adjustment of the forms and lineages of judicial activism at the cost of neoliberal caused recession of the futures of socio-economic rights in particular and human rights in general. Nothing will gladden my aging heart and soul more than a refutation of this funerary conclusion in our BISA deliberations.

60 *Sajjan Singh* v *State of Rajasthan* (1965) 1 SCR 933.
61 *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) para 42.

CHAPTER 2

A BRIEF RESPONSE TO PROFESSOR BAXI

Theunis Roux

The interests of poor and vulnerable people in the global South are not well served by Utopian academic rhetoric. In writing about 'transformative constitutionalism', I, for one, would be embarrassed to identify with any of the statements by Antonio Negri quoted at the beginning of Prof Baxi's paper.[1] What, for example, does the statement '[e]very human drive in search of the political consists in this: in living an ethics of transformation through a yearning for participation that is revealed as love for the time to constitute' mean? Or this: 'Between 1968 and 1979, our generation has seen the love for time oppose any and all manifestations of being for death'? How helpful is it to ask whether 'what is awaiting us [is] a history of freedom'? Even if it could be understood, who would be assisted by joining Negri's call to 'accelerate [the multitude's] strength and recognise its necessity in the love of time'? Too much of human history illustrates that populist appeals to the will of the masses are the devices by which demagogues and megalomaniacs seek to justify their distorted conception of democracy. That human history also illustrates that liberal constitutions may be used to legitimise capitalist exploitation does not relieve academic lawyers of their responsibility to write intelligibly.

Prof Baxi's paper begins with a meditation on the bridge metaphor used to describe South Africa's transition from totalitarianism to constitutional democracy. In place of Prof Baxi's largely semantic musings, those interested in understanding this transition would be better served by consulting one or more of the following books: Jens Meierhenrich's study of the way in which the positive conception of law bequeathed by the normative half of the apartheid 'dual' state enabled the negotiators of the 1993 South African Constitution to place their trust in law;[2] Heinz Klug's study of how the ideological ascendancy of liberal constitutionalism in 'international political

1 From A Negri *Insurgencies: Constituent power and the modern state* (1999) quoted by U Baxi 'Preliminary notes on transformative constitutionalism' (Chapter 1 of this book, above).

2 J Meierhenrich *The legacies of law: Long-run consequences of legal development in South Africa, 1652-2000* (2008).

culture' interacted with local traditions of political struggle in the drafting of the 1993 and 1996 South African Constitutions;[3] Tom Ginsburg's 'insurance theory' of the strategic imperatives driving the adoption of systems of judicial review, which includes a consideration of the extent to which the guarantee of rights-based constitutionalism in a post-apartheid South Africa allowed the National Party to risk its probable loss of political influence;[4] and Ran Hirschl's 'hegemonic preservation thesis', which ascribes the South African transition to a confluence of interests between political, economic and judicial elites.[5] You might not agree with all or any of the arguments set out in these books, but those arguments are at least presented in ways that admit of a rational response. By contrast, unsubstantiated assertions of the type that Prof Baxi engages in can be neither wrong nor right. Their only purpose, as far as I can see, is to signal his identification with the underlying political commitments of continental European political theory around 1970.

The second 'theme' developed in the first section of Prof Baxi's paper, when dismantled and put together again, seems to be that post-colonial constitutions – like those of South Africa, Brazil and India – mark a conceptual break with Western individualist approaches to human rights, and a corresponding affirmation of the strength of the 'multitude' in those countries in resisting and ultimately overcoming colonial oppression. As such, these constitutions construct a new conception of the nation, of the 'we-ness' (as he puts it)[6] that is called into being by the constitutional moment, and it is this conception that must be safeguarded by the political project of transformative constitutionalism. Even when reconstructed in this way, this argument has been much more clearly expressed by American Critical Legal Studies (CLS) scholar Karl Klare in his seminal paper on transformative constitutionalism in South Africa.[7] That paper, in turn, is flawed for various reasons,[8] but it at least sets out a coherent vision of what a transformative constitutionalist project might look like, and what would be required to instantiate it. Baxi's argument, by contrast, seems to be premised on some sort of visceral hatred of Western liberalism,[9] and a consequent inability to accept that oppressed peoples might be able to make a distinction between the harm that was done to them by the colonising power and the potentially beneficial uses to which ideas and institutions taken over from the West might be put. The greatest danger facing post-colonial countries is not that

3 H Klug *Constituting democracy: Law, globalism and South Africa's political reconstruction* (2000).
4 T Ginsburg *Judicial review in new democracies: Constitutional courts in Asian cases* (2003).
5 R Hirschl *Towards juristocracy: The origins and consequences of the new constitutionalism* (2004).
6 Baxi (n 1 above) para 1.
7 KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.
8 See T Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?' (2009) 20 *Stellenbosch Law Review* 258.
9 I am referring here in particular to the polemical reference in Baxi's contribution to this volume to 'all the strange talk which still continues to insist on the sole authorship by the "Western" world of contemporary human rights' (Baxi n 1 above, para 1).

they will be re-colonised by Western ideas, but that their aversion to all things Western – or rather their susceptibility to the arguments of politicians whose interests are served by promoting an aversion to all things Western – will prevent them from appreciating the inestimable benefits of life under a well-functioning liberal-democratic constitution.

Of the four books that provide a more coherent account of South Africa's democratic transition, the one that is closest to Prof Baxi's in ideological outlook is Hirschl's. Like Prof Baxi, Hirschl is sceptical about the transformative promise of liberal-democratic constitutions because he sees the turn to liberal constitutionalism as an essentially conservative event, namely one in which old and new political elites conspire with economic and judicial elites to preserve their 'hegemony'.[10] The problem with this thesis when applied to South Africa, however, is that the South African Constitution is not a 'classic' liberal-democratic constitution on the American model. Rather, it is, as Heinz Klug so ably demonstrates,[11] a dialectical product of the ever-evolving liberal constitutionalist ideal in international political culture and local traditions of political struggle. Rather than resulting in what Karl Klare calls a 'post-liberal'[12] constitution, this means that the 1996 South African Constitution is best viewed as a working through of the liberal tradition in the particular historical circumstances of South Africa. In turn, as Klug argues, the 1996 Constitution has contributed to the ongoing debate within international political culture about the possibilities of liberal constitutionalism. Local traditions of political struggle, on this approach, feed off the liberal tradition in international political culture, and the liberal tradition in turn develops on the back of local traditions of political struggle. The fallacy underlying Prof Baxi's attack on liberalism is to fail to see this, and instead to treat liberalism as some sort of static ideology that is not responsive to local traditions of political struggle. If that were true, liberalism would have been dead and buried when women got the vote or at any number of other critical junctures in its history.

In denying liberalism's capacity to develop in this way, what Prof Baxi wants to do, like so many left intellectuals, is to claim some sort of historical ownership of every instance of popular struggle against political domination. But this is to try to win the argument by fiat. If liberalism is denied the capacity to develop on the back of local traditions of political struggle then liberalism is simply Burkean conservatism under a different name. In truth, however, there is a vast difference between conservatism and liberalism, with the former conferring presumptive authority on existing social institutions simply because they exist, and the latter only to the extent that those institutions conform to the best available evidence of the institutional preconditions for human freedom. Once liberalism is understood in this more dynamic way, it ceases to be the polite face of capitalist exploitation, and

10 Hirschl (n 5 above).
11 Klug (n 3 above).
12 Klare (n 7 above).

instead emerges as a repository for our ever-developing understanding of the circumstances of social and economic justice.

This, then, is also the way the project of transformative constitutionalism should be understood. First, it is fundamentally a liberal constitutional project, because the success of the project is tied to the maintenance of liberal political institutions, including universal adult franchise in a competitive multi-party political system, an independent judiciary and the rule of law. Secondly, the project is a non-conservative one, in the sense that all social institutions, with the exception of the ones just mentioned, are susceptible to redefinition through the democratic process. Thirdly, the project eschews any grand theorising about the historical destiny of the masses, and instead concentrates on finding pragmatic solutions to social problems through an appropriate blend of technical expertise and democratic deliberation.

Disagreeing, as I do, with the fundamental premises of Prof Baxi's argument, it would be fruitless for me to continue this response. For my own views on the transformative constitutionalist project, I would refer readers to the article to which reference is made in footnote 8.

CHAPTER 3

A GLOBAL CONSTITUTION OF RIGHTS: THE ETHICS, THE MECHANICS AND THE GEOPOLITICS OF COMPARATIVE CONSTITUTIONAL LAW

Conrado Hübner Mendes

1 Introduction

Constitutional theory has recently witnessed an intriguing phenomenon. A practice that is at least as old as the post-War proliferation of constitutional courts, and that remained under-theorised ever since, suddenly sparked vigorous debates about its potential role and legitimacy. The cause for this awakening of theoretical attention is not difficult to diagnose. As the US Supreme Court started looking more at foreign constitutional decisions in order to illuminate its case law,[1] supposedly breaking with its self-confident and isolationist tradition, a wealth of articles by critics, advocates and sceptics, from different parts of the world, quickly erupted.[2]

On the face of it, this episode of intellectual history signals two things. First, it signals that the US Supreme Court and legal academia are still, if not the only, then the leading agenda setters in constitutional theory. As a consequence, debates of other countries tend to be reactive and exogenous. Secondly, and more seriously, it shows that particular constitutional problems from different political communities may remain either unexplored or discussed through blinkered lenses. It is an irrefutable fact that different national constitutional courts are increasingly reading and quoting each other's judgments or opinions in order to find additional ground and inspiration to take decisions in their hardest cases. Under American influence, this widening of judicial cross-reference has been challenged as a

1 The articles invariably started by listing the main cases, especially *Riggs v Palmer* 115 NY 506 (1889); *Roper v Simmons* 543 US 551 (2005); *Lawrence v Texas* 539 US 558 (2003); and *Planned Parenthood v Casey* 505 US 833 (1992).

2 A small sample of most influential articles would certainly need to include AM Slaughter 'A global community of courts' (2003) 44 *Harvard International Law Journal* 191; S Choudhry 'Globalization in search of justification: Toward a theory of comparative constitutional interpretation' (1999) 74 *Indiana Law Journal* 819; J Waldron 'Foreign law and the modern *Ius Gentium*' (2005) 119 *Harvard Law Review* 129; VC Jackson 'Constitutional comparisons: Convergence, resistance, engagement' (2005) 119 *Harvard Law Review* 109; and R Alford 'In search of a theory of constitutional comparativism' (2005) 52 *UCLA Law Review* 639.

threat against sovereignty, democracy and autochthonous constitutional tradition.

This essay intends to put this 'international dialogue of courts'[3] under a broader theoretical scrutiny. It outlines the possible normative and methodological foundations of that practice, that is, the 'ethics' and the 'mechanics' of comparative constitutional law, and sheds light on the risks of it being converted into an ethnocentric instrument or into an ideological mask for power struggle, that is, the 'geopolitics' of comparative constitutional law. It finishes by advancing the notion of 'global constitution of rights' as a wide-ranging political ideal that could and should inspire the practice of constitutional jurisprudence.

Constitutional comparisons, in this sense, must deal with different sorts of questions. Why and how to compare are definitely the elemental ones, and must be addressed at the outset of any comparative enterprise. It needs, in other words, an 'ethics' (the 'why' questions) and a 'mechanics' (the 'how' questions). However, the answers to both questions do not provide sufficient guidance to a substantially different concern: Why and how should courts use comparative law as a valid source of legal argument?

These two levels – comparison *per se* and comparison as an aid for judicial decision – are not always clearly distinguished. This lapse may create certain confusions. A normative argument at one level cannot always be generalised, without further qualifications, to the other. When a court lets a foreign decision be part of its *ratio decidendi*, it ascribes to that decision some sort of legal authority.[4] Comparison, at this second level, becomes more than an enlightening intellectual exercise; it supplies a further source of law. Still, I claim that there is a cognitive loss when both levels are treated separately. There is a dynamic interdependence between them, and they need to accommodate a similar set of principles. The following topics try to live up to this twofold task.

2 The ethics of comparative constitutional law

The attempt to unveil the values that justify a certain practice consists in an interpretive exercise.[5] This does not involve the investigation of the actual causes or motivations that led the relevant actors to follow a special habit.

3 See Slaughter (n 2 above).

4 This act will need to follow some 'metaprinciple of legal authority': see N Walker 'Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders' (2008) 6 *International Journal of Constitutional Law* 373. According to Walker, amongst the different kinds of authority that inhabit the global legal landscape, the dialogue between courts is the product of 'sympathetic consideration'. This can be read through a modest cognitive prism – Courts pragmatically see that 'like problems may require like considerations', or through a more ambitious one – Constitutional democracies share a similar moral grounding and foreign decisions may have a persuasive authority (383-384).

5 See R Dworkin *Law's empire* (1986) ch 2.

Rather, it aims to put this practice under the best possible light and, hopefully, to steer it in a more consistent way. When a regular yet unreflective habit becomes controversial, subjecting it to critical inspection helps to put this practice on a more desirable track. It is a refreshing and transformative start.

It seems that the interaction between constitutional courts has already achieved, for some time now, this stage. A number of authors have been struggling to develop a normative stance for this phenomenon. This essay aims to contribute to this collective effort. In order to do that, however, it steps back and tries to spell out the principles of comparative law itself. This is in tune with the claim that closed the previous topic: There is a dynamic interdependence between the principles that vindicate legal comparisons as an intellectual or academic task and those, on the other hand, that demand the judicial recourse to these comparisons.

The ethics of comparative law, as I envision it, comprise three principles: (i) self-understanding; (ii) self-improvement; and (iii) mutual co-operation. This triad does more or less exhaust, in a quite succinct and abstract way, what is valuable in the act of comparing. Let me try to briefly flesh them out.

The first benefit that is usually attributed to the act of comparing is an epistemic and identitarian one: By comparing we gain unexpected insights about ourselves, that is to say, we get to know ourselves better.[6] It gives us the opportunity to excavate the roots of our identities. We may realise that some features that, at the surface, were always perceived as differences, are actually commonalities, and the other way round. As Michelman phrased it, by the 'comparative encounter' we may 'clarify our picture of ourselves'.[7]

The second is an intuitive derivation of the first: by comparing, apart from grasping a more accurate comprehension of ourselves, we are also enabled to have a critical perspective of our identity and, as a consequence, to ameliorate our qualities and move forward. It gives us an opportunity to step outside, evaluate and transform ourselves. In other words, it allows for reflexivity and may lead to gradual moral improvement.

These two first values are commonplace and may well be seen as different sides of the same coin. The third one, though, captures a dimension that has been less developed in comparative theory and that will be the most important for the purposes of this paper. Mutual co-operation entails the

6 F Braudel: 'Live in London for a year, and you will not get to know much about the English. But through comparison, and in the light of your surprise, you will suddenly come to understand some of the more profound and individual characteristics of France, which you did not previously understand because you knew them too well' (cited by MA Glendon 'Rights in twentieth-century constitutions' (1992) 59 *University of Chicago Law Review* 519 520).

7 F Michelman 'Reflection: Comparative avenues in constitutional law' (2004) 82 *Texas Law Review* 1758.

appreciation that, at least in some aspects, we are part of a single, despite thin, community – which is surely subdivided into thicker ones. Morally meaningful comparisons assume a sense of partnership and reciprocity and lead to a horizontal and respectful conversation. The product of this exercise is not only mutual understanding, but also reciprocal improvement.

This triad of values may well be seen as implying three moral duties: to know yourself, to improve yourself reflexively and to engage with your neighbour as a matter of respect. The first and the second are both inward-looking: we look at the outside for the sake of ourselves. The third one, on the contrary, is outward-looking: we look at the outside because we are concerned with the other (or *alter*), with whom we share. We compare ourselves to others for the sake of both.

By applying these three general principles to the more specific realm of rights jurisprudence, we may refine them a further layer: as a matter of self-understanding, to compare rights decisions enables us to perceive our own particular dialect within the language of rights and its implications for the balance between the individual and the community;[8] as an immediate second step, we can also gradually refine our dialect and incorporate previously unobserved nuances; finally, as a matter of respect, we may jointly build a global and coherent narrative of rights and breed a sense of common enterprise.

The language of rights has a universalistic take. Its morals are not jurisdiction-bound, but connected to the very basic feature of common humanity. Of course, at the moment this language is institutionalised through bills of rights, it becomes part of a municipal legal system. Hence, moral rights are converted into legal rights and incorporated into a tradition of legal reasoning. They are encapsulated by a specific dialect. Comparisons show the contingency and particularity of our own dialect, and, hopefully, its limitations and potential for improvement. We come to realise its precise place in a political culture, the way in which it permeates the institutional division of labour and the forms of making political claims.

There is no other way to construct a global community of rights except by comparing and knowing each component that integrates this community. If, when it comes to basic political morality, we plan to speak the same language, it does not make too much sense not to try to harmonise our own national practices with other ones. Harmonisation, however, does not call for sheer homogeneity. It implies the pursuit of consistency, conceived not as plain uniformity, but as a dense give-and-take of reasons or, to put it in a different way, as a constraint to 'decide like cases alike' with a more nuanced and context-sensitive criterion of 'likeness'. It is not an attempt to expand a legalistic rule of *stare decisis* to the global domain, but to make a moral case

8 MA Glendon *Rights talk* (1970).

for an approximation through dialogue. Countries that share political ideals and the language through which they are operationalised are able to engage in this kind of cross-fertilization without overlooking local peculiarities.

Finally, why should courts look at foreign decisions when grappling with similar cases? As stated at the outset, this is a question that demands additional argumentative work. The value of comparative law does not necessarily justify that national courts use comparative material. One could probably say that there are more and less legitimate ways to promote changes in the national legal system and to internalise what others taught us as better choices for common problems. What is the most legitimate process by which a foreign choice should or could receive legal authority at home? Can courts take the lead in such a process? If we consider that practice as a good thing and want to defend it, we need complementary normative reasons. We need a justification for the authority of foreign decisions that are incorporated as judicial *ratio decidendi*; one that is reconcilable with democracy and other cherished requirements of legitimacy. In other words, we have to articulate a 'metaprinciple of authority'.[9]

Here, it does not suffice to highlight the importance of learning with the experience and insight of others in rights reasoning. Self-understanding and self-improvement do not lead us as far as that. Mutual co-operation seems to do a better job, but still does not precisely address the legitimacy anxiety. We need complementary normative assumptions. This supplement involves a threefold argument. First, democracy, apart from majority-voting of a *demos* situated in time and space, entails respect for the individual and collective decisions based on public reasons. Second, the cosmopolitan ideal, which demands an equal moral basis for the consideration of every individual in the world, is sound and impact the content of public reasons. Third, the rule of law in general, and constitutionalism more specifically, should be sensitive to persuasive authority besides a flat binding authority. This third assumption alleviates the concerns that the first two may cause in an old-fashioned majoritarian democrat, since it accepts the incorporation of foreign decisions into a national legal system as long as courts accept their persuasiveness. This rational filter renders implausible some familiar objections according to which citizens of a particular community cannot be governed by the choices of citizens of an alien community. That is not what is at stake. The ideal of a 'global constitution of rights', yet to be developed in the last topic, will help to add flesh to this argument.

3 The mechanics of comparative constitutional law

Inspired and animated by the ethics of comparative law sketched above, what is the method for doing that? The mechanics of comparative law

9 See Walker (n 4 above).

encompass two dynamically interrelated exercises: description and evaluation. One cannot neutrally describe legal and political institutions if not by assuming some normative 'level playing field', which is rarely uncontroversial.[10] However, this inescapable normative starting point cannot be simply equated with an *ex post* evaluation that can be done once a general description is carried out. Description, therefore, necessarily precedes a thicker evaluation – even if there is no such thing as neutral description, because it always has to assume at least thin normative standards.

In a nutshell, comparative law, from the descriptive point of view, means to perceive differences and similarities in the right way. From the evaluative point of view, in turn, it aims to ask what the preferable options are. Differently put, it comprehends both (i) identifying and (ii) ranking differences and similarities between diverse legal systems. Our differences are as important as our similarities, not only to our self-understanding, but also to our self-improvement. But, in order to do that, we cannot refrain from the exercise of evaluative judgments. An acute reader will certainly not be satisfied with these truisms and will immediately call for greater precision in the definition of both the 'right way' to describe and of the proper criterion to measure better and worse decisions. Let me try to elaborate a bit more.

As to description, the qualification is the very core of the question: What is the 'right way' to perceive differences and similarities? What are, correctly understood, legal differences and similarities? The 'right way' focuses at the genuine comparability, at what is meaningfully comparable behind the surface. It consists, generally speaking, in an exercise of translation, not only of distinct languages, but of political cultures and legal traditions. We cannot run away from the conundrums of legal theory when constructing powerful comparative categories that can minimally capture the functional equivalents of each system. Of course, we need to pay attention to context apart from dry formal legal sources, without letting, on the other hand, context paralyse comparisons. Comparisons, for sure, need to look beyond the surface and to doubt quick and easy similarities. At the same time, however, it cannot fall into the trap of cognitive pessimism, according to which legal systems are incomparable because the irreducibility of context to cross-cutting categories.

As to evaluation, we need to take a stand on a normative theory that supplies a way to rank institutions and states of affairs, a scheme of priorities between values. However, this does not mean that it is necessary to adhere to a comprehensive theory of political justice, from the ultimate principles all the way down to the concrete implications. In the absence of full agreement on the abstract normative theory or on its concrete consequences, how can

10 See Dworkin (n 5 above).

we still share some normative position? The only way is to deploy the traditional techniques for minimising disagreement.[11]

At a further level of specificity, what is the 'right way' to verify differences and similarities in rights jurisprudence and what is the best criterion for establishing good and better rights decisions?

Different fields of rights case law have varying possibilities of 'travelling' and crossing boundaries. They imply distinct degrees of universalising potential. When a descriptive effort comes to the analysis of rights, a fine-tuned categorisation of them needs to be done. Different aspects should be taken into account in order to look for equivalences: which are the precise positive and negative duties that each right demands from both the state and the individual; how similar political claims are, in some places, expressed and channelled through the language of rights, and, in others, by some diverse code; what the respective institutional division of labour is, noticing that some highly-judicialised rights in some places may not be in others, but still be broadly promoted (for example, judicial abdication in some places might be compensated by legislative activism, and so on). We need, in other words, to be sensitive to the varying moral and institutional contexts of the implementation of these rights. We may discover that the way to compare the implementation of basic civil and political rights is different from the one that is applicable to social rights, because the former often involves a less complex institutional architecture than the latter. Or, alternatively, we may realise that a different approach for clustering rights is in order and that the traditional rights taxonomies are unhelpful as far as certain contrasts are concerned. We may, still, find out that there is much overlap in the promotion of different sorts of rights, and that many are jointly promoted by a single package of public policies and institutional commitments. This is but a small list of the tricky aspects of that enterprise.

Once again, in order to evaluate rights decisions, one will need to rely on a theory of rights. This theory is not exhausted by abstract principles. It needs, instead, to be fairly casuistic in order to take a stand on the best balance between rights in the light of the relevant concrete circumstances of each case. In other words, the theory required for sound evaluation does not only map and order the universals, but also delves into the particulars of a multitude of factual variables that each case involves.[12]

11 Sunstein defends a way of achieving agreement at the level of concrete solutions, even if the same is not possible at the level of principles: CR Sunstein *One case at a time: Judicial minimalism on the Supreme Court* (2001). At the other extreme, Elster shows how constituent assemblies use the technique of agreeing on the abstract principles. Collegial judicial decisions may apply both strategies for reducing disagreement (top down and bottom up), depending on the circumstances: J Elster 'Deliberation and constitution making' in J Elster (ed) *Deliberative democracy* (1998).

12 On universals and particulars, see N MacCormick *Rhetoric and the rule of law: A theory of legal reasoning* (2005) ch 5.

Finally, how should courts that are convinced to pursue the ethics of comparative law perform that task? As already stated, it does not follow from the possibility that a particular rights jurisprudence 'travels' by academic or even political argument in the public sphere that it may also effectuate a 'formal travel' through a judicial decision. Assuming that the legitimacy concerns may be answered, what are the methodological hurdles that courts should face? This answer is predictably derivative of the observations above: courts must have the comparative competence, both from the descriptive and evaluative points of view. They must, in other words, detect differences and similarities 'in the right way', and seek the best solution for their own circumstances.

The mechanics of comparative law, therefore, cannot shy away from the twofold tasks sketched here. Evaluations will be contingent on the accuracy of descriptions. They are sensitive to the particularity of each context, but do not overlook the need to rely on universal ideals as guidance that may be differently, but not arbitrarily, instantiated in each particular community. These ideals provide indispensable yardsticks through which one can argue for solutions that are morally better than others. Differently put, the mechanics of comparative law must be vigilant against two basic comparative sins: descriptive myopia and normative naïveté. The former refers to comprehensions that are context-insensitive, that look at the surface instead of genuine and deep similarities and differences. The latter involves a lack of ingenuity to perceive the insufficiency of abstract normative principles to deal with concrete rights conflicts. Differences and similarities are not a pre-given social datum, to be recognised and described. They are products of thought-constructs, of interpretive concepts. Anyone who tries to describe has to be aware of the controversy behind these concepts.[13]

4 The geopolitics of comparative constitutional law

To start once again with a platitude, comparative constitutional law is not a neutral exercise. On the one hand, it can play meaningful and even transformative roles. It can serve moral and political progress. On the other hand, it can also serve conservative or authoritarian purposes. Political history provides innumerable examples of both possibilities. What precautions should someone engaged in this exercise take? Apart from a refined aptitude to manage the 'mechanics', one should be aware of the risks of converting this exercise into an instrument of pure geopolitical contest.

Rights jurisprudence travels across borders through different channels, each of which are regulated by diverse logics. In order to simplify, I propose a stylised dichotomy that captures two general kinds of logic that permeate those channels. Firstly, constitutional choices may circulate as ideological

13 See P Legrand 'How to compare now' (1996) 16 *Legal Studies* 232.

masks for a simple power struggle or particularistic interest-seeking. I call this rationale 'negative geopolitics'. Secondly, constitutional templates may be diffused as a consequence of its persuasiveness and nothing else. This is what I call 'positive geopolitics'. These are two ideal types that may cast some light on the components that influence the processes of global cross-fertilization. They are both unrealistic; they oppose an overly dark picture with a naïvely rosy picture. Both ingredients hardly operate alone in the real world. Actual processes usually contain a certain degree of both: Constitutional ideas travel because they are sometimes imposed by more powerful polities, but also because they are able to persuade.

The main concern for a legitimate international cross-fertilization is, in this sense, the dominance of 'negative geopolitics'. Some authors take it for granted as the only determinant of such interactions. Everything would be explainable through the lenses of power struggle. This is an empirical argument which I will not be able to answer satisfactorily within the limits of this article, but it seems plausible to claim that this picture of constitutional migrations is myopic and impoverished. Monological models to explain individual and collective behaviour, as long as they arrogantly pretend to be exhaustive, are doomed to fail. Their pictures are not accurate all the time. They over-generalise.

Bearing in mind the diverse geopolitics of comparative constitutional law, the intuitive and most defensible theoretical prescription that comes to mind recommends the maximisation of positive geopolitics and the respective minimisation of negative geopolitics. Simply put, that is the challenge of the actors that somehow participate in that process. Let me explain in greater depth the rationale of 'negative' geopolitics, since the rationale of 'positive' geopolitics was in essence already provided in the earlier discussion.

Negative geopolitics perverts, for obvious reasons, the abilities of self-understanding and self-improvement. Understanding and improvement are manipulated and defined by the most powerful and prestigious players of the game. Co-operation, in turn, may take place without the sense of mutuality required by the ethics of comparative law. The terms of the interaction, therefore, are set *a priori* by the centres of political and intellectual power, and not rationally negotiated through deliberation.

Negative geopolitics also leads to some comparative sins. There are four main sins: normative dissimulation, normative ethnocentrism, geopolitical subservience and argumentative insincerity. Normative dissimulation, as opposed to mere normative naïveté, involves an intentional neutralisation of controversial value-laden starting points. It takes place when a certain idea is strategically sold as an objective and value-free given. Normative ethnocentrism is slightly different, despite sharing a certain resemblance. It implies an approach to comparison that is, intentionally, both culture and context-insensitive. Geopolitical subservience refers to an unqualified

deference towards the canon and neglect towards less prestigious constitutional regimes. The constitutional history of developing countries is pervaded by deferential attitude towards canonical courts. The most common manifestation of that sin is the uncritical citation of the case law from prestigious countries. This works as a kind of rhetorical conversation stopper, a self-confirming and sufficient way to justify the correctness of the decision. It sees the foreign as a moral or intellectual authority, not as a partner. These countries basically function as 'sites of reception' and import constitutional solutions from the 'sites of production'.[14] Finally, argumentative insincerity refers to a strategic 'cherry-picking' and 'fig-leafing' attitude that determines the choice of constitutional models. This is certainly a phenomenon that pervades legal reasoning in general, not to mention the reasoning from precedents, but may be deepened when deployed with comparative sources.

Having in mind these comparative sins and the clear dangers that they represent, is it still worthy to engage in comparative constitutional law? Surely, as it often happens with attempts of normative recommendations in politics and law, they are inevitably vulnerable to misguided practice. The list of sins gives us the necessary warning to stay alert and to police the practice. This is the useful role and also the limit of scepticism. Beyond this, it can be paralysing and pernicious. It is not an argument against the practice itself, but a legitimate and welcome admonition about its difficulties and corresponding risks, of which anyone certainly has to be aware. Ultimately, this cannot but be a theoretical bet: There are more convincing reasons for facing the risks of doing comparative law than for capitulating by fear of them.

We do not have to turn a blind eye to how the 'geopolitics of comparative rights jurisprudence' has traditionally worked: from north to south; from rich to poor; from developed to developing countries. The challenge ahead is the subversion of this longstanding logic in the light of sounder 'ethics' and 'mechanics' of comparative law. Subversion, here, is not an end in itself. It simply wants to reverse a tradition that, in overall, has neither been rational nor deliberative.

5 A global constitution of rights

As announced at the very outset, the argumentative path of this text aimed to culminate in the formulation of a political ideal that should inspire constitutional jurisprudence: a 'global constitution of rights'. It is fundamentally a derivation of the ethics of comparative law applied to the interaction between constitutional courts around the globe. My purpose is to highlight the potential values of the promotion of a 'global constitution of rights' through a 'global community of courts'.[15] From that claim it does not

14 See DL Medina *Teoria impura del derecho* (2004).
15 Expression of slaughter (n 2 above).

follow that there are no other institutional routes for the pursuit of the same ideal. The ideal is self-standing. The many available strategies for its pursuit are complementary. Therefore, I do not propose a new version of a court's fetishism that has often impregnated legal theory. Constitutional courts are one distinctive 'reflexive forum' of democracies, but certainly not the only one. To the extent that they contribute to the refinement of the language of rights and face common moral dilemmas, though, they are a necessary participant of this enterprise.

A global constitution of rights, as the reader might have anticipated, is not a single monolingual normative text, nor an abstract and formulaic code. It is not a static and homogeneous top-down normative instrument either. It is, instead, a repository of applied moral reasoning that permanently defines the boundaries of personal autonomy within a polity. It is a rational reconstruction of disperse legal decisions, a plural mosaic that shares the universalist ideal of individual emancipation within a community. It is a cosmopolitan and multilingual chain novel, connected by a shared moral project. Constitutional scholars and judges are responsible to sew this global patchwork.

This political ideal, undoubtedly, requires careful re-elaboration on the nature of law's authority. The nature of the constitution that gradually emerges from the dialogue between foreign courts operates under a rationale of influence and persuasion.[16] This web of decisions exerts, therefore, a more subtle kind of authority, to which jurists and political scientists have not always paid sufficient attention. It is a manifestation of constitutionalism in its moral dimension, rather than its legal and political ones.

To participate in the development of a global constitution of rights is an option that courts may or may not wish to make. The fear of ethnocentrism and of other dangers described above seems misplaced or at least overstated. To the extent that a global constitution of rights is a laudable moral achievement, the blunt refusal to contribute to it lacks a plausible justification. This attitude rejects the other as a co-member of the same community.

Different courts feel different levels of pressure to insert themselves in a global jurisprudence of rights and to be accountable for the reasons they accept and reject. There are several layers of approximation between courts – sometimes by geographical criterion, sometimes by passive deference to prestige or reputation, sometimes, still, by a commonality of problems, by a common history and tradition. Some courts may prefer to concentrate on a regional dialogue. Some may opt to stay outside instead of actively engaging

16 Waldron (n 2 above).

with this collective construction.[17] As free riders, they may periodically profit from the experiments made in these multinational rights laboratory.

The particularity of a local tradition is not a compelling argument against participating in this international deliberation. Contextual uniqueness is an accidental fact that may, indeed, justify diverse solutions that are hardly exportable. It does not release courts, however, from the duty to engage with the reasons that are being ventilated in this global communication. The recourse to 'context' is not an automatic exemption from the desirable commitment to a cosmopolitan partnership. The justification for a clear departure from decisions taken within this community must, therefore, be derivative from a consistent theory of rights, not to a facile invocation of context. This theory holds apparently discrepant decisions together under the same principles.

A global constitution of rights, in this sense, is a cosmopolitan narrative. As a narrative, it carries the burdens of diachronic and synchronic coherence (systematicity).[18] Using Dworkin's term, it is an expansion of the ideal of integrity to the global level. This narrative, of course, is not an identifiable datum of reality. Rather, it is a product of human striving or, more specifically, of rational reconstruction. It is not a fact 'out there' to be perceived and celebrated, but a valuable project to be pursued. We may live without or dispense with it. Nevertheless, this was not the historical route chosen by contemporary constitutional courts. They are increasingly scrutinising each other's decisions. We better ground this outspread activity on a consistent aspirational theory. This essay attempted to provide the delineation of this theory and the elucidation of the several questions that it needs to face.

6 Some conclusions

What is the moral desirability and political feasibility of a global constitution of rights? The ethics of comparative constitutional law illuminates the values behind a global dialogue between courts, and, at the same time, guides it to more defensible directions. The mechanics and the geopolitics of comparative constitutional law, in turn, pointed out some minimal requirements related to its feasibility. The underlying philosophical

17 The disengagement and insularity of the US Supreme Court in that matter is a paradigmatic example. From a model of inspiration of rights protection, it is recently better associated with a repudiating anti-model. As Carozza put it: 'The failure to acknowledge and engage the universal human values that underlie human rights does more than deprive us of the most important language of cross-cultural dialogue about the requirements of justice in the world. Ultimately, it diminishes our ability to understand ourselves and our own moral resources … The price of that insularity is a self-satisfaction that can blind us to our own humanity.' See P Carozza '"My friend is a stranger": The death penalty and the global *ius commune* of human rights' (2003) 81 *Texas Law Review* 1088.

18 For the notions of diachronic and synchronic coherence, see MacCormick (n 12 above) chs 10 and 11.

commitment behind this project, predictably, is moral cosmopolitanism.[19] It is not, for sure, an uncontroversial position. Different sorts of sceptics would quickly react to that proposal. 'Ethical' sceptics would start by stating that there are no universal values that all political communities share. There would be no 'world community' in which one could expect any kind of mutual co-operation. 'Mechanical' sceptics would immediately retort that contexts are not comparable. 'Positive geopolitics' sceptics and advocates of 'negative geopolitics' would claim that politics, especially international politics and relations, is a matter of self-interest and power struggle. These sceptics see relevant potential features of this process, but hardly envision the whole picture. This essay could not delve into each of the objections, but highlighted the challenge ahead of this project.

The state of the art in comparative constitutional law, in the last decades, is characterised by a lack of a common conceptual repertoire, by a proliferation of metaphors, labels and slogans, by a multiplication of classificatory concepts and methodological recipes.[20] To take stock of these debates is a massive and urgent task. This essay intended to dig a bit deeper and to identify other layers that have not been clearly explored so far. It tried to step back and to do an interpretive exercise. There is still a lack of clarity of what is at stake when national constitutional courts engage with each other. We still do not have an overall picture of the dimensions necessarily involved, of what are the principles that may explain, justify and demand this practice. How to articulate this practice in the light of our most cherished political ideals? In other words, what is the best interpretation of it? Descriptive accuracy is not the point of this exercise, but normative soundness.

Normative theory constantly gets disappointed with the real world. That is part of its critical job. However, surprisingly or not, it has already helped to change the world at least a few times in history. It supplied alternatives, imagined different pictures of social life. And it did that because it was not satisfied with description, so to say, with pictures of reality. Courts should engage with comparative law as long as they do it 'in the right way', according to the most justified normative principles. That is the soul of the comparative message. This is not a simple task, even less in pluralistic societies, still less at a global level.

19 As to the moral cosmopolitans in constitutional jurisprudence, see Waldron's notions of *ius gentium* and 'partly laws common to all mankind': J Waldron 'Partly laws common to all mankind: Foreign law in American courts' Storrs Lectures (2007); Carozza's notion of '*ius commune* of human rights' (n 17 above); and Slaughter's idea of a 'global community of courts' (n 2 above).

20 Metaphors: transplants, borrowing, migration, mosaic … functionalism, contextualism, universalism … Classificatory concepts trying to capture the political identity of the court, usually translated through a bunch of dichotomies (activist X self restrained, progressive X conservative, social reformer X political bystander), or the legal or interpretive identity of the court (legalist).

CHAPTER 4

OF SELVES AND OTHERS: A REPLY TO CONRADO HÜBNER MENDES

Henk Botha

1 Introduction

In his lead essay, Conrado Hübner Mendes places the idea of a global constitution of rights at the centre of normative justifications of comparative constitutional law.[1] A global constitution of rights, on his understanding, signifies a process of harmonisation but not homogenisation. It is created discursively, by equal participants in a global dialogue who are committed to the ideal of individual autonomy and who pay each other the respect of engaging with and referring to each other's reasoning. In his view, it is this idea(l) which should guide the dialogue between national courts and prevent comparative constitutionalism from sliding into a negative geopolitics. A negative geopolitics connotes co-operation without mutuality. It fails to respect the autonomy of distinct constitutional systems, is insensitive to differences of context, and tends to superimpose the norms of powerful upon less powerful nations. Subservience and deference are substituted for equality and mutual respect.

Hübner Mendes does not offer a global constitution of rights as a description of what courts actually do when they engage in comparative constitutional analysis. He uses it, rather, as an idealised account which places the practice of comparative constitutionalism in the best possible light. In fact, he recognises that, traditionally, comparative constitutionalism has often stood in the service of hegemonic forces, and has worked 'from north to south, from rich to poor, from developed to developing countries'.[2] It is this negative geopolitics that needs to be resisted. A global constitution of rights must 'reverse a tradition' that 'has neither been rational nor deliberative'.[3]

1 C Hübner Mendes 'A global constitution of rights: The ethics, the mechanics and the geopolitics of comparative constitutional law', included in this book as Chapter 3 (above).
2 Hübner Mendes Chapter 3, part 4 (above). Page 65 but this will change again with formatting, may be easier to just use section number
3 As above.

There is much in Hübner Mendes's rich and evocative essay that resonates with South Africa's experience in constitutional comparativism. Drawing upon this experience, I will comment on his account of the ethics, mechanics and geopolitics of comparative constitutional law.

2 Identity and difference

The jurisprudence of South Africa's Constitutional Court is often held up as a model – or a rather extreme example – of the role judges can play in facilitating a global constitutional dialogue. Whether the Court has, in a given case, followed what it took to be an evolving transnational consensus, modelled its jurisprudence on foreign law, or distinguished the position in South Africa from that in foreign jurisdictions, comparative law has played a fundamental – and openly acknowledged – role in the development of its jurisprudence. This openness to comparative influences has been facilitated by a number of factors. These include: the lack of a constitutionalist tradition and the history of Westminster-style parliamentary sovereignty before 1994, South Africa's international isolation during the 1970s and 1980s and its wish once again to become an active and respected member of the community of nations, the fact that South Africa has a hybrid legal system shaped by different legal traditions, the role of foreign and international law in the making of both the interim and final Constitutions, and the express constitutional mandate given to judges to consider foreign law in their interpretation of the fundamental rights provisions in both the interim and final Constitutions.[4]

The South African experience dovetails nicely with Hübner Mendes's account of the ethics (or normative justifications) of comparative constitutional law.[5] His insight that the use of comparative law in constitutional adjudication can enhance our self-understanding is borne out by the numerous ways in which South African courts have used foreign law to help (re)define the democratic society inaugurated by the interim Constitution. Sometimes this is done by invoking the normative weight of an evolving transnational value consensus and/or the currency of a widely-followed interpretive approach. The Constitutional Court's finding that judicially imposed whipping 'offends society's notions of decency' and violates human dignity provides an example of the former,[6] while its embrace

4 Respectively the Constitution of the Republic of South Africa, Act 200 of 1993 (interim Constitution) and the Constitution of the Republic of South Africa, 1996 (final Constitution). Sec 39(1) of the final Constitution provides: 'When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law'. Its wording deviates only slightly from that of its predecessor, s 35(1) of the interim Constitution.

5 See H Botha 'Comparative law and constitutional adjudication: A South African perspective' (2007) 55 *Jahrbuch des öffentlichen Rechts der Gegenwart* 569, for a discussion of the different uses made by the Constitutional Court of comparative constitutional law.

of a broader constitutionalist tradition in which notions like dignity, contextual/purposive interpretation and proportionality take centre stage illustrates the latter. At other times, comparative constitutional law is invoked to highlight the distinctive features of South Africa's own legal system. Judicial understandings of South Africa's Constitution as a transformative, deeply egalitarian document which places a positive duty on the state to protect and promote fundamental rights have, in a number of instances, been articulated by drawing attention to relevant differences with the Constitution of the United States.[7]

The articulation of a national constitutional identity is thus linked to the interplay between global constitutionalism and local contexts, between universality and contingency and between the elaboration of areas of convergence and divergence. It is this interplay which enables Hübner Mendes's second justification of constitutional comparativism, namely its capacity to help transform our self-understanding. This is the idea that we are able to improve ourselves through comparative constitutional learning and as a result of the realisation of the contingency of our own legal culture. Put differently, confronting the outside other – foreign law – may help to destabilise our self-understanding and facilitate a confrontation with – and possibly accommodation of – the other that is within: those individuals, communities, differences, norms and concepts that have been relegated to the margins of the legal order.

In South Africa, comparative constitutional law has been particularly helpful in providing constitutional interpreters with a conceptual vocabulary for the negotiation of conflicting normative and institutional commitments. Unlike under apartheid, the new constitutional order embraces plurality and institutionalises dissent by committing itself to a variety of often conflicting ideals, such as continuity and change, democracy and rights, and equality and freedom. The Constitutional Court has found concepts, metaphors and modes of reasoning derived from foreign law helpful in mediating these tensions. Notions like indirect horizontal application, human dignity, proportionality and subsidiarity have enabled the Court to negotiate these tensions on a case by case basis, and thus to keep alive conflicting normative visions. Comparative law has thus helped the South African legal order to come to terms with plurality and dissent, and to remain open to challenges from within to conventional constitutional self-understandings.[8]

Comparative constitutional law sometimes serves to foreground aspects of the local context which might otherwise be neglected. Consider, for

6 *S v Williams* 1995 (3) SA 632 (CC) para 39.

7 See eg *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 45; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) para 74; *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) paras 26, 29, 147-148.

8 See H Botha 'Learning to live with plurality and dissent: The *Grundgesetz* in South Africa' (2010) 58 *Jahrbuch des öffentlichen Rechts der Gegenwart* 73 and the literature referred to therein.

instance, the dissenting judgment of Sachs J in *Solberg*, a case concerning the constitutionality of a law prohibiting the sale of liquor on Sundays and religiously-based holidays. Unlike the majority, which held that the law did not infringe freedom of religion as it did not 'force people to act or refrain from acting in a manner contrary to their religious beliefs',[9] Sachs J found that state conduct which sends out the message that Christians are full members of the political community, while Hindus, Muslims and Jews are not, is inherently problematic. He relied heavily on the reasoning of O'Connor J of the United States Supreme Court in the *Lynch* case. In that case, O'Connor J held that the establishment clause prohibits government endorsement or disapproval of religion. Government is not allowed to send a message to those who do not adhere to a particular faith that they are 'not full members of the political community'.[10] For Sachs J, O'Connor J's reasoning helps to unlock a dimension of freedom of religion – its relation to citizenship and political equality – which is not captured in the majority's definition of the right as simply freedom from coercion. It also draws attention to a dimension of the historical context which is neglected in the majority judgment, namely the way in which the apartheid state, in seeking to enforce a Christian morality, relegated other religious communities to the margins of society.[11]

In this and other cases,[12] recourse to foreign law broadened the constitutional imagination by allowing judges to move beyond their initial impression that a particular interpretation is inescapable and by opening up alternative interpretive possibilities.[13] It enabled them to look beyond the standard narratives about the ills of apartheid and the transition to democracy, and to detect forms of disadvantage that do not conform as readily to the stock stories in terms of which constitutional understanding tends to be structured.

The converse is also true. Not only can comparative law alter our understanding of the own constitutional text and context, but our understanding of the global constitutional text is invariably framed by local

9 *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) para 92.

10 *Lynch, Mayor of Pawtucket v Donnelly* 465 US 668 (1984) 687-688, quoted by Sachs J in *Solberg* (n 9 above) para 138. My discussion of Sachs J's judgment draws upon the analysis of S Choudhry 'Globalisation in search of justification: Toward a theory of comparative constitutional interpretation' (1999) 74 *Indiana Law Journal* 819 862-864.

11 *Solberg* (n 9 above) paras 149-153.

12 Compare *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC), a case in which the Court found that the Constitution imposes an enforceable obligation on Parliament to facilitate public participation in the legislative process. The Court relied on international law and comparative law, while at the same time emphasising the historic role of public participation in the struggle against apartheid.

13 See P Häberle 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat' 1989 *Juristen Zeitung* 913; V Jackson 'Ambivalent resistance and comparative constitutionalism: Opening up the conversation on "proportionality", rights and federalism' (1999) 1 *University of Pennsylvania Journal of Constitutional Law* 583 600-601 on the capacity of comparative constitutional law to challenge deeply-ingrained assumptions about our own legal system.

histories and struggles.[14] Or, to use a different metaphor, for foreign law to be useful it must first be filtered through the categories and presuppositions of our own legal culture.[15] Foreign law is therefore not something simply 'out there', waiting to be discovered, but is constructed and shaped by legal interpreters acting within particular national legal systems, who bring their own conceptual vocabulary and historical and ideological understandings to bear on the foreign materials to be interpreted. This is true even in cases relying on an evolving transnational consensus. Despite the appeal to a pre-existing consensus among democratic states, the court's comparative analysis is co-constitutive of the perceived consensus. The point is not simply that the court's analysis becomes part of the historical record and is, in turn, relied on by foreign courts as evidence of such a consensus. It is, more fundamentally, that the judicial assertion of a transnational consensus is, at the same time, a reinterpretation of the historical record which is likely to result, even if ever so slightly, in a redrawing of the terms of the supposed consensus. Consider, for example, the Constitutional Court's reliance in *S v Makwanyane* on what it perceived to be a worldwide tendency amongst democratic societies to move away from capital punishment.[16] To be able to do so, the Court had to go to great lengths to distinguish South Africa's Constitution from the constitutional texts of democratic societies in which the death penalty is still imposed. Thus, its articulation of an emerging transnational consensus lay at the dynamic intersection between global developments and the national constitutional text, and was a function of its careful construction of relevant similarities and differences.

Hübner Mendes offers, as a third justification, the idea of comparative constitutionalism as a form of mutual cooperation between equal members of a global community of rights. Comparative constitutionalism, on this understanding, is not only concerned with the improvement of self-knowledge, but is also an act of reaching out to the other – of recognising other constitutional democracies as equal partners in the creation of a global constitution of rights. That the community thus created cannot boast a particularly stable identity is, I think, self-evident. Every invocation of a global community of rights appeals to something already existing; at the same time, it is also a performative speech act to the extent that it is constitutive of and redraws the bounds of the community. The global community of rights is thus forever suspended in the interplay between constative and performative elements, between identity and difference.

14 The term 'global constitutional text' is borrowed from H Klug *Constituting democracy: Law, globalism and South Africa's political reconstruction* (2000).

15 See M Tushnet 'The possibilities of comparative constitutional law' (1999) 108 *Yale Law Journal* 1225 1308.

16 1995 (3) SA 391 (CC).

3 Possibilities and pitfalls

The instability and uncertainty at the heart of the global constitution of rights account for many of the criticisms levelled against reliance on comparative law in constitutional adjudication. In the absence of agreement on the correct procedure – or method – to be used in the interpretation of the global constitution of rights, the transnational, 'multilingual chain novel' envisaged by Hübner Mendes may appear more like a modern-day tower of Babel where reasoned debate is likely to be drowned out by the clamour of different national agents. Hence, the fear that members of this global community may talk past each other, that they may misconstrue each other's meanings, that they may take insufficient cognisance of the different contexts in which different legal systems are embedded, that they may be more concerned about their own institutional legitimacy and narrow strategic goals than about the integrity of the dialogue, and that they may 'cherry pick' those decisions closest to their own preferred outcome. The global constitution of rights, it is feared, may be so indeterminate that it is open to endless manipulation.

While these concerns are real, they should not be exaggerated. In the first place, the instability described above is not unique to the global community of rights, but is also shared by national constitutional communities. Since 'the people' do not exist prior to the inception of the legal order, and since the new legal order can only be validated retroactively by its attribution to 'the people', the national community is forever suspended between a past that never was and a projected future that may never be.[17] Every official attempt to impose unity upon the people – to speak in its name – is resisted by the unceasing play of difference which plagues identity from within.[18] In fact, if a national legal order were able to attain perfect closure – if it could settle on a single set of authoritative interpretations or self-referential interpretive practices – there would be no need to consult foreign law.

Secondly, while it is true that understanding foreign law may pose more formidable challenges – and problems of translation – than one's own legal system and that it presents the constitutional interpreter with a choice of jurisdictions, these difficulties do not outweigh the benefits of comparative analysis. Comparative understanding is a long-term project, and the remedy to failures of understanding and contextualisation is more and better comparative work. Moreover, the point of comparative constitutionalism is to broaden the horizons of the interpreter and to benefit from the reasoning

17 H Lindahl 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in M Loughlin & N Walker (eds) *The paradox of constitutionalism: Constituent power and constitutional form* (2007) 9.

18 B Honig 'Difference, dilemmas, and the politics of home' in S Benhabib (ed) *Democracy and difference: Contesting the boundaries of the political* (1996) 257.

of foreign courts, not to arrive at a comprehensive restatement of global constitutional law in any given area.

For Hübner Mendes the greatest comparative sin consists in the failure to treat different constitutional democracies as equal participants in the global community of rights. This negative geopolitics is manifested, inter alia, in an uncritical simulation on the part of developing countries of the constitutional norms and interpretive practices of developed countries. A principled transnational constitutional dialogue, in his view, presupposes the autonomy, equality and unique perspectives of the various participants, and cannot be achieved by collapsing the self onto the foreign other.[19]

In South Africa, acceptance of the role of foreign law in constitutional adjudication coexists quite comfortably with a sense of the uniqueness of South Africa's constitutional experiment. The Constitutional Court has been at pains to point out that the point of comparison is not to follow foreign precedents as if they were legally binding, but rather to compare, to identify similarities and differences, and to study and evaluate the reasoning of foreign courts, having due regard to the national constitutional text and context.[20] As pointed out above, even the Constitutional Court's reliance in *Makwanyane* on an emerging transnational consensus was situated at the intersection of global and national norms. And while the Court has sometimes been justifiably criticised for using foreign law as authority for a particular standpoint – most notably in *Du Plessis v De Klerk*,[21] a case in which the Court relied heavily on Canadian and German law in support of its conclusion that the fundamental rights in the interim Constitution did not have direct horizontal application – even in *Du Plessis* the focal point of the Court's inquiry was the text of the interim Constitution and the question why a certain textual formulation was not followed.

The greatest danger facing comparative constitutionalism in South Africa is not that the self may be assimilated to the foreign other, but that comparative law may lose its capacity to broaden the constitutional imagination and to facilitate a confrontation with those differences that are internal to the national community. The danger is, in other words, that our engagement with foreign law may simply confirm to us who we already think we are, that we may start feeling so comfortable with our own preconceptions and conceptual apparatus that comparative law is no longer able to challenge and destabilise our intuitions about the nature, possibilities and limits of law.

19 Hübner Mendes Chapter 3 (above).

20 See *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) para 72; *Bernstein v Bester NO* 1996 (2) SA 751 (CC) paras 132-133.

21 1996 (3) SA 850 (CC). See also 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 the Final Constitutions' (1996) 12 *South African Journal on Human Rights* 361 368-371.

Comparative constitutional law is situated at the intersection of two communities, both of which are contingent, unstable and as yet incomplete. The national constitutional community looks to the global community of rights as a source of self-understanding, self-improvement and regeneration. The global community of rights, in turn, is generated by the interaction between different legal orders and is continuously remoulded by national legal actors engaging in a transnational constitutional dialogue. The transformative potential of comparative constitutional law depends on our ability to uphold the creative tension between these two – to resist the assimilation of either to the other and to embrace the capacity of difference to disrupt the reification of 'settled' identities.

PART B: OVERVIEW OF THE THREE CONSTITUTIONS AND APEX COURTS

CHAPTER 5 DESCRIPTIVE OVERVIEW OF THE BRAZILIAN CONSTITUTION AND SUPREME COURT

Oscar Vilhena Vieira

1 The 1988 Constitution

1.1 Political context: Transition to democracy

After a slow and gradual process of transition to democracy, the Brazilian society in October 1988 adopted a new Constitution. This lengthy process, called *abertura* (opening), began with the adoption the 1977 Amnesty Law,[1] and was thoroughly controlled by the military regime. The Amnesty Law benefited both sides of the political spectrum, allowing the return of left-wing dissidents to Brazil, and the lifting of charges against members of the regime involved in human rights violations.[2] During this period, the regime also restructured the party system, liberalising the creation of new political parties and allowing the re-establishment of parties that had been abolished by the military *coup* in 1964. This expansion of the political system brought a climate of institutional change within a fragmented party system.[3]

In this new environment, civil society organisations became more vocal and critical of the military regime. The Brazilian Bar Association (OAB), under the presidency of Raymundo Faoro, and organisations such as Justice and Peace Commissions in São Paulo and Recife, under the leadership of Cardinals Paulo Evaristo Arns and Elder Câmara, were determined to denounce human rights violations and to exert pressure to bring about democratisation and a new constitution. During 1983 and 1984, a significant alliance between opposition parties and major social forces mobilised the whole country to re-establish the right to vote for the presidency, in a free and direct election,

1 The Amnesty Law as negotiated to be *broad, general* and *unrestricted.* This was a political compromise between the authoritarian regime and persecuted victims.

2 In November 2010, the Inter-American Court of Human Rights ruled that Brazil's Amnesty Law ought to be disregarded by the Brazilian authorities, since it was considered as an absolute obstacle to prosecution of crimes against humanity. The Brazilian Supreme Court, however, refused to comply, see *Gomes Lund & Others v Brazil.*

3 T Skidmore *The politics of military rule in Brazil* (1988) 433-447.

called *diretas já*, which could be roughly translated as 'direct [elections] now'.[4] However, such mobilisation did not suffice to assure that Congress amended the 1969 Constitution, in order to change the electoral rules. This failure resulted in a compromise between the non-extremist sectors of the military regime and part of the opposition parties that permitted the indirect election of Tancredo Neves, opposition leader, and José Sarney, from the regime, as President and Vice-President, by an electoral college, that would come to promulgate the 1988 Constitution.

The enormous social energy built up during this process was finally released through a constituent process, called by Congress in 1985.[5] The Constitutional Assembly was elected in 1986 and started to work in January 1987. In fact, it was a congressional Constitutional Assembly. A first draft produced by a 'commission of notables', presided over by Afonso Arinos de Mello Franco, a liberal politician, was abandoned by the Assembly, which decided to start from scratch.

Representatives of 13 political parties, in a very fragmented environment, formed the Assembly. The majority of the politicians that had been united while opposing the military regime had distinctly different perspectives of how a new constitutional order should be organised. The participation of social movements, civil society organisations and interest groups was massive. More than 20 000 people circulated through the Assembly every day, in a process that is considered the most democratic moment of Brazilian political life.[6]

1.2 The reactive Constitution

The result of this process was a constitution that reacted against the immediate experience of arbitrary rule and a long history of social injustice and inequality. Different from the constitutions that emerged after the fall of the Berlin Wall, in Eastern Europe, or even the post-apartheid Constitution of South Africa, the Brazilian Constitutional Assembly was insular to major international influences. Perhaps the only foreign model taken into account in a systematic way during the Constitutional Assembly was the socially-oriented Portuguese Constitution of 1976.

The result of this relative insularity was a document that kept to the traditional Brazilian political model: a presidential system within a federalist state. However, the Constitution adopted a clear aspirational stance, aimed

4 In Brazilian history, as a rule, the presidents were elected by direct elections, an exception was made for the military regime.

5 It is important to note that the Constitutional Assembly was not created by any revolutionary force. As a matter of fact, the Constitutional Assembly was called by means of a constitutional amendment (No 25) to the 1969 Constitution.

6 L Coelho 'O processo constituinte' in M Guran (ed) *O processo constituinte 1987-1988: Documentação fotográfica [sobre] a Nova Constituição* (1988), 43; and F Whitaker *et al Cidadão Constituinte* (1989).

at co-ordinating social and economic change. In this sense, it attributed to the government a key role in promoting social welfare and economic development. The economic chapter of the Constitution, originally written with a clear national developmentalist approach, was almost completely reformed in the 1990s to adjust to the wave of neo-liberalism.

The 1988 Constitution is organised into eight parts (titles), arranged with regard to: fundamental principles, fundamental rights and guarantees, the organisation of the state, the organisation of the powers, the defence of the state and of the democratic institutions, taxation and budget, the economic and financial order, and the social order. These parts are now discussed more fully.

1.3 Fundamental principles of the Constitution

In the first title of the 1988 Constitution, it is established that Brazil is a Federal Republic, constituted as an *Estado Democrático de Direito.*[7] Amongst the fundamental principles of the Republic are citizenship, human dignity and political pluralism. Demonstrating from the beginning its aspirational nature and social drive, the Constitution lays out the following as the main objectives to be pursued by the Brazilian state: the construction of a free, just society based on solidarity; national development; the eradication of poverty and substandard living conditions and the reduction of social and regional inequality; and the promotion of public welfare, free from discrimination, arising from race, sex, colour, age, and any other kind of discrimination. Finally, it establishes a group of principles that should govern the conduct of the Brazilian state in the international arena, amongst which should be highlighted the prevalence of human rights; self-determination of all people; defence of the peace; and repudiation of terrorism and racism.

If in the past there was some strong disagreement over the juridical nature of these principles among Brazilian constitutional scholars, today there is substantial consensus between jurists and the courts that all these principles have binding force, and that they must be imposed in all spheres of the Brazilian state.

Regarding the political configuration of the Brazilian state, the 1988 Constitution maintained a federal structure, which is comprised of 27 member states and more than 5 000 municipalities. The presidential system, inaugurated by the 1891 Constitution, was also preserved in 1988. The principle of separation of powers – with an independent executive, legislative and judiciary – applies to both the national and member state spheres.

7 There is a substantial difference between the (disputed) concepts of the rule of law and *Estado Democrático de Direito, Estado Democratico de Derecho* and *Rechtsstaat.* For an interesting approach, see GA O'Donnell 'Why the rule of law matters' (2004) 15 *Journal of Democracy* 32.

Municipalities comprise of only executive and legislative branches. Democratic principles govern elections for all legislative and executive positions. The nomination of members of the judiciary is carried out, in general, by means of public civil service entrance exams. Only the members of the superior courts, on the federal level, are chosen by a process which involves nomination by the President of the Republic and ratification by the Federal Senate.

Perhaps the greatest distinction of the Brazilian system of separation of powers, in relation to other countries, is the status and attributions conferred to the Attorney-General's office, organised both at the national and member state level. According to article 127 of the Constitution, the Attorney-General's office is responsible for defending the legal order, the democratic regime and the inalienable social and individual interests.[8] In this sense, it does not act only in criminal prosecution, as in many other countries, but also exercises a representative role for the public interest. Given its administrative and financial autonomy, and the guarantees of independence ensured to its members, with similar prerogatives to the judiciary, the Attorney-General's office emerges as a *quasi* fourth power in the Brazilian political system.

2 The Brazilian Charter of Fundamental Rights

Reversing the traditional order of the Brazilian constitutions which, since the Empire (1824), placed the Charter of Rights in the final part of the text, the 1988 Constitution brought the Charter of Rights to the beginning of the text, thus symbolising that these rights should be understood as being presupposed in the exercise of power. The title of rights and fundamental guarantees is divided into 12 articles. The first of these, article 5,[9] is currently composed of 70 to 80 clauses (normative statements), addressing civil rights; articles 6 to 11 address social rights in a more general manner, which are taken up at length along the Constitution: from article 193 to article 215, the rights to health, social security, social welfare, education, culture, and others are provided for in much more detail. Articles 12 and 13 refer to nationality, while articles 14 to 17 address political rights and the rights of political parties. Finally, article 170 deals with economic rights, and article 150 establishes tax payers' rights.

8 Art 127: 'The Attorney-General's office is a permanent institution, essential to the jurisdictional function of the state, and it is its duty to defend the juridical order, the democratic regime and the inalienable social and individual interests' (para 2). The Attorney-General's office is ensured of functional and administrative autonomy, and it may, observing the provisions of art 169, propose to the legislative power the creation and abolishment of its offices and auxiliary services, filling them through a civil service entrance examination or of tests and the presentation of academic and professional credentials, the remuneration policies, and the career plans; the law shall provide for its organisation and operation.

9 Art 5: 'All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms …'.

In the following sections, a brief description of the rights expressed by the Constitution will be made.

2.1 Civil rights

Article 5 of the Constitution basically recognises all civil rights established by the international legal order. It recognises the rights of equality and non-discrimination; it guarantees freedom of conscience, expression (excluding censorship), belief, demonstration, work and association; it guarantees privacy and confidentiality of correspondence; it ensures the right to material and non-material property, provided its social functions are observed, and guarantees the right of inheritance; it also establishes a long list of rights related to due process, beginning by the principle of legality; it ensures the right to access the judiciary in the case of a violation of or threat to a right; it guarantees free judicial assistance provided by the state; it ensures the right to substantial legal defence, to due process (*stricto sensu*), to a reasonable length of the legal process, the presumption of innocence, and prohibits evidence obtained through illicit means; finally, it prohibits torture, the death penalty (in times of peace) and other punishments of a cruel nature.

Article 5 additionally establishes diverse *remedies*, or constitutional actions, concerned with the protection of fundamental rights, which are *habeas corpus*, *habeas data*, to guarantee access to information about oneself, the *mandado de segurança*, to protect all other rights not secured by *habeas corpus* or *habeas data*; and the *mandado de injunção*, which is intended to ensure the efficacy of fundamental rights against legislative omission, which obstructs the immediate application of rights.

2.2 Social rights

The Brazilian Constitution defines, in article 6, social rights as the entitlement to education, health, work, housing, leisure, safety, social security, social welfare, and protection for motherhood and childhood.[10] These rights, however, are divided into two large groups. The first of these groups, regulated by articles 7 to 11 of the Constitution, refers only to labour rights, which relate to entitlements of the worker: (i) On an individual level, such as protection of unemployment, a work environment free of discrimination, minimum wage, a work day not longer than eight hours, holidays, maternity and paternity leave, amongst others, and rights related thereto; and (ii) the organisation of the working class, such as the freedom to form unions and the

10 Art 6: 'Education, health, food, work, housing, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute are social rights, as set forth by this Constitution'.

right to strike. Workers' rights are directly opposable to employers and are enforceable by the labour courts.[11]

Other social rights can be found dispersed throughout the Constitution. They are distributive rights, directly enforceable before the state. The criteria for the distribution of these distinct rights differ in each case. For example, the right to health is recognised by article 196 of the Constitution, as a universal right;[12] the right to social security, protected by article 201, in turn, has a contributive nature, which depends on contributions made by the worker himself, the employer and budgeting by the Union;[13] and the right to social welfare, shaped in article 203, should be assured in respect to the necessities of each individual, not dependent on prior contribution.[14]

The right to basic education, established in article 205, is an obligation of the state and has a universal nature.[15] The state should progressively universalise secondary education and ensure, with regard to the capacity of each individual, access to university education. Also protected are the rights to pre-school education for children of up to five years of age, and the rights to education of disabled people, preferably in the regular school network.

One important aspect of the system that organises the right to education under the 1988 Constitution is its mandatory budget allocation clause. Article 212 of the Constitution stated that the Union should spend no less than 18 per cent, and the states and municipalities never less than 25 per cent of tax revenue on education.[16] In the case of the right to health, a formula linking social expenditures to revenue was also created. In this case, however, the

11 In Brazil, all labour demands are ruled on by specialised courts. However, due to the aforementioned over-constitutionalisation of rights, a significant part of the rulings of the Superior Court of Labour is subject to review by the Brazilian Supreme Court.

12 Art 196: 'Health is a right of all and a duty of the state and shall be guaranteed by means of social and economic policies aimed at reducing the risk of illness and other hazards and at the universal and equal access to actions and services for its promotion, protection and recovery'.

13 Art 201: 'The social security system shall be organised as a general scheme, of a contributory basis and mandatory participation, with due regard for criteria that preserve financial and actuarial balance, and shall provide for, in accordance with the law ...'.

14 Art 203: 'Social assistance shall be rendered to whomever may need it, regardless of contribution to social welfare and shall have as objectives (i) the protection of the family, maternity, childhood, adolescence and old age; (ii) the assistance to needy children and adolescents; (iii) the promotion of the integration into the labor market; (iv) the habilitation and rehabilitation of the handicapped and their integration into community life; (v) the guarantee of a monthly benefit of one minimum wage to the handicapped and to the elderly who prove their incapability of providing for their own support or having it provided for by their families, as set forth by law'.

15 Art 205: 'Education, which is the right of all and duty of the state and of the family, shall be promoted and fostered with the co-operation of society, with a view to the full development of the person, his preparation for the exercise of citizenship and his qualification for work'.

16 Art 212: 'The Union shall apply, annually, never less than eighteen percent, and the states, the Federal District, and the municipalities, at least twenty-five percent of the tax revenues, including those resulting from transfers, in the maintenance and development of education. (1) The share of tax revenues, transferred by the Union to the states, the Federal District and the municipalities, or by the states to the respective municipalities, shall not be considered, for purposes of the calculation provided by this article, as revenues of the

Constitution determines that a complementary law should establish a percentage, for a period of five years. The establishment of mandatory investments on social rights, for spheres of the federation, had a strong impact on public spending in the social sector. It is estimated that the 1988 Constitution imposed on the Brazilian state an increase of more than 40 per cent in social spending, when compared to the previous system. From the decade of the 1980s to the year 2000, social indicators demonstrate a rise in life expectancy, from 62,5 years to 72,5 years; a reduction in the mortality rate from 69,1/1 000 children, to 30,1/1 000 children; as well as a reduction in the illiteracy rate, from 31,9 per cent to 16,7 per cent of the total population.[17] Even if it is not possible to establish a direct relation of causation between these two events, there is ample evidence that points in this direction.

The rights to housing and public safety, apart from statements at the end of article 6 of the Constitution, are not clearly delineated in the text. In the same way, apart from providing for a chapter on agrarian reform, the Constitution did not define a right of access to land, but only authorised the state to carry out expropriation of unproductive properties that do not fulfil their social function (article 184), with the objective of promoting agrarian reform.[18]

The Constitution also established a group of fundamental rights in the area of culture, imposing on the state obligations to expand and democratise access to cultural resource and cultural manifestations; a duty to protect popular, indigenous and black cultural manifestations; a duty to preserve ethnic and regional diversity; responsibilities regarding the protection of

government which transfers it. (2) For purposes of compliance with the head paragraph of this article, the federal, state and municipal educational systems, as well as the funds applied in accordance with article 213 shall be taken into consideration. (3) In the distribution of public funds, priority shall be given to the providing for the needs of compulsory education, as regards universalisation, assurance of quality standards, and equality, as set forth in the national education plan. (4) The supplementary food and health assistance programmes provided by article 208, VII, shall be financed with funds derived from social contributions and other budgetary funds. (5) Public basic education shall have, as an additional source of financing, the social contribution for education, a payroll tax levied on companies, as provided by law. (6) State and municipal quotas of the proceeds from the collection of the social contribution for education shall be distributed in proportion to the number of students enrolled in basic education in the respective public school systems'.

17 VE de Oliveira 'Política Social no Brasil: Da cidadania regulada à universalização regressiva – assistência social, educação e saúde' in H Dantas *et al* (eds) *Introdução à Política Brasileira* (2007) 224.

18 Art 184: 'It is within the power of the Union to expropriate on account of social interest, for purposes of agrarian reform, the rural property which is not performing its social function, against prior and fair compensation in agrarian debt bonds with a clause providing for maintenance of the real value, redeemable within a period of up to twenty years computed as from the second year of issue, and the use of which shall be defined in the law'.

historical and cultural heritage; and an obligation to establish incentives for the production, promotion and diffusion of culture (articles 215 and 216).[19]

In its environmental section, the Constitution ensured to everyone the 'right to an ecologically-balanced environment', regarding it as a public asset of the people and essential to a healthy quality of life, as something that must be preserved for future generations. Through this inter-generational pact, the 1988 Constitution imposes on the state and subsequent generations a clear obligation to preserve and restore the environment, the diversity and integrity of the inherited public space of the country; to define and protect areas of preservation; to require a previous environmental impact study in relation to activities that are potentially harmful to the environment; to control the production, commercialisation and employment of techniques that possess a risk to life, to quality of life, and to the environment; to promote environmental education; and to protect flora and fauna.

2.3 Economic rights

The 1988 Constitution, by means of Title VII, constructs the legal framework for the Brazilian economic system. From a perspective of fundamental rights, the Constitution ensures the right to property, conditioned by its social

19 Art 215: 'The state shall ensure to all the full exercise of the cultural rights and access to the sources of national culture and shall support and foster the appreciation and diffusion of cultural expressions. (1) The state shall protect the expressions of popular, Indian and Afro-Brazilian cultures, as well as those of other groups participating in the national civilisation process. (2) The law shall provide for the establishment of commemorative dates of high significance for the various national ethnic segments. (3) The law shall establish the National Culture Plan, in the form of a multi-year plan aimed at the cultural development of the country and the integration of government initiatives to attain the following: (i) protection and appreciation of the value of Brazil's cultural heritage; (ii) production, promotion, and diffusion of cultural goods; (iii) training of qualified personnel to manage culture in its multiple dimensions; (iv) democratisation of access to cultural goods; (v) appreciation of the value of ethnic and regional diversity'. Art 216: 'The Brazilian cultural heritage consists of the assets of a material and immaterial nature, taken individually or as a whole, which bear reference to the identity, action and memory of the various groups that form the Brazilian society, therein included (i) forms of expression; (ii) ways of creating, making and living; (iii) scientific, artistic and technological creations; (iv) works, objects, documents, buildings and other spaces intended for artistic and cultural expressions; (v) urban complexes and sites of historical, natural, artistic, archaeological, paleontological, ecological and scientific value. (1) The government shall, with the co-operation of the community, promote and protect the Brazilian cultural heritage, by means of inventories, registers, vigilance, monument protection decrees, expropriation and other forms of precaution and preservation. (2) It is incumbent upon the government, in accordance with the law, to manage the keeping of the governmental documents and to make them available for consultation to whomever may need to do so. (3) The law shall establish incentives for the production and knowledge of cultural assets and values. (4) Damages and threats to the cultural heritage shall be punished in accordance with the law. (5) All documents and sites bearing historical reminiscence to the ancient communities of runaway slaves are protected as national heritage. (6) The states and the Federal District may assign up to five tenths per cent of their net tax revenues to a state fund for the promotion of culture, for the purpose of funding cultural programmes and projects, the utilisation of such funds for the payment of the following items being forbidden: (i) personnel expenses and social charges; (ii) debt servicing; (iii) any other current expense not directly related to the investments or actions supported by said programmes'.

function. Thus, the power to use, enjoy and to have property at one's disposal is conditioned by its conciliation with other values that are also constitutionally protected, such as the right to a clean and liveable environment, the rights of the consumer, free competition, the reduction of inequality, labour rights, and favour a dignified existence and social justice (article 170).[20] In this sense, the right to property and the free exercise of economic activity, guaranteed by article 170 of the Constitution, fits into the context of a state that receives the constitutional power to regulate the economic activities, reprimanding the abuse of economic power that gives rise to 'the domination of the markets, the elimination of competition and the arbitrary increase of profits' (article 173(4)).[21]

In the area of taxation, the Constitution establishes a series of taxpayer rights. Only those taxes which have been previously authorised by the Constitution can be instituted. Moreover, their collection and increase will always depend on law enacted in a previous fiscal year. The Constitution also bans the creation of taxes with a confiscatory nature.[22] It is important to point out, however, that the Constitution states that, whenever possible, taxes will have a 'personal character and will be graded according to the economic capacity of the taxpayer' (article 145(iii)(1)).[23] This provision is fundamental in understanding the mechanisms of redistribution of wealth instituted by the Constitution, by means of social rights.

20 Art 170: 'The economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles: (i) national sovereignty; (ii) private property; (iii) the social function of property; (iv) free competition; (v) consumer protection; (vi) environment protection, which may include differentiated treatment in accordance with the environmental impact of goods and services and of their respective production and delivery processes; (vii) reduction of regional and social differences; (viii) pursuit of full employment; (ix) preferential treatment for small enterprises organised under Brazilian laws and having their head-office and management in Brazil … Free exercise of any economic activity is ensured to everyone, regardless of authorisation from government agencies, except in the cases set forth by law'.

21 Art 173: 'With the exception of the cases set forth in this Constitution, the direct exploitation of an economic activity by the state shall only be allowed whenever needed to the imperative necessities of the national security or to a relevant collective interest, as defined by law … (4) The law shall repress the abuse of economic power that aims at the domination of markets, the elimination of competition and the arbitrary increase of profits'.

22 Art 150: 'Without prejudice to any other guarantees ensured to the taxpayers, the Union, the states, the Federal District and the municipalities are forbidden to … (iii) collect tributes ... (b) in the same fiscal year in which the law which instituted or increased such tributes was published; (iv) use a tribute for the purpose of confiscation ...'.

23 Art 145: 'The Union, the states, the Federal District and the municipalities may institute the following tributes: … (iii) benefit charges, resulting from public works. (1) Whenever possible, taxes shall have an individual character and shall be graded according to the economic capacity of the taxpayer, and the tax administration may, especially to confer effectiveness upon such objectives, with due respect to individual rights and under the terms of the law, identify the property, the incomes and the economic activities of the taxpayer'.

2.4 Political rights

Citizenship rights are extended to all Brazilians, native or naturalised. There are, however, some limitations for naturalised citizens, with respect to the posts they can hold. The formal tool of participation is the universal vote, with equal value to all. Citizens have rights to participate in the electoral process, as voters or candidates. The illiterate are not allowed to run for office. The elections for the legislature and the executive branch at municipal, state and federal levels are direct and carried out every four years. With the exception of senators that have a mandate of eight years, all other elected posts have a mandate of four years.

There is also the possibility of citizens' direct participation through plebiscites, referendums and popular initiatives for the proposal of laws. However, these instruments of direct democracy depend on legislative authorisation or extremely demanding procedures, which has largely been restricting their use in the Brazilian political system.

Political rights cannot be suspended, except in cases of cancellation of naturalisation, by judicial decision, absolute civil incapacity, criminal condemnation conferred through a final judicial decision, refusal to meet universally-imposed public obligations or to render a required service, as in the case of military service, or in cases corruption.

There is freedom to create political parties, provided that they respect the principles of national sovereignty, democracy, pluralism, and the fundamental rights of human beings. Political parties must have a national character, and are prevented from having a paramilitary nature or from receiving funds from foreign entities or governments. Political parties are ensured autonomy in defining their internal structures and access to resources of the public party funds, as well as free access to radio and television, conforming to the guidelines of the law.

The 1988 Constitution established, through articles 118 to 121, a specialised electoral court system that has the responsibility to monitor the electoral process. Elections have been carried out in an extremely orderly form in the last two decades. In the last eight years, electronic ballot boxes collect more than 100 million votes and process the results in less than 24 hours.

2.5 Rights of vulnerable groups

The Constitution makes express reference to three vulnerable groups that receive specific constitutional treatment: (i) children, adolescents and the youth; (ii) indigenous peoples; and (iii) the elderly. The rights of children and adolescents to life, health, food, education, leisure, professionalisation, culture, dignity, freedom, and familial and community care have 'absolute

priority', according to the text of article 227 of the 1988 Constitution.[24] This is the only moment in which the constitutional text prioritises a specific group of rights. It is the obligation of the state, of society and of the family to keep children and adolescents safe from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression. In 1990, Law 8.069 was edited, establishing the Statute for Children and Adolescents. This statute describes, in detail, the rights and guarantees of children and adolescents, besides establishing a special court for monitoring these rights.

The Constitution also recognised the right of indigenous peoples to their specific social organisations, customs, languages, beliefs, traditions and judicial representation. In this aspect, it puts an end to centuries of a state tutorial practice that in effect eliminated any possibility of autonomy for the native Brazilian communities. The Constitution even assured rights to their traditional lands. This gave rise to a long process, full of conflict, of land demarcation, that took far more time than the five years originally predicted in the Acts of the Transitory Constitutional Dispositions.[25] The existing *Quilombola* communities (communities formed by descendants of fugitive slaves)[26] were also ensured rights to their lands, consistent with what is outlined by article 68, in the Acts of the Transitory Constitutional Dispositions.[27]

Finally, even if there is no further reference to vulnerable groups, the Constitution confers on the state, on society and on the family, in a generic manner, the task of supporting elderly persons.

2.6 General regime of fundamental rights

The general regime of application of the fundamental rights was basically organised by three of the four paragraphs (clauses) set in the end of article 5.[28] The first paragraph establishes that fundamental rights ought to have immediate application, independent of further legislative regulation.

24 Art 227: 'It is the duty of the family, the society and the state to ensure children, adolescents and the youth, with absolute priority, the right to life, health, nourishment, education, leisure, professional training, culture, dignity, respect, freedom and family and community life, as well as to guard them from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression'.

25 Art 67: 'The Union shall conclude the demarcation of the Indian lands within five years of the promulgation of the Constitution'.

26 Slavery was abolished in Brazil in May 1888.

27 Art 68: 'Final ownership shall be recognised for the remaining members of the ancient runaway slave communities who are occupying their lands and the state shall grant them the respective title deeds'.

28 '(1) The provisions defining fundamental rights and guarantees are immediately applicable. (2) The rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party. (3) International human rights treaties and conventions which are approved in each House of the National Congress, in two rounds of voting, by three-fifths of the votes of the respective members shall be equivalent to constitutional amendments'.

However, it is not a matter of crystal clear understanding, given that a large number of constitutional clauses expressly require complementary legislation, or demand a complex set of public policies to secure the proper implementation of fundamental rights. This mechanism was conceived, however, as a guarantee against legislative or administrative omission. The most acceptable interpretation to this paragraph states that fruition of fundamental rights does not depend on ordinary legislation, so that the omission of the ordinary legislator does not work as an excuse for denying rights. This independence does not mean, however, that the ordinary law does not have a central role in the outlining of a specific right, especially when they clash with each other. But in the absence of ordinary legislation, the judiciary is authorised to directly extract from the Constitution the content of the fundamental rights to be applied to a concrete case, especially by means of the aforementioned *mandado de injunção* remedy.

2.7 Implicit fundamental rights

The second and third paragraphs of article 5, in turn, open the door of the 1988 Constitution to the recognition of human rights not expressed in the constitutional text. The second paragraph reproduces a traditional model of liberal constitutionalism, outlining that the rights expressed in the Constitution do not exclude others resulting from the fundamental principles adopted by the Constitution. This gives the judiciary the possibility of updating the Charter of Rights without the need for constant changes in the text of the document. On the other hand, the third paragraph of article 5 provides that human rights stated in international human rights treaties, ratified by the Brazilian state, can be incorporated in the Constitution, provided that the approval of these treaties is given by the National Congress through the same procedure required for the approval of a constitutional amendment. According to the predominant position of the Brazilian Supreme Court, if the approval is given through the standard system of simple majority, the treaty will have the hierarchical power of a federal law.

2.8 Circumstances that allow restrictions of fundamental rights

With regard to extraordinary circumstances which authorise the restriction of fundamental rights, the 1988 Constitution established two hypothetical situations: the *state of defence* and the *state of siege*. The state of defence is a tool for the preservation and prompt re-establishing of public order and social peace, in restricted and determined locations, seriously threatened or facing imminent institutional instability, or affected by public calamities of grand proportion. It is the responsibility of the President of the Republic to declare a state of defence, after receiving input from the Council of the Republic and the National Defence Council. The decree must be sent within 24 hours to the National Congress, who will decide on its validity. A decree that institutes a state of defence ought to state how long it will last and can

impose restrictions on the rights of assembly, secrecy of correspondence, and secrecy of other communications (article 136).[29]

The state of siege, in turn, regards situations of serious disturbances at a national level or situations of war. In this case, the President of the Republic must ask for prior authorisation from the National Congress in order to declare it. In the case of a state of siege, the only measures restricting rights that will be permitted are the following: the requirement to remain in a specific place; detention in a building not designated for persons accused of or condemned for common crimes; restrictions relating to secrecy of correspondence, communications, and liberty of press; the suspension of the freedom to assemble; search and seizure in homes; intervention in the carrying out of public services; and requisition of property (articles 137 to 139).[30]

29 Art 136: 'The President of the Republic may, after hearing the Council of the Republic and the National Defence Council, decree a state of defense to preserve or to promptly re-establish, in specific and restricted locations, the public order or the social peace threatened by serious and imminent institutional instability or affected by major natural calamities. (1) The decree instituting the state of defence shall determine the period of its duration, shall specify the areas to be encompassed and shall indicate, within the terms and limitations of the law, the coercive measures to be in force from among the following: (i) restrictions to the rights of (a) assembly, even if held within associations; (b) secrecy of correspondence; (c) secrecy of telegraph and telephone communication; (ii) in the event of a public calamity, occupation and temporary use of public property and services, the Union being liable for the resulting damages and costs. (2) The state of defense shall not exceed thirty days and it may be extended once for an identical period if the reasons that justified its decreeing persist … (4) Upon decreeing a state of defense or extension thereof, the President of the Republic shall, within twenty-four hours, submit the act with the respective justification to the National Congress, which shall decide by absolute majority. (5) If the National Congress is in recess, it shall be called extraordinarily within five days. (6) The National Congress shall examine the decree within ten days as from receipt thereof, and shall remain in operation as long as the state of defense is in force. (7) If the decree is rejected, the state of defence shall cease immediately'.

30 Art 137: 'The President of the Republic may, after hearing the Council of the Republic and the National Defence Council, request authorisation from the National Congress to decree the state of siege in the event of (i) serious disturbance with nationwide effects or occurrence of facts that evidence the ineffectiveness of a measure taken during the state of defence; (ii) declaration of state of war or response to foreign armed aggression. The President of the Republic shall, on requesting authorisation to decree the state of siege or to extend it, submit the reasons that determine such request, and the National Congress shall decide by absolute majority'. Art 138: 'The decree of the state of siege shall specify the period of its duration, the rules required to implement it and the constitutional guarantees that are to be suspended and, after it is published, the President of the Republic shall designate the executor of the specific measures and the areas encompassed. (1) In the event of article 137 I, the state of siege may not be decreed for more than thirty days nor may each extension exceed such period; in the event of item II, it may be decreed for the entire period of the war or foreign armed aggression. (2) If authorisation to decree the state of siege is requested during parliamentary recess, the President of the Federal Senate shall immediately summon an extraordinary session of the National Congress to convene within five days in order to examine the act. (3) The National Congress shall remain in session until the end of the coercive measures'. Art 139: 'During the period in which the state of siege decreed under article 137 I, is in force, only the following measures may be taken against persons: (i) obligation to remain at a specific place; (ii) detention in a building not intended for persons accused of or convicted for common crimes; (iii) restrictions regarding the inviolability of correspondence, the secrecy of communications,

2.9 Fundamental rights as limits to the amending power of Congress

Finally, the general system of fundamental rights establishes not only that rights cannot be abolished by ordinary legislation, but that even a proposal for constitutional amendments that intend to abolish individual rights and guarantees will not be the object of deliberation by Congress. Through this clause, the 1988 Constitution creates a kind of reserve of constitutional justice that cannot be eliminated through constitutional reform powers granted to Parliament. According to what the Federal Supreme Court has already decided, in more than one circumstance, fundamental rights constitute material (substantial) limits to constitutional amending powers, enabling the Court to invalidate amendments passed by the National Congress.[31]

3 The structure and role of the Brazilian Supreme Court (STF)

3.1 Extended jurisdiction: the Brazilian Supreme Court's three roles

The Brazilian Bill of Rights prohibits any law to strip from the judiciary the power to examine violations or threats to fundamental rights.[32] Through this provision, the 1988 Constitution granted critical powers to the judiciary as a whole and to the Brazilian Supreme Court specifically for the protection of fundamental rights. Currently, it is hard to imagine any topic related to fundamental rights that might be outside the scope of the Brazilian Supreme Court. Furthermore, the 1988 Constitution, eager to protect its ambitious project from future attacks, conferred upon the Brazilian Supreme Court substantial powers as the constitutional guardian. The Court was endowed with powers that, in most contemporary democracies, are divided into three kinds of institutions: constitutional courts, specialised judicial courts, and courts of last appeal.

the rendering of information and the freedom of press, radio broadcasting and television, as established by law; (iv) suspension of freedom of assembly; (v) home search and seizure; (vi) intervention in public utility companies; (vii) requisitioning of property. The broadcasting of speeches made by congressmen in their legislative houses is not included in the restrictions of item (iii), if authorised by the respective Directing Board'.

31 Art 60: '(4) No proposal of amendment shall be considered which is aimed at abolishing: (i) the federative form of state; (ii) the direct, secret, universal and periodic vote; (iii) the separation of the government powers; (iv) individual rights and guarantees'.

32 Art 5, XXXV of the 1988 Constitution: 'The law shall not exclude any injury or threat to a right from the consideration of the judicial power'.

3.1.1 The Brazilian Supreme Court´s role as constitutional court

In its role as a constitutional court, the Supreme Court exercises its power of judicial review, that is, to rule on the constitutionality of laws and normative acts promulgated on both the federal and state level, with binding effect.

It should be noted, in the Brazilian case, that the Court also has jurisdiction to rule on the constitutionality of amendments to the Constitution, when such amendments appear to violate any of the super-constitutional provisions established in article 60(4) of the Constitution: federalism, the separation of powers, direct elections with universal suffrage, and individual rights and guarantees.[33] Consequently, the Court has the authority to have the last word on constitutional issues in our political system.

The Court was also given jurisdiction to decide whether actions by the legislative and executive branches pass constitutional muster, and, through the mechanism of *mandado de injunção*, to ensure immediate and direct implementation of fundamental rights. The political implications of the jurisdictional reach of the Court are greater than in the previous constitutional periods. New social and political actors were granted standing to challenge the constitutionality of laws, in accordance with article 103 of the Federal Constitution. This was a shift from the previous period in which only the federal Attorney-General could directly access the Court for judicial review. Today, the following actors can directly access the Brazilian Supreme Court to decide on the constitutionality of particular laws: the President, the directing board of the Federal Senate, the Chamber of Deputies or of State Legislatures, state governors, the Federal Attorney-General, the Federal Council of the Brazilian Bar Association, political parties represented in the Brazilian Congress, and confederations of labour unions or professional organisations of nationwide scope.[34] Even if we acknowledge the importance of this expansion of standing to new political actors, it is important to stress that it was not contemplated that this right would be exercised by individuals and ordinary organisations. This could be a partial explanation for the slow pace in which the Court has been challenged along these years.

The expansion on the list of actors with direct standing before the Court has profoundly impacted its role as a political institution. It rapidly became a

33 Art 60: '(4) No proposal of amendment shall be considered which is aimed at abolishing: (i) the federative form of state; (ii) the direct, secret, universal and periodic vote; (iii) the separation of the government powers; (iv) individual rights and guarantees'.

34 Art 103: **'**The following may file direct actions of unconstitutionality and declaratory actions of constitutionality: (i) the President of the Republic; (ii) the Directing Board of the Federal Senate; (iii) the directing board of the Chamber of Deputies; (iv) the Directing Board of a state Legislative Assembly or of the Federal District Legislative Chamber; (v) a state governor or the Federal District Governor; (vi) the Attorney-General of the Republic; (vii) the Federal Council of the Brazilian Bar Association; (viii) a political party represented in the National Congress; (ix) a confederation of labour unions or a professional association of a nationwide nature'.

space where those defeated in the representative sphere search for protection. It is interesting to note that the political party that most petitioned the Court for judicial review during the administration of President Fernando Henrique Cardoso was the Workers' Party (the main opposition party) while, during the administration of President Lula, the main opposition parties (the Democratic Party and Brazilian Social Democratic Party), behaved in the same way. Moreover, state governors have actively used the Court as a second political arena, seeking to block provisions adopted by their predecessors, as well as their state legislatures.

Two other relevant novelties adopted in the last few years are also contributing to increase the importance of the Court as a forum of political action. Besides the fact that the Court deliberates in public, TV Justiça, a public open channel, televises its plenary sessions. A second aperture to the public is the ability of civil society organisations and other interest groups to submit *amici curiae* briefs in cases where the Court's decisions have a significant impact. As Machado demonstrates in her Master's thesis, ordinary legislators contributed to the democratisation of access to the Court. New voices began to be heard at the Court, making it more pluralistic and increasing its political power as a setting in which political conflicts that were previously heard in the political bodies could be settled.[35] In addition, in its most important cases, the Court held public hearings where experts, activists and academics could offer opinions, not necessarily contributing to the legal discourse, but making moral, political, technical and economic arguments the Court could consider in its deliberations. The cases involving the constitutionality of affirmative action, medicine distribution, stem-cell research and abortion of anencephalic fetuses are examples of the power of this mechanism. These cases certainly increased the public profile of the Court within the Brazilian political system.

3.1.2 The Brazilian Supreme Court´s role as specialised court

The 1988 Constitution also conferred upon the Court the thorny task of serving as a specialised court. First, it has the power to judge cases involving major state officials. As a result of the unusually high rate of criminal conduct in the Brazilian upper political echelons, the Court came to serve as a criminal trial court for politicians. The problem is such that there are more than 250 complaints pending against members of the Brazilian Congress, awaiting a Court decision. The Court does not have the resources to conduct a detailed analysis of the facts and, even if it were to increase its institutional resources, its precious time would be consumed in endless criminal fact-finding, pulling it away from its constitutional responsibilities.

35 E Machado de Almeida *Sociedade civil e democracia: a participação da sociedade civil como* amicus curiae *no Supremo Tribunal Federal* São Paulo, 2006. (Mater's dissertation in law, Faculty of Law, Pontifícia Universidade Católica de São Paulo); and E Machado de Almeida 'O Amicus Curiae na Jurisprudencia do STF' (2013) 34 *Revista Brasileira de Estudos Constitucionais*.

Second, the Court is burdened by reviewing minor acts issued by Congress and the executive, often related to the internal governance of these two governmental branches. Even worse, the Court is sometimes required to resolve these questions on an emergency basis. In these situations, the Court becomes a kind of *small claims court of political matters*. I have no knowledge of any other Supreme Court that is responsible for settling matters that members of Congress were not able to resolve amongst themselves, on such a regular basis.

The same occurs with respect to injunctions impugning acts, often banal, issued by the President, as in the case of the dismissal of a civil servant. The Court's specialised jurisdiction imposes tremendous management costs and puts at risk the Court's institutional authority, as it ends up becoming involved in matters that could and should be resolved in the other branches of government. Moreover, it is unacceptable that the highest court is obliged to serve as a trial court, hearing cases involving extradition, the homologation of judgments of foreign courts, ordinary requests for *habeas corpus*, injunctions and other civil actions regarding the defendant's status.

3.1.3 The Brazilian Supreme Court´s role as court of last resort

Finally, the Brazilian Supreme Court serves as an *appellate court* or *court of last resort*, reviewing hundreds of thousands of cases adjudicated by the lower courts over the years. This task is partially due to the co-existence of the diffuse and concentrated models of judicial review. Without a strong doctrine of precedent to guide it, the Court has often been required to hear identical cases again and again. Since 1998 to the present date, the Court has received more than one million appeals assessed by 11 judges, which represents 95,10 per cent of the cases distributed and 94,13 per cent of the cases ruled upon by the Court. These figures do not include the thousands of *habeas corpus* petitions (many of which by-pass lower courts), extradition requests and other cases that reach the Court's docket every day. In addition to the inhuman toll such a case load takes on the justices, it is absolutely irrational to make millions of aggrieved petitioners wait for a decision from the Court, while many benefit unduly from the delay in these cases. Needless to say, the greatest beneficiary of this irrational system is the Brazilian government.

It is important to note, however, that these absurd statistics, which usually cause disbelief amongst foreign jurists, do not accurately represent the Court's actual day-to-day operation. The indication that the Court adjudicates more than one hundred thousand cases per year, on average, does not mean that the Court hears that many cases. The vast majority of the cases are ruled ‘monocratically’, that is, by a single justice. In many circumstances, individual justices are deciding on the admissibility of these cases. Marcos Paulo Veríssimo concludes that behind these unilateral decisions by individual justices, there may be hidden a ‘kind of informal

certiorari'.[36] This illustrates that the Court has been using a high degree of discretion to establish what cases are going to be ruled upon and when they will be ruled upon. In the political realm, having control over the agenda, for example about when some themes will be decided, is of great significance, and this power finds itself in the hands of each of the justices who render their decisions unilaterally. The processes behind the exercise of such discretion are not entirely clear, and one is left with a stark impression that unfettered selectivity prevails when it comes to what will be ruled upon and what will wait indefinitely.

The 45th Constitutional Amendment of 2004 brought about two changes to the Brazilian Supreme Court's appellate jurisdiction. First, the Court was given greater discretion (as a Court, not individual justices) to choose the appeals it will adjudicate. According to this amendment, those wishing to have their appeals heard by the Court must show that their cases have 'broad repercussions'. This was not a requisite in the past, as the only requirement was whether a constitutional violation had occurred.

The second important change brought about by the 45th Amendment was the creation of an institute named *súmulas vinculantes*. This instrument gave the Court the power to extract from its precedents an explicit concise ruling, which would bind all lower and administrative courts in Brazil. These concise rulings were conceived of to compensate for the absence of the principle of *stare decisis* in the Brazilian legal system. Both these amendments served to further concentrate power in the hands of the Court.

3.2 Composition of the Brazilian Supreme Court

The Brazilian Supreme Court is composed of 11 justices, each nominated by the President, who should select a citizen who possesses 'formidable legal knowledge' and a 'spotless reputation'. The nominee must be at least 35 years old, and cannot be older than 65. Once these criteria have been met, the President is not restricted by any other parameters and will normally consult with the Minister of Justice about his or her choice. The justices are often chosen from amongst distinguished attorneys, law professors, former Ministers of Justice, federal and state court judges, as well as members of the *Mininsterio Publico*. Irrespective of the nominee's professional background, the nomination and appointment process is the same.

The appointment of the justices is contingent upon Senate approval, by absolute majority. Although the Senate confirmation hearings are open to the public, civil society organisations usually do not take part in these events.

36 MP Verissimo 'A constituição de 1988, vinte anos depois: Suprema corte e ativismo judicial "à brasileira"' (2008) 4 *Rev direito GV, São Paulo* http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1808-24322008000200004&lng=en&nrm=iso (accessed 1 September 2011).

The media similarly takes a hands-off approach and infrequently examines a candidate's background. Since the Supreme Court's creation, in 1891, only a few nominees have been rejected by the Brazilian Senate, all of them nominated by Floriano Peixoto, the second President of the Republic (1891-1894), during the last year of his term.[37] The Senate confirmation hearings traditionally have been *pro forma*, as the senators have shown great deference to the presidential nominations, rather than exercised their discretionary power, conferred upon them by the Constitution, to challenge such nominations. Since the Supreme Court has played an increasingly significant role in the Brazilian political system, the nomination of justices will in the coming years likely receive greater attention from the media, civil society organisations and political parties.

There are no rules regulating how long a justice may serve on the Brazilian Supreme Court. The Constitution merely requires that justices, like any other public career employee, retire at the age of 70.[38] Only in the Vargas administration and during the military regime, were justices forced to step down prematurely, in violation of their rights under the Constitution. The length of a justice's term will invariably depend on the age at which he or she was appointed. The younger a justice is at the time of appointment, the longer he or she will serve at the Court.

There are several unwritten rules which circumscribe the pool of candidates from which the President may choose a nominee. The first relates to the principle of Brazilian federalism. The President will try to balance the Court's composition with the country's demographics in mind; normally more populous states are better represented at the Court, as is the case of São Paulo State. Other traditions also influence the President's choice, resulting in nominees from the main state courts as well as law professors. Finally, in recent years there has been a growing discussion about the need to ensure representation of female and Afro-decedent justices. Until President Fernando Henrique Cardoso nominated and succeeded in appointing Ellen Gracie, in the year 2000, no woman had ever served on the Court. The current Supreme Court has one seat vacant, but it was by the end of 2011 composed of nine men and two women. Justice Joaquim Barbosa, a former member of the *Ministerio Publico* and activist in the Afro-decedents rights movement, became the first black Supreme Court justice after being nominated by President Luiz Inácio Lula da Silva in 2003.

37 O Vilhena Vieira *Supremo tribunal federal: Jurisprudência política* (2002) 119.

38 Art 40 of the 1988 Constitution: 'Employees holding effective posts in the Union, the states, the Federal District, and the municipalities, therein included their associate government agencies and foundations, are ensured of a social security scheme on a contributory basis, with due regard for criteria that preserve financial and actuarial balance and for the provisions of this article. (1) The employees covered by the social security scheme set forth in this article shall go into retirement, their pensions being calculated according to the amounts stipulated under the terms of (3) … (ii) compulsorily, at seventy years of age, with a pension in proportion to the period of contribution …'.

Of the ten justices at the Court, five were practising lawyers (two in the public sector[39] and three in the private sector[40]); one worked consistently as legal advisor in the executive branch;[41] and four were judges.[42] It is important to note that, of the four who previously served as judges, only half were career judges, while the other two[43] were lawyers who joined the bench through a constitutional provision known as the 'constitutional fifth'.[44] Of the ten justices, five were at the time of their nomination actively involved in academic pursuits in the field of public law.

It is important to note that the transition to democracy did not result in an immediate transformation of the Court. New justices were nominated and appointed gradually, as sitting justices retired at the expiry of their terms. The last of the justices appointed during the military regime retired in 2003, which is tremendously important to our understanding of why it took the Court so long to behave more actively as a guardian of the new Constitution.

4 The location of the Court within the political system

In 1968, Aleomar Baleeiro, one of the most influential Brazilian jurists and a Brazilian Supreme Court justice, wrote a book now considered a classic work, its title is roughly translated to read: 'The Brazilian Supreme Court, that unknown other'.[45] This title could not be more outdated in light of the Court's current prominent position in the Brazilian political landscape. More often than not, the Court's decisions make the headlines of Brazil's main newspapers, in the politics, economics and legislation sections, and, more frequently, in the police affairs section. Every now and then, topics related to the Brazilian Supreme Court can also be found in the science, education and culture sections.

In the academic field, on the one hand, research regarding the different aspects of the Court's workings and influence has noticeably increased, not only in law schools, but also in departments of political science, sociology and history. Methods of constitutional interpretation, which formerly received little attention from constitutional scholars, have become a focal point for a new generation of jurists. The weighing of values, principles, and morality

39 Justices Celso de Mello and Joaquim Barbosa.
40 Justices Ayres Britto, Cármen Lúcia and Dias Toffoli.
41 Justice Gilmar Mendes.
42 Justices Cezar Peluso, Marco Aurélio de Mello, Luiz Fux and Ricardo Lewandowski.
43 Justices Marco Aurélio de Mello and Ricardo Lewandowski.
44 Art 94 reads as follows: 'One-fifth of the seats of the Federal Regional Courts, of the courts of the states, and of the Federal District and the territories shall be occupied by members of the Public Prosecution, with over ten years of office, and by lawyers of notable juridical learning and spotless reputation, with over ten years of effective professional activity, nominated in a list of six names by the entities representing the respective classes'. 'Upon receiving the nominations, the court shall organise a list of three names and shall send it to the executive power, which shall, within the subsequent twenty days, select one of the listed names for appointment.'
45 The original title is 'O Supremo Tribunal Federal, esse outro desconhecido'.

now play a much more central role in the study of constitutional law than in the past.

Political scientists have recently awoken to the need to better understand the role of law and the agencies responsible for applying it, after a long period during which they neglected the study of legal institutions. Given these developments in the field of political science, with its institutionalist perspective, the Court has been the primary focus for many scholars. Even economists have begun paying more attention to the consequences of judicial decisions, which sometimes lead to negative externalities. More surprising, however, has been the attention paid to the Court by non-specialists. With each controversial ruling on writs of habeas corpus, the Court has made its presence felt more strongly in the lives of citizens. Each time the Court rules on an action directly challenging the constitutionality of a law, with millions of viewers following the proceedings on TV Justiça[46] or the internet, a larger number of Brazilians accept that crucial political, moral and economic questions are resolved by a court composed of 11 justices for whom they never voted and who make their decisions using legal jargon that is nearly incomprehensible to those without legal knowledge or a legal background.

The greater influence of the Brazilian Supreme Court and courts in general is not, however, strictly a Brazilian phenomenon. There is a large specialised bibliography devoted to understanding how courts have generally gained influence at the expense of the political branches and how they have occupied a larger space in the political landscape to the detriment of parliamentary bodies.

Some researchers claim that the expanded influence of the courts is an immediate consequence of the expansion of the market system, on a global scale.[47] From the perspective of investors, the courts are a more secure mechanism to promote judicial stability and predictability than democratically-elected legislators, who are pressured by populist demands and are necessarily less efficient, from an economic perspective.

Another school of thought understands the judiciary's current prominence as a consequence of the diminution of the representative system and its incapacity to make good on its promises to guarantee justice and equality for all, ideas inherent in the democratic ideal and incorporated in modern constitutions. The people thus look to the courts as the ultimate guardian of democratic ideas. This naturally leads to a paradoxical situation since, as it seeks to fill the gaps left by the representative system, the judiciary ends up exacerbating the deficiencies of representative democracy. This

46 The rulings of the Brazilian Supreme Court are not only open to the public, but also transmitted in real time through a public television station called 'TV Justiça', which more or less means 'Justice TV'.

47 CN Tate & T Vallinder (eds) *The global expansion of judicial power* (1995).

conundrum is the main argument presented in the influential book by Garapon.[48]

For many constitutional scholars, this transfer of power from the representative system to the judiciary is, above all else, a result of rigid constitutions that are endowed with vigorous mechanisms of judicial review, based on the American model.[49] Thus, this is not a recent phenomenon. However, the expansion of the judiciary's role is more substantial when constitutions with transformative ambitions are ratified. In contrast to liberal constitutions, which established few rights and fomented the creation of political institutions geared towards allowing each generation to make its own substantive choices through legislation and public policy, many contemporary constitutions make legislators uncomfortable, because they reduce the legislative and executive branches to organs merely implementing constitutional imperatives, while the judiciary exercises its function as the ultimate guardian of the Constitution. The hyper-constitutionalisation of contemporary life is, however, a consequence of mistrust in democracy, and not a cause. Nonetheless, once the power of the Constitution is expanded and the role of the judiciary strengthened, as the constitutional guardian, there is necessarily a weakening of the representative system.

The highly ambitious text of the Constitution of 1988, in conjunction with the gradual concentration of power in the jurisdiction of the Brazilian Supreme Court, has led to a shift in the balance of power amongst the three branches of government in Brazil. I have referred elsewhere to this phenomenon as *supremocracy*.[50] The Court has gradually gained prominence as an institution in the political landscape, in light of the enormous task of safeguarding such an ambitious Constitution. In this sense, the additional powers conferred upon the Court have led it to act not only as a kind of moderating power,[51] but also as the organ responsible for providing the final word about numerous questions of a substantive nature, at times validating and legitimising a decision made by the representative organs, at times overruling majoritarian decisions. Even if this feature is also an attribute of other constitutional courts around the world, the Brazilian Supreme Court sets itself apart in degree and in kind. A wide range of issues are considered to have a constitutional dimension in Brazil and are deemed justiciable. The Court is different in kind because it granted itself the competence to exercise judicial review over constitutional amendments. The Indian Supreme Court

48 A Garapon 'Le gardien des promesses' *Justice et démocratie* (1996).
49 M Cappelletti & B Garth (eds) *Access to justice* (1978/79).
50 O Vilhena Vieira 'Supremocracy' (2008) 4 Rev direito GV, São Paulo http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1808-24322008000200005&lng=en&nrm=iso (accessed 13 November 2013).
51 During the period of the Brazilian Empire, the Imperator held the 'Moderating Power', a partial implementation of Benjamin Constant's political theory. The Moderating Power was deemed responsible to keep the harmony between the executive, legislative and judicial powers. With the rise of the Republic period, it could be said that the Moderating Power was transferred to the Brazilian Supreme Court.

might be the only other constitutional court that shares the *supremocratic* status of the Brazilian Supreme Court.[52]

Not surprisingly, one of the most astute Brazilian politicians, who has served as President of Brazil and President of the Senate and lived through all of the changes in the Brazilian political system in the last 50 years, affirmed recently that 'no institution is more important or necessary in Brazil than the Brazilian Supreme Court',[53] a comment that illustrates the shift of power from the political branches to the Court.

The 1988 Constitution transcended the realm of issues traditionally deemed as strictly constitutional – even when one bears in mind it is a welfare-focused constitution. It regulated in detail most aspects of the Brazilian state, economic and social spheres. The original document consists of 250 articles in its main part, and 94 articles as transitory disposition. Many constitutional articles, however, have dozens of clauses, such as article 5, composed of 78 clauses, regulating civil rights, serving as a sort of *maximising commitment*.[54] In other words, the constitutional content is the result of a wide negotiation between different sectors of the Brazilian society, each one assuring their own corporativist interests. This is one of the reasons why many of the constitutional dispositions, including rules, conflict directly with others. Many colleagues have referred to this process as the 'constitutionalisation of law', led by the 1988 Constitution.[55]

However, such elevated constitutional ambitions created an enormous sphere of constitutional tension and consequently generated an explosion of constitutional litigation. The equation is simple: If every issue can be regarded as constitutional, the political branches will have a small sphere of influence. Any sudden movement by administrators or legislators leads to a claim of unconstitutionality which, as a rule, ends up before the Court. The data are convincing. In 1940, the Court received 2 419 cases; this figure would reach 6 376 in 1970. After the promulgation of the Constitution of 1988, the Court then received 18 564 cases in 1990, 105 307 in 2000 and 160 453 in 2002, the year in which the Court received the greatest number of cases in its history. In 2010, the Court received 103 324 cases. This increase was the immediate result of the expansion of rights enshrined in the Constitution, and a congenital defect of the Brazilian system of appeals which, until the 45th Amendment of 2004, found itself lacking a mechanism giving the Court a discretion to choose the cases it wanted to hear, as well as an efficient mechanism through which its decisions could bind lower courts. This explosion of litigation, on the other hand, can be understood as a positive

52 For a qualified analysis of the Indian Supreme Court, see Upendra Baxi's chapter (Chapter 1 above).
53 J Sarney 'O supremo tribunal federal' *Folha de S Paulo*, São Paulo, 7 September 2008, A3.
54 O Vilhena Vieira *A Constituição e sua Reserva de Justiça* (1999).
55 G Binenbjom *A Nova Jurisdição Constitucional Brasileira* (2001); and VA da Silva *A Constitucionalização do Direito* (2004).

development in Brazilian society, as it became further aware of its legal rights under the new Constitution and sought to vindicate them.

5 Conclusion: Is the Supreme Court protecting fundamental rights?

As described above, the 1988 Constitution gave major importance to fundamental rights and the Brazilian Supreme Court – as the guardian of the Constitution – was given numerous powers to protect these rights. Over the last 20 years, the Supreme Court has faced several challenges that were not strictly related to the protection of fundamental rights. The Court's recent history can be divided into four major periods, based on the legal issues that took up the attention of the justices along these two decades. Although the Court produced important decisions on fundamental rights during the whole period, its most important 'rights jurisprudence' is being produced in the present phase of the Court.

During the first years after the promulgation of the new Constitution, in 1988, the major concern of the Court was to harmonise the previous legal system with the new constitutional standards. Many rulings were made regarding the legal regime of public employees, the distribution of competences between members of the federation (Union, states and municipalities), and between the three branches of government authority (executive, legislative and judiciary).[56]

Perhaps the major absentee at the Supreme Court bench during this period was the Amnesty Law, approved by the military in 1979. No law suit was filed requesting the Court to acknowledge and condemn the violations that occurred during the military dictatorship. Such an opportunity only presented itself 20 years later, in 2010, when the Bar Association (*Ordem dos Advogados do Brasil – OAB*) requested the Court to declare the Amnesty Law unconstitutional.[57] Unfortunately, the Brazilian Supreme Court upheld the Law, which created insurmountable obstacles to punish crimes against humanity, including, but not limited to, illegal prisons, torture, disappearance and executions of dissidents. According to the Court's President, Justice Cezar Peluso, Brazil has, by adopting the Amnesty Law, turned the page of history and found its way towards redemption through compromise. It should be noted that this ruling went in the opposite direction than similar rulings of the

56 Eg rulings such by which (i) state intervention on the municipality is not a form of penalty to the mayor (RE 106.293, Rel Justice Néri da Silveira, judged on 6 March 1989); (ii) state constitutions cannot establish a voting system to public school principals, since they must be freely appointed by the governor (ADI 51, Rel Justice Paulo Brossard, judged on 25 October 1989); (iii) the state legislature cannot impose a mandatory hearing of the governor under penalty of impeachment, in respect to the separation of powers (ADI 111-MC, Rel Justice Carlos Madeira, judged on 25 October 1989).

57 ADPF 153, Rel Min Eros Grau, judged on 4 April 2010.

Inter-American Court of Human Rights and many other courts in the region, most notably the Argentinean Supreme Court.

The second period can be reasonably identified with the term of President Fernando Collor de Mello, starting in the early 1990s, when the Court had to dedicate itself to the regulation of economic affairs. It was a period in which excessive inflation affected all sort of contracts and agreements.[58] The government constantly came up with new solutions that consisted, in general, of the creation of new monetary plans. This time of economic crisis came to an end only in 1994 with the 'Plano Real' (a new monetary plan), shaped and implemented a few years after the impeachment of President Collor.

The impeachment process was a reason of great disturbance to Brazil's new and fragile democracy. After all, Fernando Collor was the first President elected directly by the people, under the 1988 Constitution. As in most relevant matters, the Supreme Court was provoked to interfere in the impeachment process. Although the impeachment trial would be performed by the Senate, President Collor filled some constitutional remedies (*mandados de segurança*) claiming that the impeachment process should be declared invalid due to some irregularities. The Supreme Court expanded the President´s defence rights, but sustained the process as a whole, reassuring the role of the federal legislature to decide whether Collor should be impeached or not.[59] From a rights perspective, the Court sent a message that it would be rigorous about the protection of due process rights.

The two consecutive mandates of President Fernando Henrique Cardoso (1995-2002) mark the third period of the Court's role after democratisation. It was a period of intense constitutional reform, named as the Managerial Reform (*Reforma Gerencial*). The Court's attention and agenda were almost exclusively dedicated to issues such as privatisation, publicisation, the creation of regulatory agencies and social security reform.[60]

58 Eg rulings by which: (i) The presidential powers to consolidate and restructure the public debt were confirmed (ADI 686-MC, judged on 3 March 1992; (ii) municipal law that bases public employee remuneration to federal monetary index is unconstitutional (RE 145.018, judged on 1 April 1993); (iii) payment of alimony must be made in face of the real monetary value, since the inflation could transform it into a 'life pension' (RE 159.220-AgR, judged on 31 October 1994).

59 In the MS 21564 and MS 21689 filed by President Fernando Collor, he argued for the unconstitutionality of the impeachment law (Federal Law No 1,079 of 1950) and that he could not lose his presidential mandate *and* political rights for the next eight years. Both arguments were overruled by the Brazilian Supreme Court, on 23 September 1992 and 16 December 1993 repesctively.

60 In the ADI 1.376 the Brazilian Supreme Court acknowledged the constitutionality of the 'PROER Plan', a fund established to avoid a crisis in the banking system, questioned by the Labour Party as an unlawful bailout (judged on 11 December 1995). In the ADI 2010 (judged on 30 September 1999), the Supreme Court declared the unconstitutionality of a crucial part of the Security System Reform proposed by President Fernando Henrique Cardoso, that considered such decision a disaster. Finally, in ADI 1949-MC (judged on 18 November 1999), the Supreme Court sustained the model of administrative independence of the newly-founded regulatory agencies.

In 2000, the Supreme Court entered its fourth period, coincidentally with the two mandates of President Luis Inácio Lula da Silva (2003-2010). It would be from that moment on, more than 15 years after the 1988 Constitution had been adopted, that the Brazilian Supreme Court started to engage assertively on a fundamental rights agenda.

In the area of civil rights, it has ruled on several significant cases worth mentioning. Starting by the protection of human dignity, the Court built a very consistent line of precedents forbidding or conditioning extraditions to countries that do not protect due process guarantees or permit the death sentence. Cases in which the Court refused to allow extraditions to countries such as China and the United States created embarrassment to Brazil's Ministry of Foreign Affairs.[61] Still in the 1990s, the Supreme Court started to draw a more definite line protecting privacy in association with human dignity. In perhaps the most notorious case, the Court secured that a potential parent would not be obliged to submit to a DNA test, on the basis that the state was not allowed to interfere in someone's bodily integrity. Obviously, the refusal to undertake any such test would make paternity presumed.[62] The Court has not faced an unqualified case related to abortion yet, even after this precedent. However, in April 2005, it decided that the state could not punish a mother or a doctor who performed an abortion of an anencephalic fetus, based on the right to human dignity of the mother.[63] Also very relevant was the decision of the Court upholding the Bio-Security Act, allowing stem-cell research, on the basis that an enviable frozen embryo, outside the womb, could not have the same status of a born person.[64] The Supreme Court also articulated a judgment on the basis of human dignity, allowing same-sex civil unions, which was not permitted by law or even by the Constitution that limited the institution to men and women.[65]

61 In EXT 1103, an extradition claim filed by the United States of America against Juan Carlos Ramirez Abadia (charged for international drug dealing), judged on 13 March 2008, the Brazilian Supreme Court ruled that extradition decisions made by the President of Brazil may be constrained on certain occasions. More precisely, it ruled that in case of extradition to countries where the life sentence or death penalty may be applied, the President cannot extradite until such country commits itself not to condemn the defendant to death (forbidden by the Brazilian Constitution) nor to a prison sentence longer than that permitted by the Brazilian Constitution (30 years).

62 In HC 71713, judged on 10 November 1994, the Brazilian Supreme Court ruled that mandatory DNA tests are unlawful, because they offend the human dignity and the right to privacy. The Supreme Court still maintains this precedent.

63 In ADPF 54-QO, filed by National Confederation of Health Labourers, judged on 27 April 2005, the Brazilian Supreme Court ruled, on a preliminary injunction basis, on the unconstitutionality of the anencephalic fetus abortion criminalisation. However, it will only produce effects on criminal law, after the definitive ruling.

64 In ADI 3510, filed by the Attorney-General's office against Federal Law No 11, 105 of 2005 (the 'Law of Bio-security'), judged on 29 May 2008, the Supreme Court declared the constitutionality of stem-cell research, by a majority of six justices against five. The scientific, religious and legal communities were heard by the court before the ruling.

65 In ADIN 4277, judged on 5 May 2011, The Supreme Court ruled on the unconstitutionality of (Federal) Civil Code dispositions that restricted civil unions to heterosexual relationships. The claim was filed by the Attorney-General's office. Several sectors of civil society were heard before the court reached its conclusion of the legality of same-sex unions as a demand of equal rights.

In the field of freedom of expression and manifestation, the Court has been more ambiguous. In 2003 it decided on a writ of *habeas corpus* application filed by an anti-Semitic publisher. The main discussion was the criminalisation of discriminatory speech. The Court decided that offensive speech against a group that has been historically discriminated against could be criminalised. It also took a non-liberal perspective reading the freedom of speech clause in a case where Globo Television made a story about corruption schemes involving the incumbent governor of Rio some months before the election. The Court suspended the right to publish the piece, based on the argument that it could cause irreversible damage to the politician. This is considered to be one of the worst decisions of the Court on the topic of freedom of expression. In the last year, however, the Supreme Court became much more liberal when it decided two important cases. The first one not only allowed protests in favour of decriminalisation of marijuana, but also forbade public prosecutors to indict participants of these manifestations by promoting criminal behaviour. Finally, the Court considered unconstitutional the statute called 'press law', enacted by the military, which established several limitations on freedom of speech.[66]

The Court has always been very active in the field of criminal law, being considered a *garantiste* tribunal. In the field of due process, the Court very rarely engages in balancing processes. Even when the resolution of important criminal cases is at stake, the strictly secured constitutional guarantees, such as not being imprisoned before a final sentence, or not allowing the use of illicitly-obtained evidence in a court of law. The Supreme Court has also been protective of the right to claim judicial remedies before the judicial system.[67] Related to issues involving public security, the Court upheld the disarmament statute that created several restrictions on civilians acquiring a fire arm. This case is of particular importance, not just because the tribunal addresses an issue of major public concern (since Brazil has extremely high criminal rates), but also because for the first time it articulates a notion of public security, which involved the enhancement of the protection of life.[68]

66 In HC 82.424-2, the *Ellwanger* case, from 9 September 2003; in ADPF 187, judged on 15 June 2011, filed by the Attorney-General's office, requiring that a certain prescription of the Criminal Code (art 287) be interpreted accordingly to the Constitution, the Brazilian Supreme Court ruled that drug decriminalization discurse and manifestation were protected by the free speech clause, therefore it could not be deemed as a crime.

67 In HC 90866, judged on 1 April 2008, the Supreme Court ruled that the due appreciation of a criminal appeal does not depend on the convicted defendant being put in jail. It is important to notice that such decision was taken months before a Federal Law (Law 11.719 of 2008) was enacted providing the same as decided by the Supreme Court; RE 251.445 GO, 26 June 2000; and ADI 223-6 DF, 5 April 1990.

68 In ADI 3112, filed by political parties such as the Brazilian Labour Party (PTB) and Democratic Labour Party (PDT), association of gun owners and of police deputies, against the constitutionality of the Disarmament Statute (Federal Law 10,826 of 2003), judged on 2 May 2007, the Supreme Court declared the constitutionality of the federal regulation on owning and carryong guns, such as the establishment of a minimum age to acquire a firearm. The Court rejected mainly the provisions that were excessively severe with the infractors.

In the area of social rights, the Court has also addressed numerous relevant issues. The Supreme Court issued significant decisions obliging states and municipalities to spend constitutional mandatory financial resources on education and also obliging these entities to provide places for children in the school system. This string of decisions was first articulated in a case regarding the obligation of the state to provide day care to children under five years old.[69] More polemical has been the ambiguous line of decisions regarding the right to proper health treatment and medication. The Supreme Court first upheld federal legislation that conceded the most efficient medication, regardless of cost, to HIV patients. This decision created incentives for individual patients and other groups of patients to request free medication before the public health system. Deciding on individual cases, the tribunal granted some claims on the basis that a refusal would violate the rights to health and the rights to life of these individuals. After several criticisms of health authorities, the Court started to defer to these authorities the decision regarding the correct policy. The same movement occurred in the field of health treatment, resulting in a shift from a generous approach to a more budgetary-responsible perspective. In 2012, the President of the Court decided to call for a public audience on the issue, in which government agents and civil society organisations had the opportunity to present their arguments in a more systematic way. As presented by Octavio Ferraz in this volume, the fragmentation of social policy in individual claims can bring more harm than good to the individual. However, the concession of benefits to individuals forced public health authorities to remodel several policies.[70] The Supreme Court also had the opportunity to declare a constitutional amendment unconstitutional on the basis that it infringed the right of equality between man and woman. The amendment established a ceiling for public maternity leave benefits. Above this ceiling, it would be the responsibility and obligation of the employer to pay. The Court held that this position would create a disincentive for companies to hire women.[71] Finally, after more than 20 years without enacting a regulation regarding the right to strike for public servants, the Supreme Court issued a decision applying the ordinary legislation to public workers, until a specific legislation is not enacted.[72]

69 In RE 384201-AgR, filed by a citizen, judged on 26 April 2007, the Brazilian Supreme Court ruled that the government was obliged to assure free public day care to children up to five years, and also acknowledged that the judiciary can impose specific obligations on the executive power.

70 In RE 368564, judged on 30 April 2011, in which a group of citizens sued the federal government in order to obtain treatment in Cuba (Havana) for a rare, and possibly incurable, eye disease, the Brazilian Supreme Court granted the right for the treatment.

71 In RE 287905, filed by a citizen against the state of Santa Catarina, judged on 28 June 2005, the Brazilian Supreme Court granted the right to maternity leave to temporary employment conditions.

72 In MI 670, MI 708 and MI 712, all filed by unions of public employees and judged on 25 October 2007 and 28 June 2005, the Brazilian Supreme Court ruled that public employees have the right to strike, even if there is no specific law regulating the circumstances, because the workers could no longer suffer with the unlawful absence of regulation. Such decisions are considered a landmark in the court activism.

The Court also heard cases involving political rights, such as the requirement of party loyalty,[73] and provisions obstructing the participation and media access of small political parties.[74] With regard to the protection of vulnerable groups, the Court analysed questions about indigenous lands.[75]

The correlation of the different periods of the Brazilian Supreme Court with the different presidents is merely incidental. There are many other relevant factors that must be taken into account in order to properly realise the reasons why such changes came to be. There is no sense at this point to give all the reasons why the Court has changed during these years, except for one special reason: the composition of the Supreme Court. Similar to the United States system and unlike other Latin American countries such as Colombia, the Brazilian justices are substituted one by one; and not as whole groups. That being said, it is important to point out that the Supreme Court justices were not substituted after the collapse of the authoritarian regime, meaning that justices appointed during the dictatorship were still justices in the democratic period inaugurated by the 1988 Constitution. Currently there is only one justice who had been appointed by a president that was not democratically elected.

It goes without saying that most of these justices did not perceive the Supreme Court as an institution of political action. As a matter of fact, until very recently, most Brazilian jurists would not consider the Supreme Court as 'political', but technical.

Such a conservative conception of the judiciary's function reminds us to be cautious when celebrating the Court's newly-found 'activism'. There is no doubt that the Brazilian Supreme Court does protect fundamental rights, but it must be noted that it does so in very different ways.

It would not be incorrect to assert that the biggest role played by the Brazilian Supreme Court in protecting fundamental rights resides in assuring or restating rights that have already been granted by legislation. When the Court preserves these legislative advances, required by the 1988 Constitution – and that are attacked through the judicial branch by conservative sectors of society it is in fact protecting a majoritarian improvement of democracy.

73 In MS 26602, filed by several political parties, judged on 4 October 2007, the Brazilian Supreme Court ruled that all congressmen that change party affiliation after the electoral period lose their mandate and the party is authorised to give it to one of its other members.

74 In ADI 1351, filed by several political parties, judged on 7 December 2006, the Supreme Court declared the unconstitutionality of electoral provisions that granted almost insignificant shares of funding to media time for the minority parties, based on their electoral performance. The so-called 'barrier clause' (*Cláusula de Barreira*) created obstacles to minority parties and favoured the political majorities.

75 In PET 3388, judged on 19 March 2009, the Brazilian Supreme Court ruled on the demarcation of the 'Raposa Serra do Sol' indigenous reserve, interpreting that the Constitution establishes a system of continuous demarcation, by which the indigenous land is to be preserved as a whole, and not by portions, obstructing the continuity of economic activities in the area by non-indigenous people.

However, it would be incorrect to assume that the Brazilian Supreme Court protects exclusively the rights that are already granted by legislation. There were significant episodes in which the Court protected fundamental rights that were menaced by the legislative branch. That was the case when it declared the nullity of some aspects of the 'Hideous Crimes Law' (Leis de Crimes Hediondos); an Act that imposed stricter means of punishment for certain crimes and – as the majority of similar measures do – was received with open arms by the majority of public opinion. The firm position of the Supreme Court became so relevant and important that the legislative branch amended the law so that it would conform to the Court's standards.

Finally, the Court had a positive but thoroughly underexplored role in *constructing rights.* To put it in another way, the Court also protected fundamental rights by means of an engaged interpretative process that created rights that were not legally acknowledged. The main example is the granting of same-sex unions. If, on the one hand, the Court assured the constitutionality of a recent Rio de Janeiro State law, it changed radically the meaning of the (federal) Civil Code. On that occasion, the Court in effect constructed an anti-majoritarian right.

In conclusion, the Brazilian Supreme Court protects fundamental rights, even though it does so in a less progressive way than is usually perceived as acceptable by Brazilian public opinion and legal culture.

CHAPTER 6

DESCRIPTIVE OVERVIEW OF THE INDIAN CONSTITUTION AND THE SUPREME COURT OF INDIA

Shylashri Shankar [1]

1 Introduction

Public commentators and India's parliamentarians have assigned sobriquets such as 'activist', 'transformative', 'progressive', 'over-activist' and 'judicial overreach' to India's Supreme Court for transforming non-justiciable social rights into fundamental rights, monitoring government irregularities by setting up special investigative committees, and for allegedly intervening in the jurisdiction of parliament and the executive. 'The judiciary has stepped in, not only to direct the designated authorities to perform their duty, but has also taken over the implementation of the programme through non-statutory committees formed by it,' said former Indian Chief Justice JS Verma in a public lecture in March 2007. The next month, Prime Minister Manmohan Singh responded that '[c]ompelling action by authorities of the states through the power of mandamus is an inherent power vested in the judiciary', but he did warn that 'substituting mandamus with a takeover of the functions of another organ may, at times, become a case of over-reach … these are all delicate issues which need to be addressed cautiously'.[2]

These accusations of over-activism have been countered by others who argue, and rightly so, that the Supreme Court has used the power of judicial review sparingly to challenge government policies,[3] for failing to ensure the actual delivery of these rights, and for being *ad hoc* in its approach.[4] At best, the Court's judgments have had an indirect effect on public policy; the government has adopted the Court's suggestions only when it was ready to

1 I am grateful to Subhadra Banda for assistance with the research. Parts of this chapter also draw on S Shankar *Scaling justice: India's Supreme Court, anti-terror laws and social rights* (2009) and S Shankar 'Judiciary, policy and politics in India' in B Dressel (ed) *The judiciary in Asia* (2012).

2 *The Indian Express* 6 April 2007.

3 SP Sathe *Judicial activism in India* (2002).

4 L Rajamani 'Public interest environmental litigation in India: Exploring issues of access, participation, equity, effectiveness and sustainability' (2007) 19 *Journal of Environmental Law* 293.

do so.[5] For instance, the 'right to education' that the Court articulated in a 1992 judgment became a constitutional amendment only after it appeared as an election promise of a political party a decade later.[6] More recently, in a memorial lecture, current Chief Justice SH Kapadia said that it was the task of the electorate, not of judges, to make the government accountable. He warned the judges that the Court was not competent to make policy choices and run the administration and asked them to resist 'the pressure to please the majority':[7]

> In many PILs, the courts freely decree rules of conduct for government and public authorities which are akin to legislation. Such exercises have little judicial function in them. [Their] justification is that the other branches of government have failed or are indifferent to the solution of the problem. In such matters, I am of the opinion that the courts should be circumspect in understanding the thin line between law and governance.

Adherents of either viewpoint might agree with legal scholar Gadbois that India's Supreme Court is the most powerful in the world,[8] having virtually become an *imperium in imperio*, an order within an order. They would diverge, however, on how the courts have used their powers.

This is the dominant background against which any discussion of the Supreme Court of India has to be situated. These debates pertain to the judiciary's identity and the role that the higher judiciary (the Supreme Court and the High Courts) ought to play in the world's largest democracy. Ought it to be a transformative actor, a protector of constitutional rights, a facilitator of the democratic process, an organ of the state that adheres strictly to a separation of powers, or an institution that is above politics and populism? Since its establishment in 1950, the Supreme Court of India has played all these roles. A review of cases demonstrates that despite increasing judicialisation, the involvement in politics of India's higher judiciary, particularly the Supreme Court, is marked by a balancing act between supporting government actions and holding the executive accountable for its performance. The level of prudence increases as one moves up the hierarchy, from the lower courts to the High Court to the Supreme Court. My argument resonates with the observation of Vanberg[9] that Constitutional Court judges are likely to be prudent judges. India's Supreme Court judges seek legitimacy for their decisions by negotiating four elements – laws, institutional norms/ experience/rules, political preferences and public concerns – that may constrain or expand the menu of choices.[10] While India's judges are becoming ever more involved in assessing executive branch prerogatives and

5 Shankar *Scaling justice* (n 1 above).
6 *Unni Krishnan, JP v State of Andrah Pradesh* (1993) 1 SCC 645.
7 SH Kapadia 'Fifth MC Setalvad memorial lecture on judicial ethics' 16 April 2011, reported in *The Indian Express*, The Op-Ed page, 18 April 2011 11. These lectures tend to give one a sense of the main item on the CJI's agenda.
8 G Gadbois 'Supreme court decision making' (1974) 1 *Banaras Law Journal* 10.
9 G Vanberg *The politics of constitutional review in Germany* (2009).
10 Shankar *Scaling justice* (n 1 above).

performance, within the space allowed by structural conditions, such as the weakness of recent governing coalitions, higher courts in India have worked to negotiate between the constraints imposed by such institutional realities as the need to secure executive co-operation in enforcing its judgments and the demands for judicial action from the media, political parties and civil society activists. Higher court judges in India can thus be characterised as negotiators who craft judgments that avoid conflict with the political wings while preserving for the court a pro-citizen reputation. The effects of judicial intervention on governance and state-society relations and on questions of the state's accountability to citizens have been both positive and negative.

2 Background to the Constitution as a whole

The Constitution of India came into effect on 26 January 1950, the day India became a sovereign, democratic republic, free from the shackles of British colonial rule, and now celebrated as Republic Day. The 299-member Constituent Assembly (CA) met in 11 sessions from December 1946 to November 1949 to deliberate on the provisions. The CA members were indirectly elected by the provincial legislative assemblies and a proportion was nominated by the princely states. The CA appointed a number of committees to deal with different aspects of constitutional design, and these committees drew heavily on the Government of India Act 1935 as the basis on which the draft of the Constitution was to be prepared. The initial draft was prepared by BN Rau after consulting the Constitutions of the United States of America, Japan, Ireland and Germany. The CA then appointed the Drafting Committee which worked on Rau's draft and produced a draft constitution that was debated by the CA at the second reading stage. There were 7 635 amendments, of which 2 474 amendments were moved. Fifty-three thousand visitors were admitted to the visitor's gallery during the period when the Constitution was debated. The final Constitution – the longest in the world – had 395 articles and eight schedules instead of the 243 articles and 13 schedules of Rau's original draft.[11]

Tough battles raged over several issues, including the extent of judicial scrutiny of legislation, locus that defined the powers of the federal court, the appointment and removal process, and whether judges could take post-retirement jobs. The majority of CA members decided that law, that is, that made by parliament rather than by the Constitution (and interpreted by the judiciary) would determine the powers of the Federal Court. The emphasis of CA members on the importance of ensuring the independence and autonomy of the judiciary is 'partially explained by the experiences of nationalist leaders

11 Speech of Rajendra Prasad, President of the Constituent Assembly at its final session on 26 November 1949, cited in BN Rau *India's constitution in the making* (1960).

under British rule'.[12] Many were provincial lawyers and legal professionals whose political experiences with martial law under colonial rule encouraged them to pay close attention to judicial independence. The framers mulled over the best way to ensure a separation of powers between the executive, legislature and the judiciary. One delegate said:[13]

> The Supreme Court is intended in this country to serve the functions of the king in some countries where he is the fountain-head of all justice. Here there is no king, and naturally therefore we must have some independent body which must be the guardian of administration of justice and which must see that justice is done between man and man in all matters whether civil, criminal or revenue.

The CA chose a slightly different model of separation of powers from the American one where the President, Congress and the judiciary have distinct powers as well as certain powers that functionally belong to one of the wings. India's parliamentary system institutes a separation of powers between the three wings, but the effective division is between parliament and the judiciary, owing to the requirement that the head of the single largest party in parliament is also the executive (the Prime Minister). The President, who has veto powers and appoints judges, is merely a titular head, similar to the British monarch. In practice, judicial appointments are actually made by the Prime Minister and the Cabinet, and the President simply makes the formal announcement.[14] *AK Roy v Union of India* highlighted the apex court's view on the manner in which the Indian Constitution differed from the American pattern of a strict separation of powers.[15] Rejecting the petitioner's contention that ordinance-making power would destroy the basic structure of separation of powers, Chandrachud CJ said:

> There is also a sharp difference in the position and powers of the American President on one hand and the President of India on the other. The President of the United States exercises executive power in his own right and is responsible not to the Congress but to the people who elect him. In India, the executive power of the Union is vested in the President of India, but he is obliged to exercise it on the aid and advice of his Council of Ministers. The President's 'satisfaction' is therefore nothing but the satisfaction of his Council of Ministers in whom the real executive power resides.

On the issue of checks and balances on the executive, the legislature and the judiciary, the CA members emphasised balance over checks. 'The idea that the Supreme Court has to be somebody which is absolutely separate from every other institution set up by the Constitution is a wholly wrong and mischievous idea. The Supreme Court has to be one of our safeguards,'

12 GE Beller 'Benevolent illusions in a developing society: The assertion of Supreme Court authority in democratic India' (1983) 36 *Western Political Quarterly* 513; Mittal (1970: 38–55) cited by Beller, 516.
13 HV Pataskar, a representative from Bombay: General, 639, CA Debates, Book 3, Vol VIII.
14 V Gupta *Decision making in the Supreme Court of India: A jurimetric stu*dy (1995) 36.
15 AIR 1982 SC 710.

observed Santhanam.[16] Hence the ambiguity about whether the Constitution explicitly endorsed parliamentary sovereignty or implicitly allowed judicial review or did both. Sathe argues that the very fact that the Constitution incorporated a declaration of fundamental rights in Part III and gave to the Supreme Court the special responsibility to protect those rights was clear evidence of its preference for judicial review with reference to fundamental principles of freedom, equality and justice.[17] Article 13 says that the state shall make no law that takes away or abridges the fundamental rights. Others, like Rudolph and Rudolph, argue that the Constitution was not as clear on the power of judicial review, since the Constitution was silent about who would determine violations.[18] Jain[19] points out that judicial review became a basic feature of the Constitution in later rulings (the *Kesavananda Bharati* and *Minerva Mills* cases).[20] It was also unclear whether the Constitution had a basic structure that could not be legislated away by parliament. In *Kesavananda*, the Supreme Court held that the power of judicial review over legislative action vested in the High Court under article 226 and the Supreme Court under article 32, constituted part of the basic structure and could not be excluded even by a constitutional amendment. These ambiguities later led to clashes between the Court and parliament.

On the issue of civil liberties, a minority of CA members were apprehensive about giving the state draconian powers. 'Let us remember that a constitution can be subverted not merely by agitators, rebels and revolutionaries but also by people in office by people in power,' warned Kamath.[21] The majority of the framers, however, overlooked the warning and designed a draconian set of powers that were at the administration's disposal to punish those who posed a grave danger to the country. They decided that the elected wings would have the power to decide on the timing, the deployment and the content of the emergency laws. Kamath's fears came true, and one leading human rights activist concluded:

> The legislative and interpretive history of the more than fifty years after independence has been one of curtailing personal liberties, thus inhibiting the forces of social change from progressing towards constitutional objectives without violence and the consequent abuse of power and the construction of a repressive legal framework.[22]

India is one of the few countries that provides for preventive detention as an ordinary legislative power in times of peace. Explanations for this can be attributed to three features of the Constitution: (i) Fundamental rights were

16 CA Debates, Book 3, Vol VIII 649.
17 Sathe (n 3 above) 39.
18 LI Rudoph & SH Rudolph *In pursuit of Lakshmi: The political economy of the Indian State* (1986).
19 MP Jain *Indian constitutional law* (2003).
20 *Kesavananda Bharati Sripadgalavaru v The State of Kerala* AIR 1973 SC 1461; *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789.
21 HV Kamath, CA Debates, Book 4, Vol IX 108.
22 KG Kannabiran *The wages of impunity: Power, justice and human rights* (2004) 50.

seen as gifts of the state which could be curtailed; (ii) the state was a benevolent entity; and (iii) there was no need for courts to oversee the content or requirement of preventive detention. The Constitution gave the new Indian state, particularly the executive and legislature, tremendous discretionary power to enact a series of laws to deal with terrorist and seditious activities.[23] Multiple emergency laws were at the disposal of the police who had latitude to decide on the law to apply in a given case. The PDA (1950) was one such law whose provisions were 'rather severe' but, over time, the law was 'somewhat liberalised, especially in its procedural aspects with a view to give better safeguards to detainees'.[24]

Thus, some of the main themes of the Constitution had conflicting interpretations of the state's role *vis-à-vis* citizens. They invoked a strong role for the state in bringing social justice to the historically-oppressed castes, but at the same time permitted draconian laws in order to provide strong protection to citizens against those who threatened state security. The judiciary was excluded from overseeing the actions of the other two organs in both sets of laws. Does this mean that the Court gave government *carte blanche* in its treatment of detainees because of the stringent nature of these laws? Or that the Court refused to admit cases that dealt with social rights inscribed in the non-justiciable section of the Constitution? The next section deals with this issue.

23 At the central level, there is the National Security Act 1980; the Armed Forces Special Powers Act 1958; the Disturbed Areas Act 1976; the Unlawful Activities (Prevention) Act 1968; the Prevention of Seditious Meetings Act 1911; the Religious Institution (Prevention of Misuse) Ordinance 1988; the Anti- Hijacking Act 65 of 1982; the Suppression of Unlawful Acts against Safety of Civil Aviation Act 1982; the Disturbed Areas Special Courts Act 1976; the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974; the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act 1980; the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 1988; the Indian Telegraph Act 1885; and the Information Technology Act 2000. State-specific legislation includes the Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders, and Land Grabbers Act 1986; the Assam Preventive Detention Act 1980; the Bihar Control of Crimes Act 1981; the Gujarat Prevention of Anti-Social Activities Act 1985; the Jammu and Kashmir Public Safety Act 1978; the Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 1988; the Karnataka Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum-Grabbers Act 1985; the Maharashtra Prevention of Communal, Anti-Social and other Dangerous Activities Act 1980; the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers and Drug Offenders Act 1981; and the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Goondas, Immoral Traffic Offenders and Slum Grabbers Act 1982. Source: http: //www.india-seminar.com/2002/ 512/ 512%20suhas%20chakma.htm (accessed 2 March 2007).

24 Jain (n 19 above) 1357.

3 The Bill of Rights

3.1 Fundamental rights and directive principles

Rau, who was responsible for creating the first draft of the Constitution, explained to the CA members that there were two broad classes of rights: certain rights which required positive action by the state, 'which can be guaranteed only in so far as such action is practicable (Directive Principles), while others merely require that the state shall abstain from prejudicial action (Fundamental Rights)'.[25] Unlike the current South African Constitution, which treats socio-economic rights as fundamental rights, the majority of CA members in India adopted the view that social rights should function as goals for the state. Their rationale for doing so was later echoed by some modern theorists who objected to the enforceability of social rights on three grounds.[26] Firstly, fundamental rights imply an autonomous and fully capable agent, while needs entail a role for a helping hand from the state for non-capable, dependent agents. Secondly, rights mean absence of constraint and freedom from state action, while the requirements dealing with development entail positive action from the state. Lastly, rights tend to go hand-in-hand with political and property interests, while needs rest on social and economic concerns.

A minority of CA members objected to the non-justiciability of Directive Principles on grounds that a constitutional document ought to protect citizens from 'oppression of poverty, lack of vitality, lack of morals, inhuman greed, and consequent exploitation, ruthless profiteering and consequent oppression – moral, mental, social, spiritual and, last but not least, economic'.[27] Today, the debate rages globally, but 60 years ago the Indian Constitution chose to endorse the non-justiciability of social rights. The framers of the Constitution ranked the rights to food, health and basic education second to the fundamental rights and made their fulfilment contingent on the state's economic capacity.[28] Dr BR Ambedkar, the Chairperson of the Drafting Committee and a key decision maker in the debates, said that it was

> the intention of the Assembly that in future both the legislature and the executive should not merely pay lip-service to these principles enacted in this

25 Rau (n 11 above) 247.
26 For a good review of these debates, see WE Forbath 'Why is this rights talk different from all other rights talk? Demoting the Court and reimaging the Constitution' (1994) 46 *Stanford Law Review* 1771.
27 PS Deshmukh, Book 1, Vol 1, Constituent Assembly Debates 342.
28 Social rights included making effective provision within the limits of the state's economic capacity for rights to work, education, and public assistance in the event of unemployment, old age, and sickness (art 41); fair wages and conditions of work and a decent standard of life (arts 42 and 43); free and compulsory education to all children under the age of 14 (art 45); and raising the level of nutrition and standard of living and public health (art 47).

> part but that they should be made the basis of all executive and legislative action that may be taken thereafter in the matter of governance of the country.[29]

Justifying the decision, Ambedkar was of the view that a state just awakened from freedom from its many preoccupations might be crushed under the burden unless it was free to decide the order, the time, the place and the mode of fulfilling the Directive Principles: 'non-fundamental rights are created by agreement between parties while fundamental rights are the gift of the law. Because fundamental rights are the gift of the state, it does not follow that the state cannot qualify them,' was Ambedkar's response to critics who complained about the large number of restrictions on fundamental rights.[30]

The view of fundamental rights as a gift was not surprising because of the way the Constitution was framed. Unlike in countries like France, where the Constitution was created in a revolutionary moment as a social contract between the citizens, the Indian Constitution was the product of a colonial administration and the new political elites.[31]

3.2 How did the judiciary interpret these rights?

Let us examine how the Court has dealt with civil liberties. Civil rights activist and legal scholar Kannabiran rightly says that a constitution framed after a liberation struggle ought to rest on the proclamation of legal discontinuity – a transition of a people from the status of subjects to that of citizens of a nation whose sovereignty is located in the people. The declaration preceding the Preamble to the Indian Constitution embodied this discontinuity, but the laws and text of the Constitution did not. The new Indian state retained the old colonial legal and institutional framework, a view later echoed by the Supreme Court.[32]

> There is no warrant for holding that at the stroke of midnight of 25 January 1950, all of our pre-existing political institutions ceased to exist, and in the next moment arose a new set of institutions completely unrelated to the past ... It [the Constitution] did not seek to destroy the past institutions; it raised an edifice on what existed before.

Gopalan, who had been detained for three years in a Madras jail, challenged the Preventive Detention Act 1950 (PDA) in the Supreme Court of India. Gopalan argued that the new emergency law abridged his fundamental rights to free movement,[33] personal liberty,[34] and infringed the provisions of article

29 Constituent Assembly Debates. Also see G Austin *The Indian Constitution: Cornerstone of a nation* (1966).
30 4 November 1948, CA Debates, Book 2, Vol VII 40.
31 Kannabiran (n 22 above) 18; PB Mehta *The burden of democracy* (2003).
32 *State of Gujarat v Fiddali Badruddin Mithibarewala* AIR 1964 SC 1043.
33 Art 19.
34 Art 21.

22(5).[35] Article 22(5) orders the authorities to communicate the grounds for the detention and allows the detainee the earliest opportunity to make a representation against the order. The majority led by Chief Justice Kania dismissed the challenge on all except one count and said that parliament (not the Court) had the final word on preventive detention legislation and the scope of rights under article 22.

Some scholars, like Setelvad,[36] argue that the Supreme Court has a 'paltry record' on preventive detention cases after the emergency, in contrast to a 'dynamic constructive approach' on social justice. Setelvad's flaying of the Court may be a little unjust since article 22 severely reduces the scope of judicial intervention. Given these limitations, legal scholars like Jain argue that the courts 'softened the rigours of the law' by adopting 'not a mechanical view of their role' but 'a purposeful approach to draw a fine balance between individual freedom and social control'.[37] The judiciary has found opportunities to protect citizens by focusing on areas where the Court's scrutiny is permitted by law. The Court gave itself 'a toehold' to review preventive detention by focusing on article 22(5), which relates to the communication of the grounds of detention to the detainee and affords him the earliest opportunity to make a representation against the order.[38] The judges tried to ease restrictions by persuading parliament to place a maximum limit on the period of detention, and secured a right for detainees to make representations challenging the detention.[39]

While a strong web of laws reduced the scope for judicial action on security laws, judges did find ways to negotiate with the different elements and craft rulings supporting vulnerable groups. A Supreme Court judge supported Muslim minorities without separatist ambitions, supported the state against those espousing Kashmiri separatist ambitions, was pro-citizen without separatist ambitions, and was pro-state (without targeting minorities) after a terrorist attack, and was more likely to focus on the facts of the case rather than on prior ideological or personal biases.[40] A worrisome aspect is that 60 per cent the cases tried under the three security laws did not involve a threat to the state, a fact noted by the judgments; and only 35 per cent of TADA cases concerned the security of the state.

35 *AK Gopalan v State of Madras* AIR 1950 SC 27.
36 A Setelvad 'The Supreme Court on human rights and social justice: Changing perspectives' in BN Kirpal *et al* (eds) *Supreme but not infallible: Essays in honour of the Supreme Court* (2000).
37 Jain (n 19 above).
38 DH Bayley *Preventive detention in India: A case study in democratic social control* (1962).
39 See R Dhavan *Justice on trial: The Supreme Court today* (1980), HM Seervai *The Constitution of India* (1991), Jain (n 19 above).
40 Shankar (n 1 above).

4 The structure and composition of the Supreme Court

4.1 Structure of the Court

4.1.1 The number of judges

Unlike the US Supreme Court or the South African Constitutional Court, which have nine and 11 justices respectively, the Indian Supreme Court has 31 justices including the Chief Justice of India (CJI).[41] There are two streams of entry into the judiciary. In the initial decades, judges entered the service through judicial services, serving in the Sessions Court and moving up the ladder to the High Court and then the Supreme Court. Now, the bulk of higher court judges enter the High Court directly, after practising as lawyers. Almost all Supreme Court judges are elevated from the High Court.

4.1.2 Terms of office

To qualify for appointment as a Supreme Court judge, a person must be an Indian citizen, and must either be a distinguished jurist, a High Court judge for at least five years, or an advocate of a High Court for at least ten years.[42] Article 124(2) prescribes an age limit of 65. According to the Constitution, to qualify for appointment as a High Court judge, a person must be a citizen of India and have held a judicial office in the territory of India or been an advocate of a High Court or of two or more such courts in succession.[43] As far as the higher judiciary is concerned, these professional criteria are followed. But the fact remains that, for quite some time, the best talent in the legal profession has not been available for judicial appointment.[44] There is no affirmative action for historically-discriminated castes and tribes, or women. The norm is that, while making judicial appointments to the Supreme Court, care was supposed to be taken to ensure that the Supreme Court contained representation from all regions, religions and all major ethnic groups and, more recently, gender.[45] An analysis conducted by the author of the biographical profiles of 116 Supreme Court judges from 1950 to 2005 shows that the Supreme Court judge is predominantly male (97 per cent) and Hindu (87 per cent). Over 81 per cent of the judges belonged to the forward castes, only 6 per cent came from the backward castes, and 13 per cent were from other religious groups. The northern region accounted for 33 per cent of judges, followed by the south (27 per cent), east (23 per cent) and west (15

41 The Supreme Court (Number of Judges) Amendment Act 2008 increased the number of judges from 25 to 31 including the chief justice. 'In section 2 of the Supreme Court (Number of Judges) Act, 1956, for the word "twenty-five", the word "thirty" shall be substituted.'
42 Art 124(3).
43 Art 217(2).
44 Dhavan (n 39 above).
45 SP Sathe 'Appointment of judges: The issues' (1998) 33 *Economic and Political Weekly* 2155.

per cent). On average, a Supreme Court judge serves for merely four to six years, as compared to the 12 to 15 years for his South African counterpart. He or she serves for 14 to 16 years in the High Court prior to his or her elevation to the apex court. The limited term has disadvantages because it is not long enough for a judge to put his or her stamp on the Court and on issues, and also creates concerns for judicial probity and the possibility of political influence on judges in the final year of their tenure. This is because post-retirement many judges vie for appointments – which are decided by the party in power – to tribunals and commissions. A former Supreme Court justice, Krishna Iyer, notes that 'strict impartiality' by the Court was not foolproof in anti-terror (TADA) cases because a district judge on the verge of retirement could be appointed by the government (with the CJ's consent) as a member of the designated court, thus allowing him to continue working even after retirement.[46] 'One who is obliged to the state by extension beyond superannuation is less than impartial in a "terrorist" trial'.[47] On the positive side, the rapid turnover has the potential to enhance more vibrant and responsive judgments, and increase the representation of women and lower castes in the top tiers of the judiciary.

A judge of the Supreme Court cannot be removed from office except by an order of the President passed after an address by each house of parliament supported by a majority of the total membership of that house and by a majority of not less than two-thirds of the members of that house present. The results of the voting have to be presented to the President in the same session. Parliament can regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a judge under clause 4. No judge has been impeached so far, but a Calcutta High Court judge came close to it in 2011 when the Upper House of Parliament voted to impeach him. The judge resigned before the matter could be heard in the lower house.

4.1.3 Acting judges

Article 126 deals with the powers of the acting Chief Justice and article 127(1) deals with the appointment of *ad hoc* Supreme Court judges in order to meet the quorum of the Court.

4.1.4 Sitting of the Court

Order VII of the Supreme Court Rules details the sitting of the Court and the powers of the single judge. Order VII of the Supreme Court Rules states that all appeals and matters should be heard by a bench of not less than two judges, and for constitutional issues not less than five judges nominated by the Chief Justice. The Court usually sits in a division bench of two. But larger

46 VR Krishna Iyer *Human rights: A judge's miscellany* (1995) 64.
47 As above.

benches are set up in order to clarify a subject matter dealt with by a previous small bench. The 42nd Amendment Act (1976) introduced a seven-judge bench requirement for constitutional cases, but this was repealed by the 45th Amendment. Due to the vast docket, the Supreme Court Registrar (Judicial) prepares the roster, but the Chief Justice has the final say. The decisions of three-judge or more benches are final, and cannot be challenged either before a larger bench or even the full court. Any review of the decision is taken by judges who had decided the case, unless the original judge had already retired.

The number of cases being filed in the Supreme Court is consistently on the rise. About 34 683 cases were filed in Supreme Court in the year 1999, and 70 352 were filed in the year 2008. The Supreme Court of India is one of the most overworked courts in the world. Its docket had 2 614 cases in 1951 (67 per cent disposal rate), registered a spike in 1977 with 30 168 cases (34 per cent disposal rate), 139 796 cases in 1985 (36 per cent disposal rate), 141 778 cases in 1991 (24 per cent disposal rate), and 80 691 cases in 2005 (57 per cent disposal rate). Daily, on average, about 50 matters are filed for admission in the Supreme Court. This results in highly overworked judges. For instance, in 2005, a Supreme Court judge heard around 1 700 cases, while on an average during the course of a five-year stint at the Court he heard around 8 500 cases and would put his name on 700 opinions. It is not surprising that the overwhelming work load induces conformity rather than dissent, as judges plough through the docket.

Dhavan rightly argues that the vast jurisdiction (including original, writ, final appellate and advisory) of the Supreme Court is responsible for the overloaded docket.[48] The jurisdiction increased over the years because the legislature transferred more functions to the Court. For instance, the Court has jurisdiction over civil service dismissals and promotions, tax issues, election disputes, industrial and labour disputes, amongst others. One report estimates that 24 million cases are pending in different courts, some (mainly property disputes) languishing since 1950, with High Courts producing the biggest bottlenecks. With a ratio of just 10,5 judges per million population, when at least 50 judges are required, it is not surprising that there are tremendous delays in lower courts. Contrast this with the USA where there are 107 judges per million citizens. According to Hazra and Debroy, vacancies persist, with levels reaching 30 per cent in Delhi over the last 12 years in district and subordinate courts.[49]

However, Baxi is right to point out that it is unfair to put all the blame on judges; the government, the lawyers and the litigants have to shoulder some of the blame. The government is at fault for not appointing an adequate number of judges, and for providing inadequate facilities and low salaries.

48 Dhavan (n 39 above).
49 AK Hazra & B Debroy (eds) *Judicial reforms in India: Issues and aspects* (2007).

Only 0,2 percent of the GNP is spent on the judiciary. A recommendation by the Supreme Court to increase the salaries is stuck because the state governments claim they do not have the resources, while the central government refuses to bear the costs. Lawyers cause delays by their unavailability and tendency to ask for adjournments, which judges promptly grant regardless of the excuse. The Court also causes delays by failing to prioritise old cases, and the frequent turnover on the bench means that specialists do not necessarily hear the cases. In 1998, a lawyer from Karnataka filed a PIL asking for a reform of the panel system and suggested the use of specialised benches, but nothing has come of it so far.

The deliberative process of judging differs from that of the US Supreme Court and the South African Constitutional Court. Unlike the US system, there is no practice of holding regular conferences amongst the judges after the conclusion of oral arguments. Often judges are seen conferring with each other during the hearing, or immediately after. Bemoaning the absence of a formal practice of having judicial conferences, Justice PN Bhagwati wrote in his separate judgment in the *Minerva Mills* case:[50]

> Here also, I am compelled by similar circumstances, though not adventitious, to hand down a separate opinion without having had an opportunity to discuss with my colleagues the reasons which weighed with them in striking down the impugned constitutional amendments. Somehow or other, perhaps owing to extraordinary pressure of work with which this Court is overburdened, no judicial conference or discussion was held nor was any draft judgment circulated which could form the basis of discussion.

These structural factors induce lower numbers of dissents. 'Junior judges while participating with senior colleagues may out of hesitation or respect decide to suffer in silence for some time as many fresh appointees felt that the senior judges in the Court were very sensitive in the matter of seniority.'[51] Some 98 per cent of the judgments are unanimous in the sense that participating judges agree on the outcomes, and this pattern continues even today.[52] Gupta found that judges tend to dissent more often in large benches (that are usually formed to hear constitutional issues), and they dissent individually rather than in groups (unlike the US).

The matters expected to be filed in the Supreme Court have been divided into 47 subject categories which have been sub-categorised. Each fresh matter is categorised as per those subject categories. Each subject category has been allocated to one or more judges and that allocation is entered in the computer. Subject to the orders of the Chief Justice of India, fresh matters are allocated to them through the computer, as per the subject category. The writing of the judgment is a result of an informal arrangement arrived at by

50 *Minerva Mills* (n 20 above) para 84.
51 Gupta (n 14 above).
52 Shankar (n 1 above).

the judges sitting on a particular case. After the conclusion of oral arguments, if all judges agree upon a unanimous outcome, the opinion writing is assigned to one of them who gets down to framing the opinion of the Court. Once the draft is circulated amongst all judges, the draft is revised in view of the comments or suggestions received and, after it is finally approved by all judges, the judgment is announced.

The Court meets in three sessions each year, interspersed by holidays in the summer (14 May to 2 July), Diwali (12-17 November) and winter (17 December to 1 January).

4.2 Appointment process of judges

Article 124(2) states that 'every judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the judges of the Supreme Court and of the High Courts in the states as the President may deem necessary'.[53] However, consultation does not mean concurrence of the Chief Justice as the President of the Constitution Drafting Committee, Ambedkar, observed during the CA's debate on the subject:

> I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the government of the day. I therefore think that is also a dangerous proposition.

A constitutional bench of the Supreme Court later reiterated this sentiment in 1982 but was overruled in two subsequent judgments in 1993 and 1998.[54] On her return to power in 1980, Indira Gandhi considered a policy that required High Court chief justices and one-third of the puisne judges to come from that state. Several High Court judges were transferred while the renewal or non-renewal of tenure of others was rumoured to involve political considerations. Petitions questioning these matters came to the Supreme Court. The four-judge majority (three dissented) held that a judge's consent was not necessary for his transfer, but that such transfers ought not to be punitive, and that consultation with the CJI did not mean concurrence. In the 1993 ruling, the majority was inclined to define 'consultation' as the 'concurrence' of the CJI. The judgment introduced checks on the CJI's powers by clarifying that the CJI would form his opinion after taking into account the views of his senior colleagues who were required to be consulted by him for the formation of his opinion. Thereafter, the CJI had primacy in the

53 The Constitution of India 1950.

54 *Supreme Court Advocates on Record Association v Union of India* 1993 Supp 2 SCR 659 (also known as the *Second Judges* case). For a critique of the second and third judges cases, see Lord Cooke of Thorndon 'Where Angels Fear to Tread' in Kirpal *et al* (n 36 above). He points to several ambiguities in the judgment, including the lack of distinction between having primacy and being determinative. He also criticises the third judge's case for promulgating policy rather than conducting an exercise in judicial reasoning.

appointment and transfers of higher Court judges. The 1998 ruling clarified that primacy meant the primacy of the process in which the CJI and four of his most-senior colleagues would be consulted before arriving at a decision.[55]

In practice, the appointment process lacks transparency in selecting judges.[56] Selection is made on the basis of fitness rather than seniority. Unlike the lengthy confirmation process of a judge in America, the Indian Supreme Court and High Court judges do not undergo such scrutiny. Once they are picked by the collegium, their names are sent to the Council of Ministers either at the state (for High Court judges) or at the Centre (for Supreme Court judges) for approval, and then to the President. Several committees, most recently the Administrative Reforms Committee, recommended more transparent methods of selection, and the establishment of a Judicial Council to ensure accountability. Iyer highlights the murky nature of the selection process, particularly at the High Court level:[57]

> Even the extremely limited consultative process has been violated in some cases in India, and a Chief Justice is known to have been by-passed and even kept in the dark, until he was to swear in the candidate that morning. Other judges (High Court or Supreme Court) are not taken into confidence, nor is there meaningful dialogue with the Bar, people in public life or leading citizens when choosing a judge. Communal and political considerations, nepotism, regionalism, market friendly approaches, bargaining between the Chief Justice and Chief Ministers and like operations at the Central level and other unhappy factors vitiate the selection process ... The end product is polluted by the enigmatic process and judicial independence becomes, in some measure, a casualty in fact and a fiction on paper.

There is considerable debate on whether the executive interfered in most appointments even when it had the formal power to do so before 1993, and whether such interventions reduced the quality of judges. Mehta points out that a government affidavit in 1993 during the *Second Judges* case said of 575 appointments, the government had rejected the Chief Justice's opinion in only a handful of cases.[58] In a study of 116 Supreme Court judges from 1950–2006,[59] the Congress party was in power for 63 per cent of the Supreme

55 Special Reference No 1 of 1998 (*in re*) (1998) 7 SCC 739 (also known as the *Third Judges* case). The propositions laid down by the Supreme Court in regard to the Supreme Court appointments were consultation of the CJI with four most senior puisne judges of the Supreme Court; opinion of all in writing; views, in writing, of the most senior judge who hailed from the same High Court as the person under consideration; if the majority of the collegium was against the appointment, the person shall not be appointed; the exceptions to the above considerations were (a) no seniority principle applied for a High Court judge of 'outstanding merit', and (b) a High Court judge could be appointed 'for good reason' from amongst others of equal merit.

56 See Dhavan (n 39 above); Iyer (n 46 above); Hazra & Debroy (n 49 above) for a critique of the appointment process.

57 Iyer (n 46 above).

58 PB Mehta 'India's judiciary: The promise of uncertainty' in D Kapur & PB Mehta (eds) *Public institutions in India: Performance and design* (2005).

59 Shankar (n 1 above).

Court appointments, while the BJP (as head of the NDA coalition) ruled at the centre for 23 per cent of the appointments, and others-led coalitions at the centre for the remaining period. An analysis shows that 72 per cent of Supreme Court judges had served in the High Court for 11 to 16 years, and 23 per cent had served in the High Court for less than ten years, indicating that those elevated to the Supreme Court were usually senior judges. The emphasis on elevating senior High Court judges increased after 1980 – almost half the judges were in the High Court for 14 to 15 years. The percentage of Supreme Court judges who had served as chief justices of a High Court went up to 68 per cent after 1980, as compared to 41 per cent before 1980 – thus providing more corroborating evidence that seniority was a key criterion for selecting Supreme Court judges.[60]

5 The location of the Court within the political system

5.1 Transformative role of the Court and relations with parliament

We can highlight three periods in the interaction between the apex Court and parliament: the Nehruvian period when Jawaharlal Nehru was Prime Minister; the Indira Gandhi era when she was Prime Minister, and the post-Indira Gandhi era. Other scholars[61] have come up with other ways of periodising the conflict: 1960-1964 when the Court cautiously and gradually expanded its own authority; 1965-1975 when it entered a militant ideological phase;[62] 1975-1977 was a tale of two courts;[63] 1977-1980 saw a resurgence of the Court; 1980-1984 saw the Court keeping out of the way of major confrontation with the Indira Gandhi government;[64] and 1985-2005 saw the dawn and intensification of social action litigation and the increasing power of courts as parliament became more fractured.

In the Nehruvian period (1950-1964), the apex Court and parliament jostled for supremacy, albeit in an amicable fashion. The key issues included the nature of the directive principles, and of the fundamental right to property. In 1951, in *Madras v Champakam Dorairajan*,[65] the Supreme Court gave primacy to fundamental rights in any clash with directive principles. In response, parliament attached a Ninth Schedule to include statutes that could never 'be deemed to be void, or ever to have been void' on the ground of inconsistency with fundamental rights. Judges were deeply concerned about this 'intent ... to silence courts'.[66]

60 Also see Gupta (n 14 above) who shows that of the 69 appointments from the High Court, more than half of those elevated were chief justices and the rest were puisne judges.
61 G Das 'The Supreme Court: An overview' in Kirpal *et al* (n 36 above); Beller (n 12 above).
62 Beller (n 12 above).
63 Sathe (n 3 above).
64 Das (n 61 above).
65 AIR 1951 SC 226.
66 Hidayatullah's opinion in *Golaknath* v State of Punjab AIR 1967 SC 1643 1717.

After Jawaharlal Nehru's death in 1964, the Court entered its militant 'ideological' phase and put itself forward as 'a guarantor of constitutional order in a time of constitutional decay'.[67] Ferejohn's proposition that the greatest danger to judicial independence occurs when the legislature and executive are ideologically unified and the judiciary comprises of judges with a different ideology holds for India.[68] In a parliamentary system, the legislature and executive tend to be ideologically unified when there is a dominant single-party majority, since the leader of the single largest party in parliament becomes the Prime Minister. Indira Gandhi, the leader of the Congress Party (the single largest party in parliament), was in power as Prime Minister from 1966 to 1977, and again from 1980 until her assassination in 1984. In the late 1960s and early 1970s, her government embarked on translating her ideological vision into practical policies by undertaking the nationalisation of banks, and abolishing privy purses of erstwhile princely rulers of pre-independent India. These policies were challenged in the Supreme Court as infringements of the fundamental right to property (article 31). In the *Golak Nath* case of 1967, a 6:5 majority held that parliament was not competent to amend the chapter on fundamental rights;[69] in the *Bank Nationalisation* case, the majority held that the right to property was a very important fundamental right;[70] and in the *Privy Purse* case[71] it was held that the claim to receive a privy purse was part of the right to property.[72] Underlying the majority opinion was the notion that the Court must serve as a 'trustee' of the masses.

Indira Gandhi's victory in the 1971 parliamentary elections allowed the executive and parliament to design a full response to the Court. As Prime Minister, she took a series of measures to curb the independence of the Supreme Court. New constitutional amendments removed from judicial purview those amendments that abridged fundamental rights. These amendments also specified that the amendment procedures conferred sovereign powers on parliament, required the directive principles to be controlled by fundamental rights, and said that 'no law containing a declaration that it is giving effect to specified directive principles shall be called into question on the ground that it is not giving effect to such a policy'.[73]

Parliament passed the 24th and 25th amendments, which sought to reduce the level of judicial review of legislation, particularly laws enacted to implement some Directive Principles. The Court mulled over these measures

67 Beller (n 12 above) 525.
68 J Ferejohn 'Independent judges, dependent judiciary: Explaining judicial independence' (1999) 72 *Southern California Law Review* 353.
69 *Golaknath* (n 66 above).
70 *RC Cooper v Union of India* AIR 1970 SC 564.
71 *Madhav Rao Jivaji Rao Scindia v Union of India* (1971) 1 SCC 85.
72 Das (n 61 above); see HM Seervai *Constitutional law of India: A critical commentary* (1983) for an analysis of these judgments.
73 Beller (n 12 above) 525.

in *Kesavananda v Union of India* on 31 October 1972.[74] After four months, a 1 700 page document overruled Golaknath's emphasis on the 'transcendental' nature of fundamental rights, but said that parliament could not 'alter the basic structure and framework of the Constitution'. The ruling rejected the attempt to exclude statutes from judicial scrutiny but accepted that Directive Principles could override fundamental rights subject, however, to judicial scrutiny. The ruling, Beller argues, placed the Court at the heart of the polity and affirmed the Court's institutional role as a sentinel and guardian of fundamental rights.

The dominance of the executive over the judiciary intensified during the emergency which Prime Minister Indira Gandhi introduced after a High Court invalidated her election. Her party, which had a majority in parliament, enacted a new article 329A(4) which directed the Supreme Court to allow her appeal and dismiss her opponent's cross-appeal. Constitutional scholar Seervai rightly says that the emergency period was a 'tale of two supreme courts': the 'finest hour', when the Supreme Court struck down the new article 329A(4). Then we descend into 'the dark valley below where dwells the *habeas corpus* case' and constitutes a judicial surrender to the executive. The President issued an order under article 359 of the Constitution suspending the right to move the Court for the enforcement of articles 14, 21 and 22.[75] This was the third emergency that independent India had seen; the earlier two in 1962 and 1971 had occurred because of external threats (wars with China and Pakistan). The challengers of the emergency asked the High Courts to examine whether their detention under the Maintenance of Internal Security Act (MISA), a preventive detention law enacted in 1971, was in accordance with the Act, whether the law was valid, and whether the Executive had acted in a mala fide manner. Seven High Courts – Allahabad, Bombay, Delhi, Karnataka, Madhya Pradesh, Punjab and Rajasthan – upheld the appeals. The five-judge Supreme Court bench led by Ray, and comprising Beg, Bhagwati, Chandrachud and Khanna, ruled 4:1 (Khanna dissented) that the actions of the executive could not be examined by any court. Although there was no single majority ruling, four judges agreed that no citizen had standing (*locus standi*) to move a writ of *habeas corpus* before a High Court under article 226 in light of the President's order, or to challenge a detention order as illegal, as factually or legally mala fide or as based on extraneous circumstances.[76] Why did the majority rule in this fashion? Austin's answer is that the judge's motives were a mix of 'collective and individual, substantive

74 *Kesavananda Bharati* (n 20 above). Several scholars (Seervai (n 72 above), G Jacobsohn *The wheel of law: India's secularism in comparative constitutional context* (2003) and Jain (n 19 above)) have analysed the implications of the case for enhanced judicial review by the Supreme Court.

75 During an emergency, the fundamental rights guaranteed by art 19, including freedom of speech, expression, assembly, movement, property and profession, are suspended and any laws made by the executive contravening those rights are valid until the revocation of the emergency. Art 14 states that the state shall not deny to any person equality before the law or the equal protection of the laws. Art 21 states that no person shall be deprived of his life or personal liberty except according to procedures established by law.

76 Austin (n 29 above) 340-342.

and self-protective' and they ruled as they did principally because they believed they were reading the law right.[77] Simultaneously, Indira Gandhi undertook measures to pack the Court with pliable judges; these included the supercession of judges who were seen as anti-regime, and transfers of judges perceived to be hostile to her policies. Sixteen High Court judges who had upheld the challenge to MISA were transferred, and the threat of transfer hung over 40 other judges.

The 42nd Amendment passed by Indira Gandhi's emergency regime in 1976 tried to 'kill' the basic structure by asserting that there 'shall be no limitation whatsoever on the constituent power of parliament to amend the Constitution' and removed the jurisdiction of the Court on the issue.[78] Judicial independence was severely compromised in the period preceding and during the emergency. As noted before, many argue that the Court's activism on social rights stemmed from memories of this dark period.

5.2 Jurisdiction of the Court[79]

The Supreme Court has original, appellate and advisory jurisdiction. Its exclusive original jurisdiction extends to any dispute between the government of India and one or more states or between the government of India and any state or states on one side and one or more states on the other or between two or more states, if and insofar as the dispute involves any question (whether of law or of fact) on which the existence or extent of a legal right depends. In addition, article 32 of the Constitution gives an extensive original jurisdiction to the Supreme Court in regard to enforcement of fundamental rights. It is empowered to issue directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* to enforce them. The Supreme Court has been conferred with power to direct transfer of any civil or criminal case from one state High Court to another state High Court or from a court subordinate to another state High Court. The Supreme Court, if satisfied that cases involving the same or substantially the same questions of law are pending before it and one or more High Courts or before two or more High Courts and that such questions are substantial questions of general importance, may withdraw a case or cases pending before the High Court or High Courts and dispose of all such cases itself. Under the Arbitration and Conciliation Act, 1996, international commercial arbitration can also be initiated in the Supreme Court.

The appellate jurisdiction of the Supreme Court can be invoked by a certificate granted by the High Court concerned under article 132(1), 133(1) or 134 of the Constitution in respect of any judgment, decree or final order of

77 Austin (n 29 above) 342.
78 Clauses 4 and 5.
79 http://supremecourtofindia.nic.in/jurisdiction.htm (accessed 4 November 2011).

a High Court in both civil and criminal cases, involving substantial questions of law as to the interpretation of the Constitution. Appeals also lie to the Supreme Court in civil matters if the High Court concerned certifies (a) that the case involves a substantial question of law of general importance, and (b) that, in the opinion of the High Court, the said question needs to be decided by the Supreme Court. In criminal cases, an appeal lies to the Supreme Court if the High Court (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death or to imprisonment for life or for a period of not less than 10 years, or (b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused and sentenced him to death or to imprisonment for life or for a period of not less than 10 years, or (c) certified that the case is a fit one for appeal to the Supreme Court. Parliament is authorised to confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court.

The Supreme Court also has a very wide appellate jurisdiction over all courts and tribunals in India in as much as it may, in its discretion, grant special leave to appeal under article 136 of the Constitution from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

The Supreme Court has special advisory jurisdiction in matters which may specifically be referred to it by the President of India under article 143 of the Constitution. There are provisions for reference or appeal to this Court under both the Constitution and numerous statutes.[80] Election petitions under Part III of the Presidential and Vice-Presidential Elections Act, 1952 are also filed directly in the Supreme Court.

Under articles 129 and 142 of the Constitution, the Supreme Court has been vested with the power to punish for contempt of court, including the power to punish for contempt of itself. In case of contempt other than the contempt referred to in Rule 2, Part I of the Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975, the Court may take action (a) *suo motu*, or (b) on a petition made by Attorney-General, or Solicitor-General, or (c) on a petition made by any person, and in the case of a criminal contempt with the consent in writing of the Attorney-General or the Solicitor-General.

80 Art 317(1) of the Constitution; sec 257 of the Income Tax Act 1961; sec 7(2) of the Monopolies and Restrictive Trade Practices Act 1969; sec 130-A of the Customs Act 1962; sec 35-H of the Central Excises and Salt Act 1944; and sec 82C of the Gold (Control) Act 1968. Appeals also lie to the Supreme Court under the Representation of the People Act 1951; the Monopolies and Restrictive Trade Practices Act 1969; the Advocates Act 1961; the Contempt of Courts Act 1971; the Customs Act 1962; the Central Excises and Salt Act 1944; the Enlargement of Criminal Appellate Jurisdiction Act 1970; the Trial of Offences Relating to Transactions in Securities Act 1992; the Terrorist and Disruptive Activities (Prevention) Act 1987; and the Consumer Protection Act 1986.

Under Order XL of the Supreme Court Rules, the Supreme Court may review its judgment or order but no application for review is to be entertained in a civil proceeding except on the grounds mentioned in Order XLVII, Rule 1 of the Code of Civil Procedure and in a criminal proceeding except on the ground of an error apparent on the face of the record.

5.3 Remedial competence of the Court

After an order of the Court is passed, a review can be filed. Article 137 provides that, subject to the provisions of any law and rules made under article 145, the Supreme Court has the power to review any judgment pronounced or order made by it. Under the Supreme Court Rules (1966), such a petition is to be filed within 30 days from the date of judgment or order and, as far as practicable, it is to be circulated, without oral arguments, to the same bench of judges who delivered the judgment or order sought to be reviewed.

After the case of *Rupa Ashok Hurra* in 2002,[81] the concept of curative petition emerged. A curative petition is relief granted in exceptional situations where the Supreme Court can reconsider its orders after the dismissal of a review petition. The case listed exceptional circumstances in which the case could be re-opened, including:

> (1) a violation of principles of natural justice in that he was not a party to the list but the judgment adversely affected his interests or, if he was a party to the list, he was not served with notice of the proceedings and the matter proceeded as if he had notice; and (2) where in the proceedings a learned judge failed to disclose his connection with the subject matter or the parties giving scope for an apprehension of bias and the judgment adversely affects the petitioner.

A procedure for the same was also detailed in the same case:[82]

> The petitioner, in the curative petition, shall aver specifically that the grounds mentioned therein had been taken in the review petition and that it was dismissed by circulation. The curative petition shall contain a certification by a senior advocate with regard to the fulfilment of the above requirements. We are of the view that since the matter relates to re- examination of a final judgment of this Court, though on limited ground, the curative petition has to be first circulated to a bench of the three senior-most judges and the judges who passed the judgment complained of, if available. It is only when a majority of the learned judges on this bench conclude that the matter needs hearing that it should be listed before the same bench (as far as possible) which may pass appropriate orders. It shall be open to the bench at any stage of consideration of the curative petition to ask a senior counsel to assist it as *amicus curiae*. In the event of the bench holding at any stage that the petition is without any merit and vexatious, it may impose exemplary costs on the petitioner.

81 *Rupa Ashok Hurra v Ashok Hurra* (2002) 4 SCC 388.
82 Para 51.

An analysis of the use of curative petition reveals the following:[83] From April 2002 to December 2005, all 568 curative petitions which were filed before the Supreme Court were summarily rejected.[84] The only curative petitions that have in fact been successful are those where a clear breach of natural justice was demonstrable. For instance, the Supreme Court upheld a conviction despite the fact that a witness for the defence was not examined.[85]

6 Access to the Court

6.1 Who may approach the Court (standing)

6.1.1 Public interest litigation

In the 1970s, the apex Court judges introduced an innovative mode of appealing directly to the Supreme Court. In 1981, Justice PN Bhagwati articulated the concept of PIL:

> Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons by reasons of poverty, helplessness or disability or socially or economically disadvantaged position unable to approach the Court for relief, any member of public can maintain an application for an appropriate direction, order or writ in the High Court under article 226 and in case any breach of fundamental rights of such persons or determinate class of persons, in this Court under article 32 seeking judicial redress for the legal wrong or legal injury caused to such person or determinate class of persons.[86]

Such petitions can be filed at the filing counter of the Supreme Court like any other writ petition for the enforcement of a fundamental right. However, if received by post, such petitions are screened by the Registry as per the prescribed guidelines and only such of them as are covered by the parameters laid down therein, are placed before the honourable judge nominated for giving directions on such petition.

83 MM Mwamisi 'The Indian Supreme Court and curative actions' (2007) 1 *Indian Journal of Constitutional Law* 202 http://www.commonlii.org/in/journals/INJlConLaw/2007/10.pdf (accessed 5 November 2011).

84 As above.

85 *State of Madhya Pradesh v Sughar Singh* (2010) 2 SCC 71; R Shankar 'Supreme Court got it right in the Bhopal Curative Petition' (2011) XLVI *Economic & Political Weekly.*

86 *SP Gupta v Union of India* 1981 (Supp) SCC 87.

6.1.2 Letter petitions

Petitions received by post, even though not in the public interest, can be treated as writ petitions if so directed by the honourable judge nominated for this purpose. Individual petitions complaining of harassment or torture or death in jail or by police, complaints of atrocities on women, such as harassment for dowry, bride burning, rape, murder and kidnapping, complaints relating to family pensions and complaints of refusal by police to register the case can be registered as writ petitions, if so approved by the judge concerned.

If deemed expedient, a report from the concerned authority is called before placing the matter before the honourable judge for directions. If so directed by the honourable judge, the letter is registered as a writ petition and is thereafter listed before the Court for hearing.

The rule of *locus standi* has been relaxed but with the *caveat* that it cannot be used as an instrument 'for personal gain or private profit or political motive or any oblique consideration'.[87] However in the case of criminal matters, the Supreme Court re-asserted its conservative stance with regard to restricting *locus standi* in criminal matters.[88]

6.2 When may the Court be approached?

Under article 32, in the case of a violation of a fundamental right, an individual may petition the Court directly. The apex Court can be directly accessed through the PIL route. An appeal lies to the Supreme Court from any judgment, decree or final order, whether in a civil, criminal or other proceeding, of a High Court if it certifies that the case involves a substantial question of law as to the interpretation of the Constitution (article 132). In a civil appeal, (1) if the case involves a substantial question of law of general importance; (2) that in the opinion of the High Court, the said question needs to be decided by the Supreme Court.

A criminal appeal lies in the following circumstances: if the High Court (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or (b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death.

Appeals to the Supreme Court need a prior certificate granted by the High Court concerned. In order to reduce the possible delays in this process, article 134A was enacted, whereby 'as soon as may be after such passing or making, the question may be looked into by the Court on its own motion or

87 *Ashok Kumar Pandey v State of WB* (2004) 3 SCC 349.
88 *Janata Dal v HS Chowdhury* (1992) 4 SCC 305.

may be given in respect of that case'. In addition to the appeal provisions discussed, the Court may grant special leave to appeal from any judgment, decree, determination, sentence or order in any case or matter passed or made by any court or tribunal in India.

The Supreme Court has been conferred advisory jurisdiction under article 143. The President can seek the opinion of the Court on a question of law or fact which appears to be of such nature and of such public importance that it is 'expedient' to obtain the Court's opinion. Ten advisory opinions have been decided on thus far, and one was rejected.[89]

6.3 Legal representation and *amici curiae*

Very often, the Court appoints an *amicus curiae* (usually a senior counsel) to assist it in 'addressing the issue in legal terms, sifting out the relevant facts from the documents and pleadings and in helping sharpen the focus of discussion, conscious of the contingencies of judicial functioning'.[90] Furthermore, a person can file in the Supreme Court only through an advocate on record. An individual who does not want to engage an advocate can appear in person. If the individual pleads that he does not have the resources to appoint an advocate, he is entitled to legal aid (article 39A).

An advocate on record is entitled to file an appearance or act for a party in the Court, and has to instruct an advocate to appear and plead in any matter. Any advocate not being a senior advocate may on his fulfilling of the prescribed conditions be registered in the Court as an advocate on record. No advocate on record may, without leave of the Court, withdraw from the conduct of any case by reason only of non-payment of fees by his client. No advocate on record shall authorise any person whatsoever, except another advocate on record, to act for him in any case. An advocate on record is required to file a memorandum of appearance on behalf of the party, accompanied by a *Vakalatnama* duly executed by the party. An advocate on record is entitled to act as well as to plead for the party in the matter and to conduct and prosecute all the proceedings before the Court. He or she is also entitled to deposit and receive money on behalf of the party.

6.4 Accessibility of Court judgments

With the assistance of the National Informatics Centre, a web-enabled retrieval system, the Judgment Information System (JUDIS) has been implemented, thereby making available, on the internet, a complete text of all reported judgments of the Supreme Court from 1950 to date. Unreported

89 Jain (n 19 above).
90 S Murlidhar 'The expectations and challenges of judicial enforcement of socio-economic rights' http://delhidistrictcourts.nic.in/ejournals/Social_Rights_Jurisprudence.pdf (accessed 10 November 2011).

judgments and signed orders are also now being uploaded on the website. Judgments can be accessed through the party's name, the advocate's name, the date of judgment and also through a free text search which enables the user to retrieve all the judgments on a particular subject. It is also possible to find out which judgments were delivered during a particular period or which judgments with a particular name were delivered during that period. The judgments are available on this site within 24 hours of their being delivered in the Court. Digitally-signed orders are available on the Court website. A litigant can download the electronic copies which can prove the authenticity of the signor and integrity of the document. However, such orders cannot be used as certified copies, for which one has to apply to the Copying Section of the Court. All the previous orders passed in a case are also available in chronological order.

7 The deliberative performance of the Court

7.1 Judgments: Style and structure

The Court's judgments are in written in English. The text begins with a head note that summarises the main order, and the rest of the judgment is broken down into paragraphs. Some judgments that deal with complex constitutional questions are extremely long – the *Kesavananda* judgment numbered 1 700 pages – while others could be as short as one page. The judgments contain a summary of the case, a list of the issues raised, and the rationale adopted in the decision on each issue by the opinion writer. In case of some divergence of opinion, the other judges also report the reasons for the divergence and the implications for the case. One of the criticisms levied against the style of these judgments is that the rationale of the ruling often gets lost in a verbose style favoured by many judges who draw on philosophy, history, and long quotes from earlier judgments. The practice of using law students as clerks has only just begun in the Supreme Court and may perhaps introduce a crisper style.

These judgments are binding on the lower courts and operate as precedents for subsequent cases. Most judgments refer to earlier cases; however, it is less clear whether the judge understands the precedent in the way the earlier case had understood it. One of the more confusing aspects of judgments is that there may not be a clear consensus on a key issue, with the result that the opinions reflect a plurality rather than a single point of view or even a majority point of view.

7.2 Reasoning of the Court (internal culture)

The internal culture of reasoning continues to mindlessly rely on precedent. This is because of the overworked and understaffed nature of the courts as well as the structural attributes that promote collaboration and *status*

quoism rather than dissent. The early retirement age (65 years) and relatively low salaries force judges to look for work after retirement.

One former CJI provided a shocking indictment of India's judges, saying that more than 20 per cent of judges were corrupt.[91] The political links of a former CJI's family, the links between another former CJI and private sector lobbies, and the system of post-retirement appointments of judges point to *quid pro quo*-type connections between the top echelons of the state. To combat corruption, the cabinet approved a Bill in December 2006 to amend the Judges Inquiry Act (1968) and to create a National Judicial Council that will examine all complaints of corruption and misdemeanours against judges. Some of the provisions of the judicial accountability bill on conflict of interest were included to circumvent such collusion.

This is because of the difficulty in investigating allegations of corruption against a judge. In *Veeraswami*,[92] to protect judges from harassment by the executive, the Supreme Court laid down that no criminal case in matters of corruption against a judge could be conducted without 'consulting' the CJI.[93] The President of India is supposed to consult the CJI before giving permission to prosecute a judge of a superior court under the Prevention of Corruption Act (1949). But the CJI's opinion is binding in respect of corruption cases. A Judicial Standards and Accountability Bill is scheduled to be introduced in parliament shortly. It establishes an oversight committee that will receive complaints and send them to the relevant committees in the High Courts, which will investigate and within three months recommend further action or closure of the case. If further action is recommended, the oversight committee will appoint a panel of three members. The positive aspects of the Bill include a complaints process, a code of conduct, disclosure of assets and a time limit for each step of the process. The negative aspects are that the judiciary still has enough power to regulate itself. The oversight committee includes the CJI and two senior-most judges, and two members appointed by the executive (the Attorney-General and an eminent member nominated by the President). While the Bill does not say whether the committee's decisions have to be unanimous or a simple majority, the norm seems to be that decisions would be of a majority, which gives judges the deciding vote on whether to take action or investigate their colleagues. The complaints can be dismissed if the High Court committees decide that the complaint has no basis; and/or if the process of impeachment does not occur in both houses within the same session of parliament. These moves – judiciary's scrutiny of

91 SP Barucha's words reported in 'Panel favours Judicial Commission' *The Tribune* 8 April 2002.

92 *K Veeraswami v Union of India* UOI (1991) 3 SCC 655.

93 The judgment is unclear on whether this procedure has to be followed for all criminal cases against a judge or only for cases dealing with corruption charges. Before launching into a discussion about consultation, the Court says that 'the judges are liable to be dealt with just the same way as any other person in respect of criminal offence. It is only in taking of bribes or with regard to the offence of corruption the sanction for criminal prosecution is required'.

corruption in government and the Judicial Accountability Bill – have enhanced attempts to check corruption within courts.

A judgment, as Gadbois correctly notes,[94] is but one act of a lengthy and complex political drama involving substantial give and take by parliament and the Court. As several scholars[95] have pointed out, it is not obvious that the Court has always frustrated legislative intent. The Court 'often serves the covert desires of elected leaders' witnessed in its legal nit-picking of agrarian reforms which 'matched obvious uncertainties in the [ruling] Congress party'. Secondly, as Dhavan enumerates, the Court has sometimes been agreeable in validating controls instituted by parliament, such as those over the marketing, distribution and prices of scarce commodities, the creation of state monopolies, and regulations on working conditions.[96] Thirdly, the Court does not irrevocably lock itself into untenable political positions; witness how the Court dropped its insistence about the fundamental rights nature of the right to property after Indira Gandhi's victory in 1971.[97] The internal norms and the memories produced by the institutional dynamics with the legislature and the executive thus call attention to the negotiated nature of judicial behaviour.

7.3 External legal culture

Epp argues that a rights revolution did not occur in India because rights advocacy groups in India were weak and fragmented, handicapped by weak institutionalisation and dependence on charismatic leadership.[98] Judges cannot foment a rights revolution on their own; the occasional sweeping decision has little effect because lawyers and political activists cannot follow through. The low proportion of cases registered by non-governmental organisations (NGOs) in health and education supports that contention. But Epp fails to give adequate weight to the efforts by some judges in bolstering the advocacy groups. In the absence of popular/electoral pressure, judges manage at least to draw attention to the government's obligations and duties. The increase in *suo moto* cases in recent years is testimony to this. But as one Delhi administrator noted, the 'clean air' judgments were primarily the handiwork of a couple of judges, and were Delhi-centric. So what happens to pollution control in other cities like Bangalore and Mumbai? This is one of the fallouts of a judge-led litigation in the absence of strong support structures. The relationship between the Supreme Court and civil society organisations has proceeded through several stages. The discussion of social rights litigation shows that judges were keen to create conditions for more cases

94 Gadbois (n 8 above).
95 Beller (n 12 above); FR Frankel *India's political economy, 1947–77: The gradual revolution* (1978); Dhavan (n 39 above).
96 Dhavan (n 39 above).
97 As above.
98 CR Epp *The rights revolution: Lawyers, activists and supreme courts in comparative perspective* (1998) 71.

registered on behalf of vulnerable groups and on issues like the environment that were of concern to most citizens. Bhagwati argues that the initiation as well as the responsiveness of the apex Court to human rights concerns made for an effective synergy between the two groups, particularly in environmental litigation.[99] Epp's survey of cases shows that the Court's support for rights claims increased from 35 per cent during the emergency to about 70 per cent in 1990. The judge-led social action litigation produced a vibrant support structure of NGOs and other groups in environmental issues. Such vibrancy, however, has not resulted in NGOs choosing litigation as a viable strategy for ensuring the delivery of health and education rights. As some studies have found, litigation was the least preferred alternative for NGOs, primarily because of the poor enforcement of Court directives. Galanter[100] is right to argue that PILs are responses to episodic cases of outrage rather than a tool that is systematically used by NGOs and other groups to improve public services. The patterns emerging from our models suggest that NGOs may be right in not pursuing a litigation-oriented strategy. The judges have become more wary of PILs and NGOs in the past two decades and were significantly less likely to favour such cases.[101]

7.4 Use of international law

In numerous cases, the Indian Supreme Court has emphasised that, while discussing constitutional requirement, courts should keep in view the core principle embodied in the international conventions and instruments and as far as possible give effect to the principles contained in those international instruments, more so when there is no inconsistency between them and there is a void in domestic law.[102]

8 Conclusion

In the last two decades, India's Supreme Court has started carving a niche for itself as mediator/facilitator overseeing the access to and the quality of socio-economic and human rights. Some scholars have theorised that the strategic behaviour of the executive and the legislature in empowering judges is part of a 'top down' process[103] where elected officials might allow judges to make policies so as to avoid responsibility for controversial decisions,[104] or to

99 PN Bhagwati 'Judicial activism and public interest litigation' (1985) 23 *Columbia Journal of Transnational Law* 561.
100 M Galanter *Law and society in modern India* (1989).
101 Shankar (n 1 above).
102 *ADM Jabalpur v Shivkant Shukla* (1976) 2 SCC 52; *Vellore Citizens Welfare Forum v Union of India* AIR 1996 SC 2115 (precautionary principle); *Vishaka v State of Rajasthan* AIR 1997 SC 311 (CEDAW).
103 R Hirschl *Towards juristocracy: The origins and consequences of the new constitutionalism* (2004).
104 MA Graber 'The nonmajoritarian difficulty: Legislative deference to the judiciary' (1993) 7 *Studies in American Political Development* 35.

protect rights from new or emerging electoral majorities.[105] Others have emphasised the motivation of judges themselves.[106] Still others have emphasised macro drivers (democratisation) or 'bottom-up' processes, such as the spread of rights discourses and legal networks.[107] The behaviour of Indian judges does not fit neatly into any of these categories. Supreme Court judges have negotiated with different actors, thus highlighting not the rise of a 'juristocracy', but a continuous dialogue with other actors and organs of the state. Indian judges want their judgments to be perceived as legitimate, but legitimacy has to be negotiated; it is not inherent in an institution. One source of the Court's legitimacy, Sathe[108] points out, rests on the people's perceptions that judgments are principled, objective and just. This involves seeing whether a decision conforms to the spirit of a right. Judgments on public health issues, for instance, articulate major values, such as a 'right to potable water' or to clean streets, but the actual decision focuses on what is feasible.

In an article, Chayes contrasted the traditional remedies, such as compensation for harm, with the more complex and ongoing remedies created in public law litigation:[109]

> Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking, fashioned *ad hoc* on flexible and broadly remedial lines, often having important consequences for many persons …

The case law on social rights and the more recent emphasis on clean government demonstrate complex negotiations between the Court and the other organs of the state, as well with the petitioners from civil society, private sector and other parts of the citizenry to craft solutions that are ongoing and flexible. A review of recent judgments indicates the movement of the higher courts towards more intervention in policy and law enforcement domains. Judges have often justified judicial intervention in administration as unavoidable to combat the lawlessness and ineffective administration. The transfer of more contentious political issues to the Court's docket by the political elites has gained momentum in recent years. Instances of political elites transferring the contours of a policy to the Court go back to the 1950s and 1960s in affirmative action where, as Sathe says,[110] the political elites wanted an umpire who could adjudicate their contentious issues according to certain principles.

The judiciary's positive response to petitions from NGOs on issues of quality and access to schools and health facilities may be linked to the

105 Hirschl (n 103 above).
106 L Baum *Judges and their audiences: A perspective on judicial behaviour* (2007).
107 Epp (n 98 above).
108 Sathe (n 3 above).
109 A Chayes 'The role of the judge in public law litigation' (1976) 89 *Harvard Law Review* 1305.
110 Sathe (n 3 above).

increasing judicialisation of politics in India. In another paper, I have argued that there are three ways in which increasing judicialisation has had a positive impact.[111] First, the judiciary has knitted alliances with other actors – political parties, citizen groups, activists and the media – to keep a watchful eye on the administration's performance. This has strengthened state-society relations and the scrutiny of misrule. Second, the Court has used the force of law to impose deadlines, define elements of governmental accountability, and ask for explanations for non-compliance. This seems to have generated efforts within the government to tighten administrative rules and weed out corrupt officials. Besides including corruption as a key performance management evaluator of ministries, the top administrative officer (the Cabinet Secretary) recently decided to hold weekly meetings for disposal of pending cases against top bureaucrats in different ministries. On the negative side, a more worrying concern is the monitoring by the higher judiciary of day-to-day or month-to-month implementation of its orders. This increases the load on an already overburdened judiciary and will lengthen backlogs in delivering justice. And if despite such supervision the executive fails to comply with Court directives, the institutional legitimacy of the judiciary will be besmirched.

111 S Shankar 'The embedded negotiators: India's higher judiciary and socio-economic rights' in D Bonilla (ed) *Constitutionalism in the Global South* (forthcoming).

CHAPTER 7

DESCRIPTIVE OVERVIEW OF THE SOUTH AFRICAN CONSTITUTION AND CONSTITUTIONAL COURT

Wessel le Roux [1]

1 Introduction: The Constitutional Court and the ongoing rationalisation of the apartheid judiciary

The South African Constitutional Court held its first sitting on 15 February 1995.[2] The argument before it concerned the constitutionality of the death sentence. It was a controversial issue, which the politicians should have decided during the transitional negotiations, but opportunistically left for the Court to resolve.[3] Under the circumstances, the task of the Court was to fashion constitutional principle from political pragmatism.[4] The Court ruled that the legislation, which authorised the death sentence, was

1 The final version of this chapter is heavily indebted to the work of a number of early participants in the BISA project, who produced the basic outline of the chapter and its first draft.

2 There is an extensive and growing body of literature available about the Court. Accessible introductions to the Court from a comparative perspective are provided by H Klug *The Constitution of South Africa: A contextual analysis* (2010) and M Kende *Constitutional rights in two worlds: South Africa and the United States* (2009). The most comprehensive study of post-apartheid constitutional law is S Woolman *et al* (eds) *Constitutional law of South Africa* 2nd ed (2008) (four volumes). The most up to date introduction to the Constitution and the Constitutional Court is IM Rautenbach *Rautenbach-Malherbe constitutional law* (2012); and B Bekink *Principles of South African constitutional law* (2012).

3 *S v Makwanyane* 1995 (3) SA 391 (CC) paras 20-25. The Court described this way of resolving the political deadlock during the negotiation process as the 'Solomonic solution'.

4 See R Dworkin 'The forum of principle' in Dworkin *A matter of principle* (1985) 33-57, and F Michelman 'Law's Republic' (1988) 97 *Yale Law Journal* 1493. Both scholars argue that it is the task of judicial review to speak principle (normative integrity) to parliamentary politics. Both perceive liberal parliamentary politics as dominated by short-term instrumental or strategic party political concerns. Both defend a republican model of deliberative democracy as an alternative. The key to the alternative is judicial review and an apex court that embraces deliberative rationality as its ethos. The views of these two scholars were extremely influential in the early days of post-apartheid democracy (in fact, Michelman conducted a workshop with the newly appointed Constitutional Court judges a weak before the Court opened). For the purposes of this descriptive overview, I assume that the vision of the Constitutional Court as a forum of principle (or model of deliberative democracy) presents the Court in its best possible light. Champions of parliamentary politics might not share this interpretive charity (see J Waldron 'The core of the case

unconstitutional. In the decade and a half that have passed since then, the Court has provided principled guidance to politics in more than 500 decided cases. These cases have drawn attention to the complex relationship between the Constitutional Court and the political branches of government, but also between the Court and other Superior Courts within the judicial branch of government itself.[5] This is partly because the demand for legal continuity from apartheid to democracy left the apartheid judiciary intact. None of the apartheid courts were closed, no lustration laws were passed, and no purge of the judiciary took place. Instead, the drafters of the Constitution issued the following instruction to the Minister of Justice:[6]

> As soon as is practical after the new Constitution took effect all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution.

In spite of the fact that the drafters required the process to take place as soon as was practically possible, the transformation of the apartheid judiciary still remains unresolved two decades later.[7] In fact, the preamble to the Renaming of High Courts Act 30 of 2008 states that the 'rationalisation' of the South African judiciary 'is a comprehensive and ongoing process and is to be based on a policy framework which is still being finalised in conjunction with all relevant role-players'. In the meantime, new legislation is completed in a piecemeal fashion as part of 'a quest for enhanced service delivery and the rapid transformation of the judiciary', as it is put in the preamble of another innovation, the South African Judicial Education Institute Act 14 of 2008.

One of the key issues bedevilling the transformation of the apartheid judiciary is what the Constitution means by a judicial system that would 'suit

4 against judicial review' (2006) 115 *Yale Law Journal* 1346), nor, in fact, will many sympathetic supporters of the Court and judicial review (see T Roux *The politics of principle: The first South African Constitutional Court, 1995-2005* (2013)).

5 The court structure in South Africa is set out in sec 166 of the Constitution of the Republic of South Africa, 1996 (the Constitution'). The courts are (a) the Constitutional Court; (b) the Supreme Court of Appeal; (c) the High Court of South Africa, and (d) the Magistrates' Courts. In terms of sec 6 of the Superior Courts Act 10 of 2013, the High Court consists of nine divisions, one for each of the nine provinces of South Africa. The High Courts, the Supreme Court of Appeal and the Constitutional Court are known as the Superior Courts. The Magistrates' Courts operate as courts of first instance in less serious matters at the level of the city or district. High Courts operate as courts of first instance in serious matters at provincial level. Appeal lies from the Magistrates' Court to the High Court of the province. From the High Court appeal lies, with leave having been granted, to the Supreme Court of Appeal and/or the Constitutional Court (as courts with national jurisdiction).

6 Item 16(6) of Schedule 6 of the Constitution.

7 The constitutionally mandated rationalisation or transformation of the apartheid judiciary has come to mean three distinct things. Firstly, it refers to the change in the racial and gender composition of the courts and thus the appointment process of judges. Secondly, it refers to changes in the jurisdiction and power of the courts within the over-all court structure. Lastly, it refers to a change in the legal culture or interpretive jurisprudence of the courts. See further D Moseneke 'Separation of powers, democratic ethos and judicial function' (2008) 24 *South African Journal on Human Rights* 341 351.

the requirements of the Constitution'. The Constitutional Court has been at the centre of these debates. During its short life the Court has undergone a series of important changes as the vision of a democratically suited judiciary gradually becomes clearer. The first change occurred in 1997, when the final Constitution extended the power to declare legislation unconstitutional to all High Courts (prior to the amendment the Constitutional Court exercised exclusive and original jurisdiction in all constitutional matters). A further major change occurred in 2001, when the President of the Constitutional Court became the Chief Justice of South Africa (a position held prior to that by the President of the Supreme Court of Appeal). The most recent change occurred in 2013, when the Constitution was amended to extend the jurisdiction of the Court beyond constitutional matters, converting the Constitutional Court into an apex court (a position shared prior to the amendment by the Supreme Court of Appeal in all non-constitutional matters). The conversion of the Constitutional Court into an apex court with general appeal jurisdiction in all legal matters was hotly debated for almost a decade and the Minister of Justice, Jeff Radebe, described the important change with some relief and revived vigour as 'the beginning of a new chapter in our constitutional democracy'.[8]

This does not mean that the constitutionally mandated rationalisation of the apartheid judiciary and the Constitutional Court is finally complete. As a new complication, the Minister of Justice controversially announced on 28 February 2011 that an academic institution would soon be commissioned to undertake a complete review of the role and powers of the Constitutional Court.[9] The decision to place the Court under review officially raises the question whether a Constitutional Court with strong review powers is indeed suited to the requirements of South Africa's social-democratic Constitution.[10] The question has been asked with increasing regularity since President Zuma's rise to political power.[11] Soon after his election as President, President Zuma identified the powers of the Court as one of the key issues to be addressed during his presidency.[12] Other members of the ANC National Executive Committee have echoed this sentiment and have

8 'Comments of Minister Jeff Radebe, on the occasion of the debate on the Superior Courts Bill in the National Assembly on 22 November 2012' available at http://www.justice.gov.za/m_speeches/2012/20121120_min-sup-courts.html (accessed 20 November 2013).

9 E Ferreira 'Radebe announces study of ConCourt rulings' *Mail & Guardian* 28 February 2012 http://mg.co.za/article/2012-02-28-radebe-announces-study-of-concourt-rulings (accessed 30 November 2013).

10 For a brief discussion of the question and alternative answers, ranging from a reformed parliamentary process to a weaker model of judicial review (the so-called Commonwealth model of constitutional review) see DM Davis 'Transformation and the democratic case for judicial review: The South African experience' (2007) 5 *Loyola University Chicago International Law Review* 45 50-57.

11 For a discussion of this growing tension see R Maiman 'Political cultures in conflict: Contextualising constitutional litigation in South Africa' in F Viljoen (ed) *Beyond the law: Multi-disciplinary perspectives on human rights* (2012) 17.

12 Zuma has been quoted as saying: 'If I sit here and I look at the chief justice of the Constitutional Court that is the ultimate authority. I think we need to look at it, because I don't think we should have people who are almost like God in a democracy. Why? Are they

variously described the Court as a 'counter-revolutionary agent',[13] and a 'fateful concession' of the 1990s.[14]

According to Theunis Roux's recent study of the first years of the Constitutional Court, these comments and the tension between the ruling ANC party and the Court simply confirms a latent tension in the post-apartheid transition that the Court had to discount from the start.[15] Roux suggests that constitutional courts with strong review powers, such as the South African Constitutional Court, face difficult jurisprudential and political challenges during transitions to constitutional democracy. In South Africa, a relatively conservative legal culture had (and still has) to come to terms with the ideal of judicial activism. At the same time, a relatively conservative populist political culture had (and still has) to come to terms with the reality of judicial interventions into majoritarian political processes. Many Constitutional Courts in post-authoritarian contexts fail to survive these tensions. The South African Constitutional Court stands out in the regard, because it managed to do so with more than some success. Whether Roux is correct in his explanation of this success or not,[16] the point is that the position of Constitutional Courts in most transitional democracies must be constantly renegotiated. Post-apartheid South Africa is no exception.

Against this background, any attempt to provide a descriptive overview of the South African Constitutional Court must face up to obvious difficulties. As I was completing this overview, the Constitution Seventeenth Amendment Act of 2012 was making its way through Parliament and has now significantly changed the status and jurisdiction of the Constitutional Court. While this overview refers to these changes, I have tried to capture the structure and power of the Court as it existed when most of the specific comparative studies of the BISA project were undertaken (2008-2011). I only refer to the recent amendments in order to bring the picture up to date and, more importantly, to underscore Roux's insight that a fundamental transformation of the powers of the Court, which now seems closer than ever, was a possibility that the Court had to discount in its jurisprudence from the start.

not human beings?'. See P Joubert 'Zuma threat to Constitution' *Mail & Guardian* 18 April 2009 http://mg.co.za/article/2009-04-18-zuma-threat-to-constitution (accessed 30 November 2013).

13 Gwede Mantashe, the Secretary-General of the ANC, is reported to have made this statement about the Court at the time when the judgment of the Court in the corruption investigation against President Zuma was awaited. See P Mkhabela 'Full Interview: ANC's Mantashe lambasts judges' *Sowetan Live* 18 August 2011 http://www.sowetanlive.co.za/news/2011/08/18/full-interview-ancs-mantashe-lambasts-judges (accessed 12 November 2013). The Court ruled against President Zuma.

14 Ngoako Ramatlodi made this comment in an opinion piece about the 'relentless efforts to immigrate the little power left with the executive and the legislature to civil society and the judiciary'. See N Ramatlhodi 'The big read: ANC's fatal concessions' 1 September 2011 http://www.timeslive.co.za/opinion/commentary/2011/09/01/the-big-read-anc-s-fatal-concessions (accessed 30 November 2013).

15 Roux (n 4 above)

16 Roux argues that the Court secured both political and legal legitimacy by strategically or pragmatically compromising on constitutional principle in key judgments.

The overview begins with a brief history of the South African Constitution. It then provides a brief outline of the Bill of Rights and the process of adjudicating a human rights claim under the Constitution. The last part of the overview discusses the structure, jurisdiction, membership and deliberative performance of the Court, given the constitutional and human rights framework.

2 Background to the Constitution as a whole

South Africa's modern constitutional history begins in 1910, when the Union of South Africa was established as a dominion under the British crown after the South African War (1899-1902).[17] The Union Constitution closely followed the Westminster tradition and so celebrated the sovereignty of the Union Parliament (subject only to conformity with any Act of the British Parliament which applied to South Africa). This external constraint on the Union Parliament was removed in 1931 by the Statute of Westminster. In *Ndlwana v Hofmeyer* the Appellate Division of the Supreme Court ruled that the granting of sovereignty to the Union Parliament meant that an Act of Parliament henceforth conclusively proved itself by being produced in court.[18] As such, no court had the power to question the procedural validity of any legislation (let alone the substantive validity). This self-imposed limitation of judicial authority also applied to the entrenched provisions of the Constitution. This decision allowed Parliament to remove black voters from the common voter's roll in 1936, without complying with the special procedure that entrenched this right.

The strong version of parliamentary sovereignty adopted in *Ndlwana* was overturned 15 years later, when the same Appellate Division held in *Harris v Minister of the Interior* that Parliament remained bound procedurally to the entrenched provisions in the South Africa Act of 1909, and thus that the Court retained the power to review the procedural validity of legislation.[19] This softer version of parliamentary sovereignty enabled the Court to temporarily block the removal of coloured voters from the common voters' roll. However, once the Nationalist government had reconfigured the membership of Parliament and was able to comply with the special procedure that entrenched this right, the Court proved itself powerless (in *Collins v Minister of the Interior*) to further prevent this basic human rights violation on substantive (as opposed to procedural) grounds.[20]

17 A good introduction to South Africa's constitutional history can be found in I Currie & Johan de Waal *The new constitutional and administrative law: Volume one: Constitutional Law* (2001) 39-71.

18 1937 AD 229. The court ruled that 'the procedure express or implied in the South Africa Act is so far as Courts of Law are concerned at the mercy of Parliament like everything else' (238). This view also meant that the ordinary meaning of the text so produced provided conclusive proof of the intention of Parliament.

19 1952 (2) SA 428 (A).

20 1957 (1) SA 552 (A).

Over the next 40 years, the undemocratic, whites-only Parliament which took shape during the 1950s abused the constitutional room created by the court's understanding of the doctrine of parliamentary sovereignty to extend and convert the history of colonial dispossession and exploitation into the legislative system of apartheid. During this period, the Republican Constitution of 1961 and the Tricameral Constitution of 1983 explicitly confirmed that no South African court had the power to review the constitutionality of apartheid legislation on substantive grounds.[21]

In sharp contrast to the first three South African Constitutions (1910, 1931, 1961 and 1983) and the British tradition of parliamentary sovereignty, the basis for a different vision of a non-racial and non-sexist South Africa was clearly established in 1955 when an alternative constitutional assembly, known as the Congress of the People, adopted the Freedom Charter as a human rights manifesto at Kliptown, Soweto.[22] While the Charter did not explicitly recognise a power of judicial review, it inspired an armed struggle against the apartheid state and essentially served as a quasi-constitutional ground for the review of apartheid legislation. During the 1960s the struggle led to the banning of a large number of liberation movements (including the ANC, the PAC, Azapo and the SACP) and the imprisonment of the leaders of the struggle (the famous Rivonia trial which led to the imprisonment for life of Nelson Mandela and others was a key moment in the judicial suppression of the liberation struggle).[23]

The 1970s witnessed the liberation of Angola and Mozambique from Portuguese colonialism and the Soweto Riots of 1976. By the 1980s the underground struggle against apartheid had forced the apartheid regime into a destabilising war with neighbouring countries like Angola, and successive states of emergency based on extensive security legislation. In the interpretation of this and other apartheid legislation, the apartheid judiciary again revealed itself generally incapable or unwilling to steer the law into a pro-rights direction. Strong academic opposition to the lack of interpretive judicial activism developed at the time. Academics like John Dugard, Etienne Mureinik, Lourens du Plessis and David Dyzenhaus argued that the courts had the common law presumptions at their disposal as a common law Bill of Rights to limit the force of apartheid legislation. All that was required was a change in the court's interpretive approach to the law (legalistic textualism).[24]

When it became clear towards the end of the 1980s that the militarisation of South African society and politics under President PW Botha

21 Sec 59(2) of the Constitution of the Republic of South Africa Act of 1961 and sec 34(2) read with sec 34(3) of the Constitution of the Republic of South Africa Act 110 of 1983. The only legislation that was subject to procedural review (as introduced in the *Harris* case) was legislation that changed the official languages of the country (Afrikaans and English).

22 NC Steytler (ed) *The Freedom Charter and beyond: Founding principles for a democratic South African legal order* (1991).

23 J Joffe *The State vs Nelson Mandela: The trial that changed South Africa* (2007).

was not likely to produce a stable constitutional alternative to apartheid, he was deposed as leader of the Nationalist Party and replaced with President FW de Klerk.[25] The latter used the occasion of the opening of Parliament on 2 February 1990 to dramatically announce the unbanning of all underground and exiled liberation movements, the unconditional release of imprisoned leaders, such as Nelson Mandela, and the lifting of the state of emergency with a view to a normalisation of society and a negotiated transition to democracy.

Negotiations between the apartheid government and the liberation movements formally began when the Conference for a Democratic South Africa (CODESA) was convened on 20 December 1991. However, CODESA collapsed without producing consensus about the constitution-making process. The governing Nationalist Party (NP) wanted to conclude the bulk of the constitution drafting process before the first democratic elections took place, while the African National Congress (ANC) wanted to defer the bulk of the process to after the first elections. As the country threatened to slide into civil war, a compromise was urgently needed and eventually reached between the two camps. The compromise was embodied in a new Record of Understanding in September 1992 and resulted in the resumption of negotiations in the form of the Multi-Party Negotiation Process (MPNP) in March 1993.

24 See, for example, J Dugard 'The legal process, positivism and civil liberty' (1971) 88 *South African Law Journal* 181. This view was vindicated after the fall of apartheid by the Truth and Reconciliation Commission which found that the judiciary remained attached to a misplaced conception of parliamentary sovereignty and failed to explore the interpretive scope that was available to protect the rights of citizens against the apartheid legislature. In this way, the dominant interpretive methodology of the judiciary inadvertently contributed to the longevity of apartheid. See Truth and Reconciliation Commission of South Africa *Report: Volume 4* (1998) 93.

25 Those actively opposing the state were also undertaking projects with an eye to the transition ahead. In 1988 the ANC produced its *Constitutional Guidelines for a Democratic South Africa*. Precursors to negotiations on a new constitutional dispensation finally came about in 1987 when a number of South Africans with close links to the government met with representatives of the still banned ANC in Dakar, Senegal. This led to a series of follow-on meetings, perhaps the most significant of which, on constitutional issues and fundamental rights, was held in Harare, Zimbabwe in February 1989. At this meeting prominent legal academics allied to the government met with members of the ANC, including the chairperson and members of its Constitutional Committee. 'The communiqué issued after the conference contained the following telling line: "The high point of the conference was the consensus reached on the need for a new constitutional order, a justiciable Bill of Rights and an independent judiciary".'

The compromise involved what Andrew Arato calls the 'post-sovereign model of constitution-making'.[26] The model entails a programmed two-stage transition. During the first stage, parties agree on a number of constitutional principles and draft an interim constitution.[27] The purpose of the interim constitution is to regulate government on a coalition basis for a short interim period, while a democratically elected constitutional assembly drafts a final constitution. The purpose of the constitutional principles is to guide and limit the law-making power of the constitutional assembly during the second stage of the process. In this way legal continuity is ensured throughout the process and no revolutionary hiatus occurs. Law and legal institutions play a key role in this model of transition.[28]

This two-stage model played, and continues to play, a key role in the history of the South African Constitutional Court.[29] The success of the model turns on the power of an impartial institution, like a Constitutional Court, to certify at the end of the second stage of the process that the final constitution complies with the constitutional principles agreed upon during the first stage. The model is a dramatic celebration of judicial review at its most powerful and helps explain why the Constitutional Court was originally designed as a specialist constitutional court with exclusive jurisdiction in constitutional matters only. The model also suggests that the creation of the Court was not necessarily motivated by a deep and broad normative commitment to a rights based model of constitutionalism in which judicial review plays a central and permanent role. Even so, the negotiating parties invested a lot in the legitimacy of the new Court (their project depended on it), so much so that they were willing to defer key issues on which political consensus could not be reached to the Court for determination after the transition. As mentioned above, the most important example is the constitutionality of the death penalty, which was deliberately left undecided and textually indeterminate – a clear indication that the original intention of the drafters was that the Court should play an active role in post-apartheid politics and not adopt an originalist approach to the interpretation of the Bill of Rights.[30]

26 A Arato 'Post-sovereign constitution-making and its pathology in Iraq' (2006-2007) 51 *New York Law School Law Review* 535. Arato claims that South Africa, unlike Hungary and Iraq, perfected the model.

27 The MPNP agreed to thirty-four Constitutional Principles which are contained in the interim Constitution. Most of these refer to orthodox features of democracies (separation of powers and an independent judiciary) and to universally agreed upon rights, such as the principle of equality and prohibition of discrimination. However many have a peculiarly South African character, speaking to South Africa's past. The requirement of democratic representation at all levels of government is modified by a provision requiring the representation of 'traditional leadership'.

28 See further H Botha 'Instituting public freedom or extinguishing constituent power? Reflections on South Africa's constitution-making experiment' (2010) 26 *South African Journal on Human Rights* 66.

29 Roux (n 4 above) 162-165.

30 FI Michelman 'Constitutional authorship, "Solomonic solutions", and the unoriginalist mode of constitutional interpretation' (1998) *Acta Juridica* 208.

Whether all the politicians at the time fully understood and accepted the implications of their pragmatic support of a Constitutional Court with strong review powers or not, agreement was finally reached on the text of the interim Constitution in the early hours of 18 November 1993. The interim Constitution was adopted as one of the final Acts of the last white parliament on 22 December 1993. The first democratic elections took place on 27 April 1994, the same date that the interim Constitution came into operation.

With the entry into force of the interim Constitution, racial segregation was no longer legally mandated. The vote was extended to all South Africans, as was a fairly detailed list of rights enshrined in a justiciable Bill of Rights. The doctrine of parliamentary sovereignty, central to the apartheid order, was replaced by the principle of constitutional supremacy. The Bill of Rights and other constitutional provisions would now be the threshold against which all governmental conduct was measured and the judicial system was empowered to strike down legislation inconsistent with any of the Constitution's provisions. The centralised executive and legislative power employed by the apartheid government was dispersed, divided amongst national, provincial and local spheres of government. The provisions contained in the Bill of Rights were ground-breaking in many respects. For instance, the provisions on the right to equality and prohibition of unfair discrimination, specified a list of extensive (although not exhaustive) grounds, any one of which, if shown to be the basis for differentiation, would constitute *prima facie* unfair discrimination. This list contained the grounds of both 'sex' and 'gender' and 'sexual orientation'.[31] Group and cultural rights were also inscribed in the interim Constitution, putting it at the fore of progressive constitutions the world over. However, tensions at the MPNP as to whether to include a more expansive or more limited chapter of fundamental rights resulted ultimately in the exclusion of socio-economic rights, such as access to housing.[32]

Other important innovations aligned to the Bill of Rights provisions were the institutions created by the Constitution for the promotion and protection of fundamental rights. Apart from the formal judicial system and the new Constitutional Court, the following were also established: the Public Protector, the Human Rights Commission, the Commission on Gender Equality, and the Commission on Restitution of Land Rights.

As for the form of state inscribed in the interim Constitution, it might best be described as unitary with several concessions given to federalism. There was to be democratic and representative institutions of government at the national, provincial and local levels. Chapter 11 made traditional authorities an integral part of provincial and local government. Changes at the provincial level probably represented the most fundamental departure from what had

31 Sec 8(2) of the interim Constitution.
32 L du Plessis & H Corder *Understanding South Africa's transitional Bill of Rights* (1994) 22-35.

gone before. Instead of four provinces and ten ostensible independent 'homelands', South Africa now had nine new provinces, each with an elected provincial legislature and a provincial executive of national unity. These provincial legislatures were entitled to enact their own constitutions. An extensive constitutional scheme whereby provincial powers were entrenched was put in place: Schedule 6 listed matters in respect of which provinces had exclusive jurisdiction. These powers could only be overridden by the national government in exceptional circumstances.

Another novel feature of the interim Constitution was the concluding section titled 'National Unity and Reconciliation'. It prefaced the passage of the Promotion of National Unity and Reconciliation Act which established the Truth and Reconciliation Commission (TRC). As was later held in *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa*,[33] this section provided a constitutional imprimatur to the process of extending conditional amnesty to political offenders provided they gave full disclosure of the crimes they had committed.

The task of the first democratically elected parliament (in a series of special sittings as the Constitutional Assembly) was to draft a final constitution within two years. This Constitution had to comply with the 34 constitutional principles which grounded the transitional process. However, in many respects the basic features of the interim Constitution mentioned above were simply retained and refined. The strong review powers of the Constitutional Court, which were needed during the transition, were retained for the future. The devolution of power to provinces with exclusive legislative competences was also retained. On the other hand the transformation of the judiciary was once more deferred to the future (see above). The final Constitution was democratically adopted by the Constitutional Assembly on 8 May 1996 and referred to the new Constitutional Court for certification. Living up to the drama of the democratic transition, the Court declared the final Constitution unconstitutional on a number of points.[34] The Constitution was amended by the Constitutional Assembly according to the directions of the Court and resubmitted to the Court for certification. The amended text was finally approved by the Court on 6 December 1996, assented to on 10 December 1996 by former President Nelson Mandela, and came into force on 4 February 1997.

As was the case with the interim Constitution, the core of the final Constitution is a justiciable Bill of Rights, contained in Chapter 2 of the

33 1996 (4) SA 672 (CC).

34 *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC). For example, the Court held that the Constitution failed to comply with the Constitutional Principles by not providing for the right of individual employers to engage in collective bargaining; by not sufficiently entrenching the provisions of the Bill of Rights against amendment; and by not adequately safeguarding the independence of the Public Protector.

Constitution, and a Constitutional Court with extensive remedial powers to enforce compliance with and promotion of this Bill of Rights.

3 The Bill of Rights

The apartheid years were marked by the egregious violations of individuals' civil and political rights. Torture, extra-judicial and judicial executions, detention without trial, restraints on freedom of expression and assembly were all fairly commonplace. Apartheid also systematically impoverished the vast majority of the population on an everyday basis. That legacy of poverty continues today and poses the greatest challenge to South Africa's still relatively new democracy. The Bill of Rights was designed to guide the transformation of this unjust society and thus assumes from the start that law and human rights litigation can serve as a powerful tool of fundamental societal change.

According to the prevailing interpretation, the Bill of Rights therefore serves as a 'post-liberal'[35] manifesto for the transformation of post-apartheid society into a multi-cultural and egalitarian social democracy.[36] In the words of justice emeritus Albie Sachs, the Bill of Rights confirms that '[a] democratic, universalistic, caring and aspirationally, egalitarian society embraces everyone and accepts people for who they are'.[37]

According to Dennis Davis,[38] at least seven features of the Bill of Rights supports this interpretation of the Bill as a blueprint for transformation. The equality clause (section 9) prescribes a concept of substantive equality, and the Constitution places a positive obligation on the state to protect and promote all the rights in the Bill of Rights (section 7). The Bill of Rights applies horizontally between private subjects, which means that all power, whether private or public, is subject to scrutiny and justification (section 8). Section 23 protects a range of labour rights which extend to protect even undocumented immigrants or illegal foreigners.[39] A range of socio-economic rights, including the right to housing and health, ensure that socio-economic programmes prioritise the poorest of the poor. Cultural, religious and language-based identities are celebrated and constitutionally protected. The founding values of the Bill of Rights explicitly include equality, freedom, dignity, democracy and social justice. Lastly, section 36 of the Bill contains a general limitation clause, which ensures that constitutional rights do not automatically trump the social policies and legislative initiatives of the democratically elected government.

35 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 remains the classic statement of this interpretation of the Constitution.
36 Davis (n 9 above).
37 *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) para 60.
38 Davis (n 9 above) 45-46.
39 *Discovery Health Limited v CCMA* 2008 (7) BLLR 633 (LC).

According to this social-democratic interpretation of the Bill of Rights, it is imperative to avoid overtly moralistic or definitional interpretations of human rights (as pre-political entitlements). The proper function of rights is to deepen and further the deliberative quality of democratic political processes (rather than to block those processes). As Etienne Mureinik famously understood,[40] the aim of the Bill of Rights is to establish a political culture of justification (and thus of dialogical relationships)[41] after the era of authoritarian rule. This dialogue takes place between citizens but finally also between institutions and the branches of government.[42]

In line with this general understanding, rights based argumentation under the South African Constitution proceeds as follows. The argument divides into three distinct phases. In the first phase, the onus is on the victim of an alleged rights violation to establish that the violation has indeed taken place. The Court must assess this claim by interpreting the content of the right in question and the nature of the law or conduct that allegedly violates the right. In doing so, section 39(2) of the Bill of Rights requires of the Court to assess the rights claim against the most rights friendly interpretation of the law or conduct possible. In many instances, it is possible to defuse the dispute by simply reinterpreting the law or conduct in question to conform to the Constitution (a process also called reading-down). Where this interpretive technique is not possible, the Court will conclude phase one of the argument with a finding that the right in question has either been violated or not.

Where a rights violation has been established, the onus shifts into phase two of the reasoning process to the person responsible for the violation. This person has the opportunity under the limitation clause (section 36) to establish that the violation is justifiable in an open and democratic society based on human dignity, equality and freedom.[43] To determine the constitutional merits of such a claim, the Court must weigh up the nature and importance of the right and the extent of its violation, on the one hand, and the purpose or policy objective in question, on the other. The Court must establish whether the objective justifies the violation. The Court might reject the claim that the violation is justified for one of three reasons: The policy objective (the end) cannot be democratically justified; the rights violation

40 E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

41 As Nedelsky remarked with reference to the Canadian Charter of Rights, if rights are to become central to our political discourse, it is necessary to reconceive of rights, not in the liberal tradition as trumps, but as the medium or fabric of equal relationships that foster autonomy (J Nedelsky 'Reconceiving rights as relationships' (1993-1994) 1 *Review of Constitutional Studies* 1).

42 This model was originally suggested in the Canadian context by PW Hogg & AA Bushell 'The Charter dialogue between courts and legislatures: (Or perhaps the Charter of Rights isn't such a bad thing after all)' (1997) 35 *Osgoode Hall Law Review* 75. According to Hogg, a key to the constitutional facilitation of democratic dialogue through rights litigation is the limitation clause in the Canadian Charter (sec 33 of the Canadian Charter). This same might be said about the general limitations clause contained in sec 36 of the South African Constitution.

43 Sec 36 of the Constitution.

bears no rational connection to the policy objective (the means does not promote the end); or the rights violation is disproportionate to the objective (the end does not justify the means).

Where the Court finds that a rights violation cannot be justified, it must conclude phase two of the reasoning process with a finding that the law or conduct in question is unconstitutional and invalid.[44] The declaration opens phase three of the rights-based deliberative process. In this phase, the Court must decide on the best way to remedy the rights violation and prevent its recurrence in the future. The Court has a wide discretion in this regard. It 'may grant appropriate relief' and 'may make any order that is just and equitable' in the circumstances.[45] These open-ended constitutional provisions provide the Court with enough opportunity to enter into a second constructive dialogue with the executive or legislature (as the case may be). The standard way of doing so is to suspend the declaration of invalidity for between six months and two years, in order to provide the political branches sufficient time to remedy the constitutional defect at their own political initiative (see further below).

4 The structure and composition of the Court

4.1 The structure of the Court

4.1.1 The number of judges

The Constitutional Court consists of 11 members, including the Chief Justice of South Africa, the Deputy Chief Justice of South Africa and nine other judges.[46]

The Chief Justice of South Africa was originally not a member of the Constitutional Court, but a member of the Supreme Court of Appeal (this was the position inherited from apartheid).[47] The merger of the President of the Constitutional Court and Chief Justice occurred in 2001, as a step in the ongoing rationalisation of the judiciary and a move towards the creation of a single apex court.[48] The position of the Chief Justice was strengthened in September 2010 with the creation of the Office of the Chief Justice as a state Department next to the Department of Justice.[49] The Chief Justice today not only heads the Constitutional Court, but the judiciary as a whole, and

44 Sec 172(1)(a) of the Constitution.
45 Sec 172(1)(b) of the Constitution, read with sec 38 of the Constitution.
46 Sec 167(1) of the Constitution, read with sec 4(1)(a) of the Superior Courts Act.
47 Sec 168(1) of the Constitution (before its amendment in 2001 by the Constitution Sixth Amendment Act).
48 The Constitution was amended by the Constitution Sixth Amendment Act in 2001, in order to effect this change.
49 Proclamation No 44, 2010 published in *Government Gazette* No 33500, dated 3 September 2010.

exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.[50] The new judge-headed Department was created to provide greater institutional independence to the judiciary, and to render support to the Chief Justice in executing administrative and judicial powers and duties as head of the judiciary.

4.1.2 Terms of office

The judges of the Constitutional Court are appointed for a single, non-renewable term of 12 years (or until they attain the age of 70, whichever occurs first).[51]

The fixed and limited terms of office of Constitutional Court judges is an exception in South Africa, where judges are otherwise appointed to serve for an unlimited number of years until the retirement age of 70 years. Given its exceptional status, there has been some debate about the most appropriate term of office for Constitutional Court judges. Under the interim Constitution, judges were appointed for seven years only. The final Constitution extended this to a non-renewable term of 12 years.[52] However, in 2001 a constitutional amendment was proposed which would originally have resulted in the permanent appointment of Constitutional Court judges (similar to the appointment of other judges). The proposed amendment was not adopted. In its place the limited term of 12 years in office was retained, but made subject to the qualification that 'an Act of Parliament may extend the term of office of a Constitutional Court judge'.[53] The Judge's Remuneration and Conditions of Employment Act 47 of 2001 was passed soon thereafter. The Act extended the term of office of Constitutional Court judges to a maximum period of 15 years.[54]

The limited term of office on the Court has at least three advantages: It ensures a dynamic, responsive and vibrant constitutional jurisprudence; it enables greater gender and racial participation and representation on the Court; and it allows judges to channel their experience on the court into other areas of service after the completion of their term as Constitutional Court judges (see below). At the same time, the restriction means that experienced but relatively young judges are sometimes forced to leave the Court at the prime of their abilities.

The strict limitations on the term of a Constitutional Court judge recently threatened a constitutional crisis. In terms of the 12 year rule, Chief Justice

50 Sec 165(6) of the Constitution.
51 Sec 176(1) (as substituted by sec 15 of the Constitution Sixth Amendment Act of 2001).
52 Sec 176(1) of the Constitution.
53 Sec 176(1) of the Constitution (as amended by the Constitution 6th Amendment Act, 2001).
54 Sec 4(1).

Ngcobo, who joined the Court in 1999 and became Chief Justice in 2009 at the age of 56, had to retire two years later in 2011 at the age of 58. To counter the effect of the rule, President Zuma invoked section 176(1) of the Constitution and invited justice Ngcobo to continue to serve as Chief Justice.[55] The Chief Justice accepted the Presidential invitation in the face of criticism from a number of civil society organisations. The Constitutional Court eventually ruled that the independence of the judiciary was compromised by the actions of President Zuma, even if he acted in terms of a legislative provision that seemingly authorised him to extend the term of a Chief Justice.[56] As a result, Chief Justice Ngcobo withdrew his acceptance letter and Chief Justice Mogoeng was appointed in his place.

4.1.3 Acting judges

The Constitutional Court routinely makes use of acting judges. At least 16 judges have thus far served in an acting capacity of between two months and a year, without subsequent permanent appointment to the Court. The major cause for the appointment of acting judges is illness and the long leave roster of permanent judges. As far as the latter is concerned, the Minister of Justice may, on the recommendation of the Chief Justice, grant leave to a Constitutional Court judge for a period of three and a half months for every period of four years actual service completed by the judge.[57] This entitles each permanent judge to three periods of long leave during her or his term of office (which translates to the appointment of three acting justices for each permanent justice).[58]

The extensive use of acting judges opens the door for executive interference with the Court. The Court itself is highly sensitive to this possibility and recently warned that '[t]he potential danger to judicial

55 The section provides as follows: 'A Constitutional Court judge holds of office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge'. The Act of Parliament relied on by President Zuma was the Judges' Remuneration and Conditions of Employment Act. Sec 8(1) of the Act provided as follows: 'A Chief Justice who becomes eligible for discharge from active service, may, at the request of the President, continue to perform active service as Chief Justice of South Africa for a period determined by the President'.

56 *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC).

57 Regulation 3(1) of the Judges' Remuneration and Conditions of Employment Act, 2001 Regulations.

58 The appointment of acting judges to the Court has been the subject of some debate. Earlier versions of the Superior Courts Bill and the Constitution Fourteenth Amendment Bill included an amendment to the procedure for the appointment of acting judges to the Constitutional Court. According to the proposed amendment, the President would have been enabled to appoint an acting judge to the Court on the recommendation of the Minister of Justice after the latter *has consulted with* the Chief Justice (no longer *with the concurrence of* the Chief Justice). This removed one of the few formal safeguards against the executive abuse of acting appointments. The proposed amendment was widely criticised and fortunately abandoned. See C Albertyn 'Judicial independence and the Constitution Fourteenth Amendment Bill: Current Developments' (2006) 22 *South African Journal of Human Rights* 126 130.

independence and the separation of powers is ever present in the appointment of individual Judges to hear a specific case'.[59] This is particularly so on a Court that sits *en banc*, where minority and majority splits are increasingly common, and where acting judges are appointed for fixed terms, at a time when the court roll for the term is likely to be known. Given these dangers, the appointment of acting judges to the Court is regulated by the Constitution itself.[60] The appointment of acting judges is subject to far more demanding conditions than the appointment of acting judges to other courts. The appointment must, firstly be made by the President (as opposed to the Minister of Justice). The appointment must, secondly be made with the concurrence of the Chief Justice (as opposed to merely after consultation with the senior judge of other courts). The appointment may, lastly, only be made in cases where there is a vacancy on the Court or when a judge is 'absent'.

The Constitutional Court recently held that the appointment of between six and eight acting Constitutional Court judges to hear an appeal would be unconstitutional.[61] The issue arose because eight of the 11 judges of the Court were directly involved in a complaint against a judge of a High Court (which formed the subject of the application for leave to appeal) and would thus have had to recuse themselves (see further below). In order to safeguard the independence of the judiciary, the Court interpreted the constitutional power of the President to appoint acting judges restrictively. It held that acting judges may not be appointed for individual matters, and that the 'absence' requirement means 'physical absence from work' (which excludes the recusal of a judge who is otherwise available, or the appointment of acting judges to relieve the world-load of the available judges).

4.1.4 Seat and sittings of the Court

The permanent seat of the Court is Johannesburg.[62] The Court sits in newly designed Court Building on Constitutional Hill.[63] The Constitutional Hill precinct was developed as part of the urban regeneration of a notorious prison complex of the apartheid era and houses a number of human rights institutions. The Court building itself serves both as a memorial to the victims of the long and bitter struggle against apartheid, and a monument to the victory of constitutional democracy.[64] In its own right the building is a

59 *Hlophe v Premier of the Western Cape Province, Hlophe v Freedom under Law* 2012 (6) SA 13 (CC) para 41.
60 Sec 175 of the Constitution.
61 *Hlope* para 42.
62 Sec 4(1)(b) Superior Courts Act, 2012. Whenever it appears to the Chief Justice that it is expedient or in the interests of justice to hold its sitting for the hearing of any matter at a place elsewhere than at the seat of the Court, it may hold such sitting at that place.
63 B Law-Viljoen (ed) *Light on a Hill: Building the Constitutional Court of South Africa* (2006).
64 L du Plessis 'The South African Constitution as memory and promise' (2000) 11 *Stellenbosch Law Review* 385; W le Roux 'War memorials, the architecture of the

powerful architectural expression of the founding values of the post-apartheid constitutional order and the ideal of street democracy.[65]

The Court is in session during four terms in each year: 5 February to 31 March; 1 May to 31 May; 15 August to 30 September; and 1 November to 30 November. However, a case may be heard out of term if the Chief Justice so directs.

All matters before the Constitutional Court must be heard by at least eight of the eleven judges.[66] The common practice is for all 11 judges to hear every case. The Court sits as a court of appeal (with exceptional instances of direct access) and therefore does not hear oral evidence. Court sittings take place in public in a court chamber purposefully designed to accentuate the openness and accountability of the Court. The official logo of the Court and the architectural imagery of the court building depicts the Court metaphorically as a deliberative gathering of the constitutional community under a tree.[67] To facilitate the quality of the deliberation, written argument must be filed in all cases. The Chief Justice issues directions to the parties and indicates whether oral argument will be heard. When oral argument is allowed, it is subject to such time limits as the Chief Justice may impose. Arguments may be presented to the Court in any of the nine official languages, but it is still standard to address the Court in English. In the name of accessibility and openness, the Court provides interpreters where necessary.

The sittings of the Court are open to the print and visual media. In *South African Broadcasting Corporation v National Director of Public Prosecutions* the Court stressed that exposure of judicial proceedings to the public gaze is particularly important in a country where, historically, all the major instruments of public power in general functioned in a way that was 'oppressive, distant, unresponsive and frequently mysterious'.[68] The Court explained its accommodating policy towards media participation in its proceedings as follows:[69]

> Courts should in principle welcome public exposure of their work in the court room, subject of course to their obligation to ensure that proceedings are fair.

Constitutional Court building and counter-monumental constitutionalism' in W le Roux & K van Marle (eds) *Law, memory and the legacy of apartheid: Ten years after AZAPO v President of South Africa* (2007) PULP 65. A virtual tour through the building is available on the website of the Court at www.constitutionalcourt.org.za (accessed 17 December 2013).

65 W le Roux 'From acropolis to metropolis: The Constitutional Court building and South African street democracy' (2001) 16 *SA Publiekreg/Public Law* 139.

66 Sec 167(2) Constitution, 1996 read with sec 12 of the Superior Courts Act, 2012.

67 The roof of the Court Chamber and Foyer contains slits which let in natural sunlight, the chandeliers are designed in the shape of leaves and the carpet has the mottled effect as the ground under a tree on a bright sunlit day. The logo of the Court is the people gathering under a tree. These African images and metaphors capture the ideal of the Court as a deliberative and democratic space and place.

68 2007 (1) SA 523 (CC) para 130.

69 *South African Broadcast Corporation* para 32.

> The foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the judiciary as much as to other branches of government. These values underpin both the right to a fair trial and the right to a public hearing (ie the principle of open court rooms). The public is entitled to know exactly how the judiciary works and to be reassured that it always functions within the terms of the law and according to time-honoured standards of independence, integrity, impartiality and fairness.

As will be seen below, the desire of the Court to conduct its sittings and work in an open and deliberative manner also impacts on its approach to issues like standing before the court, the extensive use of friends of the courts (*amici curiae*), the deliberative interactions between judges in preparing a judgment after a court sitting, a culture of dissenting judgments on the Court and, most importantly, the appointment process of the judges to the Court. These are all attempts to ensure the democratisation of the Constitutional Court and its jurisprudence as part of the democratic transformation of the judiciary and South African society in general. Each of these aspects is discussed in more detail below, staring with the last mentioned issue first.

4.2 Appointment and removal of judges

During apartheid, the appointment of judges was the prerogative of the President, acting on the advice of the Minister of Justice behind closed doors. In an attempt to provide the appointment process, and the judiciary as a whole, greater openness and democratic accountability, a Judicial Service Commission was established in 1994. The Commission has the primary task of assisting the President in appointing and removing judges, but may advice national government on any matter relating to the judiciary or the administration of justice.[70]

The Commission consists of 23 members and includes representatives of the judiciary, the executive, the legislature and the broader legal profession.[71] The Chief Justice, who presides at meetings of the Commission, the President of the Supreme Court of Appeal and one Judge President of the High Court (designated by the other Judges President) represent the judiciary. The Minister of Justice and four members designated by the President represent the executive. Six members of the National Assembly (at least three of whom must be members of the opposition parties) and four members of the National Council of Provinces represent Parliament on the Commission. Finally, two practising advocates (nominated by the advocates' profession), two practising attorneys (nominated by the attorneys' profession), and one legal academic (nominated by the law teachers at South African Universities) represent the broader legal profession.

70 Sec 178(5) of the Constitution. The Commission function in terms of the Judicial Service Commission Act 9 of 1994.
71 Sec 178(1) of the Constitution.

The Commission initially performed its work without much ado, until it was suddenly thrusted into public controversy in 2008, when it received a complaint of judicial misconduct from the Judge President of the Western Cape, John Hlophe, directed against all eleven Constitutional Court judges.[72] The complaint was a direct response to an earlier complaint submitted to the Commission by the members of the Constitutional Court against Hlophe JP.[73] The Commission dismissed both complaints, but remained in the spotlight when it interviewed candidates, including Hlophe JP, for four vacant Constitutional Court positions in 2009 (the so-called 'Kliptown interviews'). Hlophe JP was not shortlisted, but the incident resulted in far greater scrutiny of the Commission and its work. This attention soon resulted in a successful legal challenge of the earlier decision of the Commission to dismiss the complaints by Hlophe JP and the members of the Constitutional Court.[74] In March 2011, the SCA ordered the Commission to re-open the matter, but the Commission postponed its re-opened hearing indefinitely in October 2013, after the Constitutional Court judges in question had objected to the legitimacy of the hearing.[75]

The ongoing Hlophe saga, and the litigation surrounding it, have severely tarnished the public image of the Commission. Criticism of the Commission has intensified under the chairmanship of Chief Justice Mogoeng, largely because of public comments made by the Chief Justice understood to suggest that merit is less important than demographics in appointment decisions.[76] The absence of a set of appointment criteria and the secret voting procedures of the Commission attracted criticism from civil society organisations, opposition parties, and even a former Constitutional Court judge.[77] The controversy came to a head on 4 July 2013, when the Helen Suzman Foundation lodged an application in the High Court, challenging the manner in which the Commission has recently conducted the appointment process of judges, after Jeremy Gauntlett, a prominent white senior advocate, had repeatedly been overlooked for appointment to the Constitutional and other

72 The factual background is set out in *Hlophe* (n 59 above).

73 The judges complained that Hlophe JP had tried to inappropriately influence the outcome of the decision of the Court in the matter of *Zuma v National Director of Public Prosecutions; Thint (Pty) Ltd v National Director of Public Prosecutions* 2009 (1) SA 1 (CC). For a critical reflection on the incident see S Choudhry '"He had a mandate": The South African Constitutional Court and the African National Congress in a dominant party democracy' (2009) 2 *Constitutional Court Review* 1.

74 *Acting Chairperson: Judicial Service Commission v Premier of the Western Cape Province* 2011 (3) SA 538 (SCA); *Freedom under Law v Acting Chairperson, Judicial Service Commission* 2011 (3) SA 549 (SCA).

75 A Areff 'Hlophe tribunal postponed indefinitely' *Mail & Guardian* 8 October 2013 http://mg.co.za/article/2013-10-08-hlophe-tribunal-postponed-indefinitely/ (accessed 30 November 2013).

76 C du Plessis 'White men can't judge' *City Press* 7 April 2013 http://www.citypress.co.za/news/white-men-cant-judge/ (accessed 20 November 2013).

77 C du Plessis 'Yacoob laments subjective judicial appointments' *City Press* 7 March 2013 http://www.citypress.co.za/politics/yacoob-laments-subjective-judicial-appointments/ (accessed 20 November 2013).

courts.[78] Whatever the outcome of the litigation, the controversies surrounding the Commission and the politicisation of the appointment process have negatively affected potential applicants for judicial appointment and on at least two occasions the Commission could not shortlist any candidates for appointment to an advertised Constitutional Court position because of a lack of applicants for the position.[79]

4.2.1 The appointment process

The President appoints all Constitutional Court judges. When appointing the Chief Justice and Deputy Chief Justice, the President exercises an executive discretion but must consult the Judicial Service Commission and the leaders of all parties represented in the National Assembly.[80] The President has a far narrower discretion when it comes to the appointment of the other nine judges of the Constitutional Court. As mentioned above, the President must select the judges for appointment from a list of suitable candidates presented to it by the Commission and *after consulting* with the Chief Justice and the leaders of all parties represented in the National Assembly. The list must contain three more names than the number of appointments to be made (for a single appointment, the President will thus be given a choice of four candidates). The President may refuse to appoint some of the short-listed candidates, but must then advice the Commission, with reasons, why some of the nominees are acceptable. The Commission must then supplement the list with further nominees and the President *must* thereafter make the appointment from the supplemented list.[81]

The procedure for the preparation of the list of nominees by the JSC is as follows:[82] the Chief Justice informs the Commission when a vacancy occurs or will occur in the Constitutional Court. The Commission announces the vacancy publicly and calls for nominations by a specified closing date. Each nomination must include a letter of nomination, a detailed *curriculum vitae* of the candidate, and a questionnaire prepared by the Commission and completed by the candidate. A screening committee thereafter draws up a shortlist of candidates and publish the shortlist. As part of the process of preparing for interviews, the Commission invites comment on any of the

78 E Mabuza 'Helen Suzman Foundation heads to court to declare JSC appointments irrational' *Business Day Live* 7 June 2013http://www.bdlive.co.za/national/law/2013/06/07/helen-suzman-foundation-heads-to-court-to-declare-jsc-appointments-irrational (accessed 20 November 2013).

79 This happened for the first time in 2008. After a second round of interviews, the JSC announced that it was still not able to submit four suitable candidates to the President, and thus had no choice but to advertise the position of one Constitutional Court judge for a third time. The problem of finding appropriate candidates for appointment to the Constitutional Court repeated itself in 2012. In the latter instance, the JSC had to extend the closing date for nominations twice, because of an apparent lack of interest. Eventually just four candidates were interviewed and shortlisted.

80 Sec 174(3) of the Constitution.

81 Sec 174(4) of the Constitution.

82 Procedure in terms of R423 (GG 24596 of 27 March 2003) issued in terms of sec 5 of the Judicial Service Act.

shortlisted candidates. The bar and attorneys' profession give their assessment of nominees, as do other legal organisations from civil society, such as the Black Lawyers' Association.

The Commission interviews all short-listed candidates based on these submissions. The interviews are open to the public and the media and highly publicised.[83] After completion of the interviews, the Commission deliberates in private and selects the candidates to be shortlisted for appointment by a majority vote. The Commission supplies the names of the recommended candidates and the reasons for their recommendation to the President, announces the list of names publically, and waits for the President to select his preferred candidate(s).

4.2.2 The removal of judges

As noted above, every Constitutional Court judge is appointed for a fixed term, but is subject to the disciplinary authority of the Judicial Service Commission, and my be removed from office before the end of the term of appointment. Complaints of misconduct against a Constitutional Court judge can be laid before the Commission (as happened in the Hlophe saga). Complaints are lodged and dealt with by a Judicial Conduct sub-Committee which is composed of the Chief Justice as Chairperson of the Committee, the Deputy Chief Justice and four other Judges.[84] The sub-Committee must consider every claim and decide whether it warrants further investigation or not. If it does, then the Commission can investigate the complaint and decide on an appropriate sanction. Where the Commission finds that the judge suffers from an incapacity, is grossly incompetent, or is guilty of gross misconduct it can recommend to Parliament that the judge in question be removed from the Court.[85] If the National Assembly thereafter adopts a resolution by two thirds of its members to remove the judge, the President must terminate the appointment of the judge.

A number of complaints of judicial misconduct have been brought against the members of the Constitutional Court. In addition to the Hlophe complaint, a formal complaint against Chief Justice Mogoeng was lodged with the Commission in August 2013.[86] A disciplinary sub-committee of the

83 The official website of the Constitutional Court contains extensive extracts from the interviews before the JSC of many of the present judges on the Court. The interview with Moseneke DJP, for example, is contained at http://www.constitutionalcourt.org.za/site/judges/transcripts/dikgangmoseneke1.html (accessed 17 November 2013).

84 Chapter 2 of the Judicial Service Act.

85 Sec 177 of the Constitution.

86 The misconduct in question related to a public speech in which the Chief Justice defended the appointment criteria used by the JSC, well knowing that the matter was at the time contested in the Superior Courts. Senior academic scholars, such as Georg Devenish, described the complaint as a test for both the judiciary and democracy (G Devenish 'Letter: Impeachment call tests judiciary' *Business Day Live* 22 August 2013 http://www.bdlive.co.za/opinion/letters/2013/08/22/letter-impeachment-call-tests-judiciary (accessed 20 November 2013).

Commission announced in November 2013, with reasons, that it considered but decided to dismiss the complaint without further investigation.[87] The seriousness and decisiveness with which the Commission dealt with the complaint confirms the importance of the complaints mechanism as a means to secure the accountability of the judiciary, and, equally importantly, shows that valuable lessons have been learned from the mistakes made during the Hlophe sage.

4.3 Membership to and composition of the Court

4.3.1 Membership criteria

Membership to the Court is in principle open to any appropriately qualified woman or man who is a fit and proper person for the position of Constitutional Court judge. The requirements for appointment are the same as for other judges in South Africa, except that only South African citizens can become members of the Constitutional Court.[88]

4.3.2 Representivity of the Court

South Africa is a multi-cultural society and the aspiration is that the Court should demographically represent men and women from all segments of society. The Constitution prescribes that '[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed'.[89] As was mentioned above, the meaning of this injunction and the manner in which it is applied by the Judicial Service Commission remains hotly debated. However, an even greater challenge is to ensure the presence of a plurality or diversity of world-views on the Court.[90] As numerous commentators have pointed out, the use of demographics is at best a very crude mechanism to achieve diversity on the bench.[91]

87 'Advocate Paul Hoffman pondering Mogoeng complaint dismissal' *Times Live* 11 September 2013 http://www.timeslive.co.za/politics/2013/09/11/advocate-hoffman-pondering-mogoeng-complaint-dismissal (accessed 20 November 2013).

88 Sec 174(1) of the Constitution.

89 Sec 174(2) of the Constitution.

90 In *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC) para 42 the Court described diversity of the bench as a valuable asset to a Court and rejected attempts to undermine the background experiences of judges to inform the adjudication process with an appeal to a misplaced ideal of absolute impartiality (impersonality).

91 Recall the essentialist debate during the 1980s whether women necessarily embody a 'different voice' in moral and legal decision-making. The same question applies to other demographic features, like race. See C Menkel-Meadow 'Portia in a different voice: Speculations on a women's lawyering process' (1985) 1 *Berkeley Women's Law Journal* 39. AJ van der Walt 'Closure and openness on difference and democracy – A response to Justice Froneman' (2001) 12 *Stellenbosch Law Review* 28 argues that the change in the racial and gender composition of the Constitutional Court has not translated into a change in the reasoning style or interpretive jurisprudence of the Court.

The Judicial Service Commission has not been overtly successful in securing the degree of demographic representivity on the Court that the Constitution requires (taking into account that it does not have the final say in who gets appointment). The Court has thus far had 24 permanent members. Of these 12 had been black, 10 white and 2 Indian; 4 had been women and 20 men. At the end of 2013 there were two women serving on the Court (compared to two in 1995);[92] three white judges (down from seven in 1995), and six black men (up from four in 1995). After the retirement of Justice Yacoob in 2013, the Indian community is not currently represented on the Court (down from one in 1995).

4.3.3 Questions about the impartiality and ability of Constitutional Court judges

In spite of the recent misgivings about the appointment process of judges, the legal fraternity and community at large generally respect and celebrate the impartiality and ability of the appointed members of the Constitutional Court.[93] One much publicised exception occurred in *President of the Republic of South Africa v South African Rugby Football Union*. In this case, the applicant (himself a politician) suggested that he had a reasonable apprehension that the Court might be biased in his dispute with former President Mandela, because the President had appointed all the judges and at least five of the judges might have had political affiliations or friendships with President Mandela and the ANC. The Court rejected the recusal application, reminding the applicant that in a multi-cultural society the members of the Court will inevitably share different cultural and political backgrounds to the parties before them. This fact alone does not justify the applicant's scepticism towards the ability of the Court to dispense justice.[94]

The conversion of the Court in 2013 into an apex court with general jurisdiction has led some commentators, and at least one judge, to raise new questions about the ability of the members of the Court to perform their new task. The Constitution requires that at all times at least four members of the Constitutional Court must have had previous judicial experience.[95] This is a

92 This fact has been blamed on President Zuma by a former member of the Court, Justice Zac Yacoob. See 'Women in ConCourt: It's the president's doing, says Zak Yacoob' *City Press* 9 October 2013 http://www.citypress.co.za/politics/women-constitutional-court-presidents-says-zak-yacoob/ (accessed 20 November 2013).

93 The only serious public outcry about any member of the Court erupted in 2011 around the suitability of Justice Mogoeng for appointment to the position of Chief Justice. The controversy stemmed from what appeared to be homophobic sentiments in some of the judgments delivered by Mogoeng CJ. The issue was raised in public during the interview before the Judicial Service Commission and the justice publicly dispelled any fears in this regard.

94 Para 43: 'In a multicultural, multilingual and multiracial country such as South Africa, it cannot reasonably be expected that judicial officers should share all the views and even the prejudices of those persons who appear before them'. A reasonable apprehension of bias requires more than merely pointing to the cultural and political differences between the litigants and the Court.

95 Sec 75(4) of the Constitution.

relatively low threshold of collective experience. Added to the fact that the maximum term on the court is 12 years, some commentators have suggested that the composition of the Court renders it incapable of serving as an apex court with the highest legal authority in all matters. A justice of the Supreme Court of Appeal, Carole Lewis, argues that if the Constitutional Court is to assume the role of an apex Court, which it has now done, then the method of and requirements for appointment will eventually also have to be changed in order to secure non-constitutional expertise on the Court.[96]

4.3.4 The role of retired Constitutional Court judges

The Judicial Service Act regulates the formal employment of retired Constitutional Court judges.[97] A retired judge may only hold or perform any other office of profit with the written consent of the Minister of Justice. As indicated above, because of the limited term of office on the Court, many judges leave the Court at a relatively early stage of their careers. A number of retired judges have remained active in the field of human rights monitoring and education. Some, like Laurie Ackerman at UNISA and Albie Sachs at UWC, have been active in the teaching of post-graduate courses in constitutional law. Other former judges have assumed leadership positions on Commissions or Councils. For example, Yvonne Mokgoro serves as the Chairperson of the South African Law Reform Commission and Kate O'Regan serves as the Chairperson of the United Nations' Internal Justice Council.

5 The location of the Court within the political system

The place of the Court within the South African political system is understandably controversial. The place occupied by the Court is largely the combined effect of constitutional design and judicial policy. The Court was formally designed as a specialised constitutional court with strong review powers. In the exercise of those powers, the Court constantly has to make interpretive policy decisions about the appropriate degree of judicial activism required in the circumstances.[98] The strong review powers of the Court means that there cannot be clear lines of separation between the judiciary, the executive and the legislature. In addition to its traditional judicial role, the Court also has the power to repeal and amend legislation (a legislative function), and the power to guide and monitor policy development and implementation (an executive function).

Iain Currie implored the Court in the early stages of its development to adopt a policy of 'judicious avoidance' towards its strong review powers.[99]

96 C Lewis 'Reaching the pinnacle: Principles, policies and people for a single apex court in South Africa' (2005) 21 *South African Journal of Human Rights* 509.
97 Sec 11(2).
98 Roux (n 4 above).
99 I Currie 'Judicious avoidance' (1999) 15 *South African Journal on Human Rights* 138.

This means a policy to defer as much as possible for final decision to the executive and legislative branches, and where the Court has to make a final decision itself, to justify the decision on formal grounds or substantive reasons that are shallow and narrow. Judicious avoidance has largely been the working philosophy of the Court.

Looking back at the first 15 years of the Court, critics of the Court suggest that this policy towards the use of its strong review powers has had negative effects on the development of a transformative human rights culture. Stu Woolman complains that the policy resulted in the vanishing of the Bill of Rights as a substantive guideline for political action.[100] Danie Brand complains that deference to other decision-makers within the political system has undermined the transformative impact of socio-economic rights litigation in particular, and of human rights law in general.[101]

In the rest of this section I further introduce this debate about the political role of the Court by first discussing the formal constitutional powers of the Court (the institutional design) and then returning in section 7 to the manner in which the Court has exercised these powers.

5.1 Jurisdiction of the Court

Before it was converted in 2013 into the highest court of appeal in all matters, the Constitutional Court served as a specialised constitutional court. This was partly done to free the development of a post-apartheid human rights discourse from the dominant apartheid jurisprudence (recall that the demand for legal continuity meant that the apartheid judiciary was retained). Zihad Motala argued at the time that the judiciary is a comparatively conservative force in society and that the apartheid judiciary should thus not be given the power of judicial review (taking the experience of the New Deal in the USA into account, where the Supreme Court blocked progressive labour law legislation and reform).[102] Another American constitutional scholar, Karl Klare, also warned that the conservative and formalist legal culture of the apartheid judiciary posed the biggest threat to the progressive or transformative aspirations of the Constitution.[103]

These fears seem to have been overstated and the drafters of the final Constitution had developed enough trust in the judiciary to extend the power

100 S Woolman 'The amazing, vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762.

101 D Brand 'Judicial deference and democracy in socio-economic rights cases in South Africa' (2011) 22 *Stellenbosch Law Review* 614.

102 Z Motala 'Towards an alternative judicial structure based on the continental models' (1991) 24 *Comparative and International Law Journal of South Africa* 285.

103 Klare (n 35 above). Writing ten years later, Klare (with Dennis Davis) concluded that his fear was partly founded and partly unfounded (DM Davis & K Klare 'Transformative constitutionalism and the common and customary law' (2010) 26 *South African Journal on Human Rights* 403).

to review the validity of legislation to all High Courts. This power was made subject to confirmation by the Constitutional Court.[104] The Constitutional Court explains that this change was essential to deepen the deliberative quality of its judgements. For this reason the Court is reluctant to sit as a court of first instance without the benefit of the plurality of views generated by the venting of the issues in the High Court and Supreme Court of Appeal (see below).

Between 1997 and 2013, the Constitutional Court and the Supreme Court of Appeal operated next to each other as apex courts. The Constitutional Court had concurrent jurisdiction over constitutional matters with the High Courts and the Supreme Court of Appeal, but was the apex court in these matters.[105] In addition, the Constitutional Court exercised exclusive jurisdiction in a number of constitutionally delicate matters. Only the Constitutional Court could hear disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;[106] decide on the constitutionality of any parliamentary or provincial Bill;[107] hear disputes about the constitutionality of an amendment to the Constitution;[108] decide the Parliament or the President has failed to fulfil a constitutional obligation;[109] or certify a provincial constitution.[110]

In 2013 the Constitutional Court became the highest court of the Republic with concurrent jurisdiction with the other Superior Courts in all legal matters.[111] However, it retained its exclusive constitutional jurisdiction. The Constitutional Court may now decide constitutional matters and any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by the Court.[112]

104 Sec 167(5) of the Constitution.

105 A key question during this period was whether the issue before the Court involved a 'constitutional matter'. According to sec 167(7) of the Constitution it included 'any issue involving the interpretation, protection or enforcement of the Constitution'. It proved conceptually impossible to draw a clear line between constitutional and non-constitutional matters. See the discussion by Froneman J in *Mankayi v AngloGold Ashanti* 2011 SA (3) 237 (CC) paras 117-126, who pointed out that the mere fact that a case involved the interpretation of a rule of common law, customary law or statute law meant that it raised a constitutional matter. This was so because sec 39(2) of the Constitution prescribes that every court must promote to spirit, object and purport of the Bill of Rights when it interpret legislation or develops the common and customary law. All questions of law were constitutional matters. The real question thus crucial question thus was thus not whether the matter was a constitutional matter, but whether it was appropriate for the Court to hear the matter.

106 Sec 167(4)(a) of the Constitution.

107 Sec 167(4)(b) of the Constitution.

108 Sec 167(4)(d) of the Constitution.

109 Sec 167(4)(e) of the Constitution.

110 Sec 167(4)(f) of the Constitution.

111 Sec 167(3)(a) of the Constitution.

112 Sec 167(3)(b) of the Constitution. The formulation is derived from the judgment of Froneman J in *Mankayi* para 117 and reflects Froneman J's sound and practical jurisprudence.

5.2 Remedial competence of the Court

Typical of a system of strong review,[113] the Constitutional Court 'makes the final decision whether an Act of Parliament, a provincial Act, or conduct of the President is constitutional',[114] and in doing so 'must declare that any law or conduct that is inconsistent with the Constitution is invalid'.[115] The Court may, in addition to the declaration of invalidity, also make 'any order that is just and equitable'.[116] This widely worded remedial power must be understood in the light of section 38 of the Constitution, which authorises the Court to 'provide appropriate relief' where a right in the Bill of Rights 'has been infringed or threatened'. The Court's policy towards the exercise of these review powers was formulated in *Fose v Minister of Safety and Security*:[117]

> This Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have particular responsibility in this regard and are obliged to forge new tools' and shape innovative remedies, if needs be, to achieve this goal.

In response to these constitutional obligations and considerations, the Constitutional Court has developed a rich arsenal of remedies.

In deciding on a remedy or combination of remedies, the first question to consider is whether to suspend the declaration of unconstitutionality in order to allow the political branches an opportunity to tailor a remedy, or whether the Court should assume remedial responsibility itself. In politically sensitive matters the Court is likely to refer the matter to the political branches for their attention and action. A good example is provided by *Fourie v Minister of Home Affairs* in which the Court was divided whether to allow Parliament an opportunity to remedy the fact that gay and lesbian couples could not get married under South African law.[118] The majority suspended the declaration of invalidity to allow the legislature to adopt new legislation. The minority decided to provide immediate relief to the parties by amending the existing Marriage Act (see below). Where the Court involves the legislature and/or

113 M Tushnet *Weak courts, strong rights: judicial review and social welfare rights in comparative perspective* (2008) 18-42.
114 Sec 167(5) of the Constitution.
115 Sec 172(1)(a) of the Constitution.
116 Sec 172(1)(b) of the Constitution.
117 1997 (3) SA 786 (CC).
118 2003 (5) SA 301 (CC).

executive in the remedial process, it can issue a wide range of instructions in the form of a mandamus and structural interdict. The Court can thus set time-frames and issue other reporting instructions that must be complied with (as happened in the *Nyathi* case discussed above).

Where the Court decides to remedy the defect itself, it can exercise quasi-legislative powers by amending the offending legislation, either by deleting the unconstitutional provisions (severance), or by inserting new provisions into the Act (reading in).[119] This decision must not be misread as an attempt by the Court to displace the work of the legislature and thus the value of representative democracy. In *C v Department of Health and Social Development, Gauteng*, the Court went out of its way to explain that its remedial intervention should be understood as an attempt to enter into a deliberative constitutional dialogue with the legislature:[120]

> In the ordinary course, where reading-in can provide an effective remedy, it will generally be preferable to a bald declaration of invalidity5 and to a suspensive order, coupled with interim relief. This preference of remedies, however, is not strict, but simply indicates the relative suitability of remedial options. For one to gain a full appreciation of all remedial options, it is useful to evaluate each possibility on its own merits. […] A final order of reading-in does not give the judiciary the ultimate word on pronouncing on the law. Instead it initiates a conversation between the Legislature and the courts, for Parliament's legislative power to amend the remedy continues to subsist beyond the granting of the relief, and may be exercised within constitutionally permissible limits at any future time. I would therefore encourage the Legislature to exercise its entitlement to alter the remedy, should it see fit to do so, in view of its specialist expertise and, of course, subject to its constitutional mandate.

An order or decision issued by a court binds all persons to whom and organs of state to which it applies.[121] This inevitably brings the Court into relationship with the other branches of government.

5.3 Relationship with 'other branches'

In any constitutional democracy the relationship between the judiciary (with the Constitutional Court at its apex) and the political branches of government is fraught with theoretical and political difficulties. Post-apartheid South Africa is no exception. The seriousness of the issue is revealed by the fact that many of the senior members of the Court have specifically addressed the topic in public lectures.[122]

119 *C v Department of Health and Social Development, Gauteng* 2012 (2) SA 208 (CC).
120 *C v Department of Health and Social Development, Gauteng* para 46 and 57.
121 Sec 165(5) of the Constitution.
122 P Langa '"A delicate balance": The place of the judiciary in a constitutional democracy' (2006) 22 *South African Journal on Human Rights* 2; D Moseneke 'Oliver Schreiner memorial lecture: Separation of powers, democratic ethos and judicial function' (2008) 24

From the perspective of the judiciary and legal community, the overriding concern is with the constitutional duty of the executive and legislature to respect the independence of the judiciary. The Constitution vests judicial power in the courts.[123] The courts are independent and subject only to the Constitution and the law, which must be applied impartially and without fear, favour or prejudice.[124] The Constitution creates a duty to respect this judicial independence and imposes both negative and positive obligations on the state.

As far as the negative obligations are concerned, the Constitution states that no person or organ of state may interfere with the functioning of the courts.[125] From the discussion above, it should be clear that this negative duty has been a central focus of media, academic and judicial attention as the rationalisation of the judiciary gradually unfolds.

As far as the positive obligations are concerned, the Constitution states that the executive and legislature must take legislative and other measures to assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.[126] At the very minimum, this positive obligation requires that state departments comply speedily with the orders of the Constitutional Court.

Compliance with this obligation has been uneven and the issue was specifically included in the current review of the Court. The Constitutional Court has been criticised for its seemingly naive faith in the commitment and ability of the state to act in an appropriately remedial manner in response to the judgments of the Court.[127] This has been so, especially in the case of socio-economic rights where neither the declaration of rights in *Government of the Republic of South Africa v Grootboom,*[128] nor the mandamus in the *Minister of Health v Treatment Action Campaign (No 2)*[129] brought about the required remedial state action. The image and reality of a Constitutional Court that is impotent to enforce its judgments and orders, and thus to provide effective relief for rights violations, undermines the very basis of the rule of law and constitutional democracy.

The tragic case of Mr Nyathi powerfully illustrates the problem periodically faced by the Constitutional Court (and Superior Courts in

South African Journal on Human Rights 341; S Ngcobo 'South Africa's transformative Constitution: Towards an appropriate doctrine of the separation of powers' (2011) 22 *Stellenbosch Law Review* 1.

123 Sec 165(1) of the Constitution.
124 Sec 165(2) of the Constitution.
125 Sec 165(3) of the Constitution.
126 Sec 165(4) of the Constitution.
127 RJ De Beer & S Vettori 'The enforcement of socio-economic rights' (2007) 3 *Potchefstroom Electronic Law Journal* 10. Consider the remark in *TAC (No 2)* para 129 that '[t]he government has always respected and executed orders of this Court'.
128 2001 (1) SA 46 (CC).
129 2002 (5) SA 721 (CC).

general).[130] In this case, the refusal by the state to adhere to a monetary court order resulted in the unnecessary death of the applicant as the Constitutional Court case was still pending. The Constitutional Court described the refusal of the state to honour monetary court orders against it as an 'immense challenge' and 'a serious problem'. The Court explained the dire state of affairs as follows:[131]

> In more recent years, and in particular the period from 2002 onwards, courts have been inundated with situations where court orders have been flouted by state functionaries, who, on being handed such court orders, have given very flimsy excuses which in the end only point to their dilatoriness. The public officials seem not to understand the integral role that they play in our constitutional state, as the right of access to courts entails a duty not only on the courts to ensure access but on the state to bring about the enforceability of court orders.

The Court conceded that it initially relied on the moral obligation of the state to settle its debts, but that this reliance on the moral obligation of the state is no longer acceptable, as it has proven to be 'unproductive' and has 'revealed the state's inability or refusal to abide by its own moral standards'. The Court concluded:[132]

> Hence, we need legislative measures that will provide an effective way in which judgment orders may be satisfied, and mechanisms that will inform the litigants in detail on the procedures that they will need to follow regarding payment of court orders against the state. It has become necessary for this Court to oversee the process of compliance with court orders and to ensure ultimately that compliance is both lasting and effective.

To deal with the problem, the Court temporarily assumed a role akin to that of the Director-General of the Department of Health and issued a structural interdict that compelled the department to 'to provide this Court on affidavit with a plan of the steps it will take to ensure speedy settlement of unsatisfied court orders by no later than 31 July 2008'. The Court also issued a structural interdict against the State Attorney to the effect that 'the state department should take steps to rectify the situation and that it should report back to the Court about the steps that had been taken'.[133]

The Court has on occasion found it equally difficult to secure the compliance of the legislature with remedial court orders. This issue arises where the Court provides the legislature with a time-frame within which to remedy a constitutional defect. In a recent case, the Court dismissed an application for an extension of the period within which remedial legislation

130 *Nyathi v MEC for the Department of Health, Gauteng* 2008 (5) SA 94 (CC).
131 *Nyathi* para 60.
132 *Nyathi* para 83.
133 *Nyathi* para 64.

had to be enacted from 8 to 14 months.[134] The Court rejected the explanation by the Minister responsible why the Bill in question had not been passed in time, as well as the separation of powers argument that the Court could not in the circumstances amend the legislation itself. The Court made clear that it could no longer tolerate the suffering of the victim of the human rights violation in question while the legislature dragged its feet and amended the legislative text by reading a new prohibition into the Act.

Finally, the frequent failure of state departments and their legal advisors to effectively litigate human rights disputes equally violates the positive constitutional duty to promote the effectiveness of the Court as a human rights institution. The issue is particularly pertinent during the limitation analysis when the government bears the responsibility to justify the rights violation in question in light of the policy objectives it seeks to achieve.[135]

6 Access to the Court

The manner in which access to the Court is structured is crucial to the Court's self-perception as an open and deliberatively accountable institution. The access provisions are designed to ensure that as many as possible viewpoints on the meaning of the various rights in the Constitution receive an audience in the Court.

6.1 Who may approach the Court (standing)

South African courts have traditionally adopted a fairly conservative attitude toward standing, requiring a person who approaches the court for relief to have an interest in the sense of being personally affected by the wrong alleged. Section 38 of the final Constitution brings about a radical change to the common law question of standing. The section lists the following as persons who may approach the Court: (a) any one acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.

In addition, any person or organ of state *with a sufficient interest* may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court.[136] In *Ferreira v Levin* the

134 *Minister of Communications v Ngewu* [2013] ZACC 44 (5 December 2013; as yet unreported). See also *Ngewu v Post Office Retirement Fund* 2013 (4) BCLR 421 (CC).

135 The difficulties associated with the lack of submissions by the State Attorney on matters that raise the constitutional invalidity of legislation have been set out in *South African Liquor Traders Association and Others v Chairperson, Gauteng Liquor Board* 2009 (1) SA 565 (CC) paras 50-54.

136 Sec 172(2)(d) of the Constitution.

Constitutional Court held that a person acting in his or her own interest did not necessarily have to be the person whose own constitutional rights had been infringed.[137] Chaskalson P, writing for the majority, clarified that while it was for the Constitutional Court to decide what constituted a sufficient interest, it would adopt a broad approach to the question of standing.[138]

The Court has defended its inclusive approach to standing on the basis that constitutional litigation is of particular importance in our country where we have a large number of people who have had scant educational opportunities and who may not be aware of their rights. In *Lawyers for Human Rights v Minister of Home Affairs,*[139] the Court granted standing to Lawyers for Human Rights, acting in the public interest, to challenge the constitutionality of legislation that allowed for the deportation of illegal foreigners. The Court did so on the basis that the rights in question are fundamental to the very fibre of post-apartheid society, that the consequences of their breach are far reaching, and that the group of persons involved, illegal foreigners, is extremely vulnerable (they are frequently poor persons with little education and knowledge of South African law, no contacts in South Africa, and in the country for short periods of time). This means that undocumented foreigners facing deportation will generally not be able to effectively challenge legislation in South African courts. In the circumstances, Lawyers for Human Rights had standing to raise the constitutionality of the provisions in the public interest.

6.2 When may the Court be approached?

As with standing, the Court tends to be expansive in determining ripeness. In *Ferreira*,[140] the Constitutional Court did not decline to hear the matter on the basis that the legislation the applicants sought to impugn had not yet precipitated any prosecutions against them. It appears that the courts will not refuse to consider the merits of constitutional challenges merely because action has not yet been taken against the plaintiff. Where there is a real threat of irregularity, the court will be prepared to hear the matter at the instance of any plaintiff who brings the issue before it.

Prior to the advent of the interim Constitution, mootness did not play a particularly significant role within South African law. The Constitutional Court has, however, now indicated that mootness will be a possible obstacle to relief in constitutional matters where the constitutional issue is not merely moot as between the parties but is also moot relative to society at large. This was what the Court held in *JT Publishing (Pty) Ltd v Minister of Safety and*

137 1996 (2) SA 621 (CC).
138 *Ferreira* para 38.
139 2004 (4) SA 125 (CC) para 14. See also para 17.
140 *Ferreira*.

Security,[141] when it declined to grant an order sought by applicant on the basis that the legislation they sought to impugn had been repealed.

6.3 How can the Court be approached?

The Court exercises appeal, confirmatory and original jurisdiction and can be approached in each of these capacities.

6.3.1 Applications for leave to appeal

Rule 19 of the Court regulates applications for leave to appeal. Appeals to the Constitutional Court must be lodged within 15 days of the order against which the appeal is sought. Applicants must indicate whether they also intend appealing to another court (mostly the Supreme Court of Appeal). The Court decides whether or not to grant the appellant leave to appeal. Applications for leave to appeal may be dealt with summarily, without receiving oral or written argument other than that contained in the application itself. The Court may also order that the application for leave to appeal be set down for argument and direct that the written argument of the parties deal not only with the question whether the application for leave to appeal should be granted, but also with the merits of the dispute. Applications for leave to appeal will only granted if it is in the public interest to do so. A litigant is able to appeal directly to the Constitutional Court from a High Court (thus avoiding the normal route of appeal to the Supreme Court of Appeal).

6.3.2 Confirmation proceedings

The Constitutional Court must confirm an order of constitutional invalidity made by any other Superior Court before the order has any force.[142] In terms of Rule 16 of the Court, a registrar of a court making an order of constitutional invalidity must lodge a copy of that order with the registrar of the Constitutional Court within 15 court days. A party to the dispute may also apply for the confirmation of an order of invalidity within 15 days of the making of the order.

6.3.3 The original jurisdiction of the Court

In addition to the power to confirm or reverse decisions of the other Superior Courts, the Constitutional Court also sits as a court of first instance in a number of instances. In these instances, the Court can be directly approached by means of application proceedings. The Court can be approached directly in the following matters:

141 1997 (3) SA 514 (CC).
142 Sec 167(5) of the Constitution.

Applications by legislative bodies

The Constitutional Court has exclusive and original jurisdiction to hear applications by the National Assembly and any of the nine Provincial Legislatures for an order declaring that all or part of an Act of Parliament or a Provincial Act is unconstitutional.[143]

Referrals by the President or a Premier

The Constitutional Court has exclusive and original jurisdiction to decide on the constitutionality of a parliamentary or provincial Bill.[144] It may only do so after the President or Premier has referred an adopted Bill to the Court for a decision on its constitutionality. Before the President of Premier can refer a Bill to the Court to certify its constitutionality, the Bill must first be send back to the legislature for reconsideration.[145]

Direct access in case of serious human rights abuses

National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court to bring a matter directly to the Constitutional Court.[146] Applications for direct access are governed by Rule 18 of the Constitutional Court Rules, read with section 167(6)(a) of the Constitution.[147]

The Court has a discretion whether to grant direct access or not. The Court will only grant direct access in exceptional cases and when it is in the interests of justice to do so.[148] In the ordinary course of events this would not be the case.[149] The discretion is exercised on a case by case basis taking into account the overlap between the issues raised and their strong interconnectedness (where a party applies for direct access in a matter already before the Court); the need to achieve legal certainty in a matter and to resolve a dispute urgently; the need to give special courts the opportunity to express their views on the matter; the importance of the constitutional issue raised and the desirability of obtaining an urgent ruling of the Constitutional Court on that issue; whether any dispute of fact may arise in the case; the possibility of obtaining relief in another court; time and costs that may be saved by coming directly to the Court; and the prospects of success.

143 Sec 167(4) of the Constitution.
144 Sec 167(4) of the Constitution.
145 Secs 79(3) and (4) & 121 Constitution.
146 Sec 167(6) of the Constitution.
147 Read with sec 15(1)(b) of the Superior Courts Act, 2012.
148 *Van Vuren v Minister of Correctional Services* 2010 (12) BCLR 1233 (CC) para 143.
149 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) para 11.

The general reluctance of the Court to act as a court of first and last instance reveals the deliberative and republican understanding of constitutional law prevalent on the Court (see above). If constitutional matters could, as a matter of course, be brought directly to the Court, the Court would be called upon to decide cases without the benefit of the views of the lower courts having constitutional jurisdiction. Yet, the Constitutional Court has stressed that the views of other courts are especially important in this early stage of the development of our constitutional jurisprudence. The judgment in *Van Vuren v Minister of Justice and Constitutional Development* is a good example of the dynamic surrounding direct access.[150] A sentenced prisoner in person tried to secure direct access to the Court from prison in order to have legislation that might affect his release on parole declared unconstitutional. This was a test case for the aspiration of the Court to have open doors to the vulnerable. The Court refused the application for direct access, but called upon the Law Society to arrange for legal representation and to assist the applicant to institute the action in the High Court. The case is also interesting because of the fact that the State Attorney did not file any response to the application. The Court regarded this failure in a serious light as it impacts on the quality of the public and deliberative nature of human rights and constitutional adjudication.[151]

Some commentators contend that the strict jurisdictional rules governing direct access to the Constitutional Court should be amended in order to facilitate greater access by poor communities:

> The Constitutional Court's record over the past ten years reveals a practice of restricting rather than expanding the conditions of direct access . . . this has been to the detriment of the Court's ability to act as an institutional voice for the poor as, increasingly, only empowered individuals and groups have the resources to bring litigation through the judicial system to the Constitutional Court.[152]

6.4 Legal representation and *amici curiae*

Any person who has access to the Court (see above) may appear in person or be represented by a legal representative. In terms of Rule 6 of the Court, except where the Court or the Chief Justice directs otherwise, no person shall be entitled to appear on behalf of any party at any proceedings of the Court, unless he or she is entitled to appear in the High Courts.

Civil society organisations have used the ability to appear as *amici curiae* to good effect and have made a valuable contribution to the development of

150 2007 (8) BCLR 903 (CC).
151 *Van Vuren* para 13.
152 J Dugard 'Court of first instance? Towards a pro-poor jurisdiction for the South African Constitutional Court' (2006) 22 *South African Journal on Human Rights* 261 266.

the post-apartheid human rights culture.[153] In terms of Rule 10 of the Court, any person interested in any matter before the Court may, with the written consent of all the parties in the matter, be admitted therein as an *amicus curiae* upon such terms and conditions, and with such rights and privileges as may be agreed upon in writing with all the parties before the Court, or as may be directed by the Chief Justice. The Court defended a broad approach to the participation of *amici* as follows: [154]

> It also provides invaluable space for friends of the court in public interest matters and, by doing this, promotes access to the courts and ensures that courts are well informed on public interest matters when making decisions. High Courts often hear vulnerable litigants with limited resources. These litigants are invariably unable to produce the kind of compelling evidence that an expert, like the Children's Institute, may be able to provide. In these instances, the amicus speaks to aid voiceless and penniless people and assists the court in making an informed decision.

Where the parties before the Court refuse to provide the consent necessary, a prospective *amicus curiae* may apply to the Chief Justice to be admitted as *amicus curiae* on such terms as the Chief Justice determines. An *amicus curiae* has the right to submit a written argument, provided that such written argument does not repeat any matter set forth in the argument of the other parties and raises new contentions which may be useful to the Court. Amici are confined to making written submissions which must be limited to the record on appeal or referral and may only refer to facts not disputed.[155]

6.5 Accessibility of court judgments

Any person with access to the internet has open access to the full text of all the judgments of the Court. Judgments can be accessed online via the official website of the Court (www.concourt.org.za) or the website of the Southern African Legal Information Institute (www.saflii.co.za). Both sites contain a full list of all the judgments of the Court to date in PDF and word format and provide helpful search options. In some instances, the judgments of lower courts in a matter, the directions of the Chief Justice, the heads of argument, and the pleadings are also available in electronic format on the website of the Constitutional Court. Most judgments are electronically available on the same day that they are handed down.

In addition to these open access electronic reserves, judgments of the Court are commercially available in both print and electronic formats. Most

153 C Murray 'Litigating in the public interest: Intervention and the *amicus curiae*' (1994) 10 *South African Journal on Human Rights* 240 259.

154 *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp 2013* (2) SA 620 (CC) para 34. See also *Minister of Health v Treatment Action Campaign (No 1)* 2002 (5) SA 703 (CC) para 5; *Institute for Security Studies In Re S v Basson* 2006 (6) SA 195 (CC).

155 See Rule 31.

of the Court's judgments are included in the South African Law Reports (published by Juta) and the Constitutional Law Reports (published by Butterworths/LexisNexis). Access to these reports requires a subscription, although most Universities and law firms (and some public libraries) have complete sets of law reports available in their reference sections.

7 The deliberative performance of the Court

7.1 Judgments: Style and structure

Between 1995 and 2013, the Court delivered just more than 500 written judgments. The majority of these judgments involved the re-interpretation of the rules of the common law, customary law and legislative law in the light of the spirit, object and purport of the Bill of Rights (also known as the indirect application of the Bill of Rights, or weak judicial review under section 39(2) of the Constitution). In 160 cases the constitutionality of legislation was directly challenged as human rights violations. In these cases the Court exercised strong review powers under section 172 of the Constitution. It declared legislation unconstitutional in 100 instances. The conduct of the President was directly challenged in ten cases (four against President Mandela; two against President Mbeki and four against President Zuma). Five of these challenges were successful. Most recently the Court set aside the decisions of President Zuma to appoint a National Director of Prosecutions, and to extend the Chief Justice's term of office. Given the Court's strong review powers and remedial competence, these statistics reveal a judicial policy of self-restraint rather than overzealous activism.

The Court delivers its judgments in open Court. Unlike the classical common law tradition, judgments are not delivered *seriatim* as a series of individual opinions in which every judge speaks in his (or her) own name. Unlike the classical civil law tradition, judgments are not delivered *per curiam* in which only one judgment is delivered in the name of the Court and any dissenting opinions remain a secret of the Court. The judgment of the Court is a deliberative and collaborative effort, which typically results in a majority judgment supplemented by concurring and dissenting minorities. Justice emeritus Kate O'Regan (who served on the Court from 1995 to 2009) describes the Court as 'a forum for reason' and deliberation.[156] The Court prides itself on its deliberative performance and the official website of the Court explains the internal deliberative process of the Court between the public hearings and judgment as follows:[157]

156 K O'Regan 'A forum for reason: Reflections on the role and work of the Constitutional Court: *Discourse and debate: Helen Suzman memorial lecture'* (2012) 28 *South African Journal on Human Rights* 116.

157 www.constitutionalcourt.org.za (accessed 20 November 2013).

> Once a case has been set down, the chief justice will ask a particular judge to do special preparation and possibly write the judgment. Usually cases will be spread out so that each judge writes from time to time. Once all parties have been heard, the judges meet to discuss the possible outcome of the case. *This is one of the central features of the Court*: *the judges act collegially and meet often to discuss important and controversial aspects of a case*. A few days later, the writing judge will submit a memo to all the others, indicating where he or she stands. If there are disagreements about the decision or the route taken in reaching it, the judge who disagrees with the main writer will prepare to write a concurrence or dissent. Writing a judgment is a long process. The judge prepares a first draft and circulates it. The judges then meet and submit comments or changes. If a dissenting judgment has been written, the justices will begin to indicate which judgment they will follow and why. Sometimes lengthy discussions take place. Once consensus is reached, the judgments are thoroughly checked. The judgment is then handed down.

On the same website an unnamed member of the Court explains the deliberative life on the Court in the following terms:

> We have no hierarchies or pecking order in our Court. We speak out freely with a view to achieving principled consensus wherever possible. We workshop as a collective again and again, and carry on the debate through e-mail and one-on-one conversations. The objective is to find as much principled common ground as we can. But each one of us has his or her own individual conscience, and when we feel it necessary to differ from our colleagues we do not hesitate to do so. So strongly do we feel about the right to individual expression that we even help strengthen the judgments of colleagues who take positions different from our own!

Emeritus justice Kate O'Regan explains that this method of crafting or writing judgments is informed by both the normative vision of the Court as a democratic institution and the opportunities provided by the relatively light case load of the Court (when compared to some other jurisdictions).[158] Whatever the case may be, the deliberative quality of the Court's judgments is a widely celebrated aspect of its jurisprudence.[159]

In line with the deliberative nature of the judges' conferences described above, the preferred style of judgment writing on the Constitutional Court is the unanimous judgment. A unanimous judgment is a judgment in which all the members of the Court concur individually in a judgment written in the name of a designated member of the Court. Where this degree of agreement is not possible, the Court prefers to deliver a clear majority judgment along the same lines. A single minority judgment (in which a number of judges may again individually concur) or a series of individually dissenting or concurring judgments always accompany a majority judgment.

158 O'Regan (n 157 above) 121.

159 For an insightful defence of this approach see H Botha 'Freedom and constraint in constitutional adjudication' (2004) 20 *South African Journal on Human Rights* 249.

There is no specific Constitutional or statutory provision that explicitly mandates this highly individualised or personalised style of judgment. Relying on its inherent power to regulate its own process, the Court immediately adopted the common law culture of personalised judging in the first three cases it decided. The very first judgment of the Court (*S v Zuma*) resulted in a unanimous judgment in the sense that every member of the Court individually concurred in a judgment written by Kentridge AJ.[160] The second judgment (*S v Makwanyane*) resulted in each of the eleven members of the Court delivering his or her own individual opinion that the death penalty was unconstitutional.[161] The third judgment (*S v Mhlungu*) split the Court seven against four and resulted in a majority, a minority and two concurring judgments.[162] Overall, the first three cases of the Constitutional Court resulted in no less than 16 different judgments. The individually crafted opinion has remained the mainstay of the Constitutional Court's judgments ever since. The Court nevertheless finds it necessary from time to time to deviate from its standard practice and to deliver *per curiam* judgments in the name of the Court.

Judgments are written in plain and accessible English. The judgments are broken down into short paragraphs and footnotes are used to provide references. Legal sources are mostly fully quoted in footnotes. In line with the contextual approach to constitutional interpretation, judgments include a summary of the factual background, the history of the case and the judgments of the courts below, the arguments of both parties, the relevant legal provisions, the legal question, the appropriate approach to the problem, the resolution of the problem, the appropriate remedies and costs. Judgments are concluded with a formal court order.

7.2 Use of international law

The Court relies freely and widely on both foreign and international law sources and precedents.[163] The Court does so largely as an interpretive aid. In South African law, international human rights norms and other international law apply directly only in the exceptional cases of self-executing provisions (provided that the international agreement has been approved by Parliament and provided that it is not inconsistent with the Constitution or national legislation).[164] In all other cases, international law norms apply only indirectly through the application and interpretation of either the Bill of Rights (via section 39(1) of the Constitution), or national legislation (via

160 1995 (2) SA 642 (CC).
161 Each of the 11 members of the Court delivered a separate concurring judgment.
162 1995 (7) BCLR 793 (CC).
163 For a view from the outside see J Foster 'The use of foreign law in constitutional interpretation: Lessons from South Africa' (2010-2011) 45 *University of San Francisco Law Review* 79.
164 Sec 231(4)(c) of the Constitution.

section 233 of the Constitution).[165] In *Glenister v The President of the Republic* the Constitutional Court explained the effect of section 233 as follows:[166]

> Section 233 demands any reasonable interpretation that is consistent with international law when legislation is interpreted. There is thus no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law. We do so willingly and in compliance with our constitutional duty.

In *Makwanyane* the Constitutional Court embraced both binding and non-binding international law as an interpretive aid.[167] Justice Chaskalson made the following statement:[168]

> In the context of section 35(1) public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which the [Bill of Rights] can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the European Commission on Human Rights, the European Court of Human Rights and in appropriate cases, reports of specialized agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of [Bill of Rights].

Lourens du Plessis describes the Constitutional Court judges as 'comparative constitutional law enthusiasts' and 'universalists' actively pursuing the constitutionalisation of international law.[169] Cosmopolitanism is therefore correctly identified by Roederer as a foundational constitutional value of the post-apartheid Constitution and the jurisprudence of the Court.[170] It provides a welcome break from the insular nationalism that characterised the era of apartheid.[171] Indeed, Seyla Benhabib presents the democratic iteration of cosmopolitan human rights norms as the normative model of deliberative democracy and politics at the beginning of the 21 century. It is a

165 The section reads as follows: 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.
166 2011 (3) SA 347 (CC) para 202.
167 *Makwanyane*.
168 *Makwanyana* para 35.
169 L du Plessis 'Interpretation' in S Woolman *et al Constitutional law of South Africa: Volume 2* 2nd ed (2008) 32-185.
170 See C Roederer 'Founding provisions' in Woolman *et al* (n 2 above) 13-1 13-8.
171 However, in *The Citizen (Pty) Ltd v McBride* 2011 (4) SA 191 (CC) Mogoeng J wrote a minority judgment (see paras 243-244) in which he stressed that the Constitution must not be understood as a cosmopolitan or post-traditionalist document. Mogoeng J suggested that the Bill of Rights must be interpreted from a traditional or Africanist perspective (adding in a footnote that he favours such a traditionalist reading, fully cognisant of the provisions of sec 39(1) of the Constitution). The tension between African traditionalism and international cosmopolitanism is just one of the many tensions that mark the post-apartheid Constitution and jurisprudence of the Court.

model with which the South African Constitutional Court would feel completely comfortable.[172] As I tried to suggest throughout this review, it is a model which the Court might even, and not without reason, claim as their own.

172 S Benhabib *Another cosmopolitanism* (2008) 45.

CHAPTER 8

THE ROLE AND IMPACT OF INTERNATIONAL AND FOREIGN LAW ON ADJUDICATION IN THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA

Juana Kweitel, Ranbir Singh and Frans Viljoen

1 Introduction

In this age of globalisation and interdependence, principles of international law affect all states, small and large, rich and poor, weak and powerful. Many of the structural changes that have taken place in the world economy since the early 1980s have resulted in liberalising capital, labour, services and the products of intellectual property, which in turn have increased the interdependence of state and societies. For many years, national jurisdictions only dealt with national issues, which came before the domestic courts, including apex courts such as the Supreme Courts of Brazil and India, and the Constitutional Court of South Africa. Increasingly, the comfort of dealing with only municipal law is dwindling, since all these courts now have to deal with disputes that have international dimensions.

International law has come to impinge on core aspects of national life, be it economic, social or cultural. International law adjudication itself exists at two levels: public international law and private international law. In this chapter, the focus falls on the role of public international law principles in the adjudication of law at the domestic setting. Choice of law principles and jurisdiction issues under private international law will not be dealt with in this paper.

Public international law is generally defined as the body of rules and regulations that determines the conduct of sovereign states. According to traditionalists' views, international law regulates the relations between or amongst sovereign states. This view was opposed by modern jurists who have expressed the view that international law not only regulates the relations between or amongst states, but also – at least to a certain extent – regulates the conduct of international institutions, individuals and non-state entities. International law is essentially comprised of two bodies of law: conventional international law (treaty based law) and customary international law (law based upon state practice). Both these aspects will be considered here. This

contribution deals with the impact and implementation of international law especially in the context of human rights adjudication.

Brazil, India and South Africa are UN members. As treaties are the main source of states' international human rights obligations, a table of adherence by the three states to the core UN human rights treaties is provided:

Table: Status of adherence to core UN human rights treaties by Brazil, India and South Africa

	Brazil	**India**	**South Africa**
CERD	1968	1968	1998
Art 14	-	-	-
ICCPR	1992	1979	1998
Optional Protocol I	2009	-	2002
Optional Protocol II	2009	-	2002
ICESCR	1992	1979	-
Optional Protocol	-	-	-
CEDAW	1984	1993	1996
Optional Protocol	2002	-	2005
CAT	1989	-	1998
Article 22	-	-	1995
Optional Protocol	2007	-	-
CRC	1990	1992	1995
Optional Protocol I	2004	2005	2009
Optional Protocol II	2004	2005	2003
CMW	-	-	-
CRPD	2008	2007	2007
Optional Protocol	2008	-	2007
CED	2010	-	-

With four exceptions, the states under discussion have ratified all the core treaties. The first exception is the failure of India to become a party to the Convention against Torture (CAT); the second is South Africa's non-adherence to the International Covenant on Economic, Social and Cultural Rights (ICESCR); the third is the fact that only Brazil has become a party to the Convention against Enforced Disappearances (CED); and the fourth is shared reluctance by all three states to ratify the Convention on Migrant Workers and members of their Families (CMW).

Brazil is the state with the best formal adherence status. The most disquieting insight is that India has not accepted any of the optional complaint mechanisms under any of the treaties.

Human rights treaties do not only emanate from the UN, but also from regional intergovernmental organisations. As a member of the Organisation of American States (OAS), Brazil is party to numerous Inter-American human rights treaties and is subject to the jurisdiction of the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights – albeit only since 1998.[1] South Africa is a member of the African Union (AU), is a state party to all relevant AU treaties, and is subject to the jurisdiction of the African Commission and Court on Human and Peoples' Rights. India is not part of an equivalent regional arrangement. The absence of regional monitoring or adjudicative procedures may be a factor in explaining India's reluctance to subject itself to the protective competence of UN human rights treaty bodies.

The approach of a particular state's municipal courts to international law will be characterised by that state's attitude to and reception of international law – an attitude which may and does differ according to the type of international law in question, namely treaty law or customary international law. The implementation of international law at the domestic level is based on the place and role accorded to international law in the country's constitution. Traditionally, the relationship between international law and the domestic legal system has been viewed through the theoretical prism of the 'monistic theory' and 'dualistic theory'. Increasingly, it has become apparent that the theoretical divide is not as rigid as previously understood. However, to the extent that it has retained its relevance, the contribution will also consider to which of these theories each of the three states subscribes.

Greater internationalisation in an increasingly globalised world, closer networks and communication, trans-boundary movement of services and education, and many other factors also make the law of other states ('foreign law') more relevant. In addition to international law, the role of foreign law and the jurisprudence of other national courts are therefore also considered in this chapter.

In this contribution, the following aspects are investigated in respect of the apex courts of Brazil, India and South Africa:

(1) What is the *constitutional status* of international law in relation to other sources of law in each of the three countries?
(2) What is the process by which treaties are *adopted and domesticated*?

1 For a list of Inter-American human rights treaties ratified since the promulgation of the 1998 Federal Constitution, see CM Rosato & LC Correia 'The *Damião Ximenes Lopes* case: Changes and challenges following the first ruling against Brazil in the Inter-American Court of Human Rights' (2011) 15 *SUR-International Journal on Human Rights* 91 95.

(3) May these courts and *have they used* (applied) international law and foreign law as a source of *interpretative guidance*?
(4) May these courts and have they applied international law as a source of a *self-standing remedy for individuals*? In other words, the question whether individuals may invoke international law before domestic courts as an independent source of a remedy, will also be looked at.

2 The status of international law in relation to other sources of law

2.1 Brazil

There is long-standing jurisprudence establishing that international treaties in Brazil have the same status as federal laws.[2] Until recently, there has been a debate about whether human rights treaties should have a different hierarchical position. There are at least four positions regarding the status of international human rights treaties under Brazilian doctrine. These positions consider human rights treaties as follows:

- Position 1: Human rights treaties are superior to the Constitution (supra-constitutional status).
- Position 2: Human rights treaties have the same status as the Constitution (constitutional status).
- Position 3: Human rights treaties are inferior to the Constitution, but superior to federal laws (supra-legislative but infra-constitutional status).
- Position 4: Human rights treaties are at the same level of hierarchy as federal laws (legislative status).

Until quite recently, the Supreme Court maintained that all international treaties ratified by Brazil have the same internal status as federal laws (Position 4). This issue was raised as part of recent constitutional reforms. Several options were discussed, particularly in light of the regional trend in the Americas in terms of which a special domestic mechanism is established to ensure that special constitutional status is accorded to human rights treaties. This trend is exemplified by Argentina, where a rule was adopted in 1994, giving constitutional status to a list of human rights treaties that had been ratified before the constitutional reforms, and establishing a procedure to give the same status to new internationals norms.[3] According such special status to human rights treaties by these means has at least two implications:

2 RE 80.004; Brazil, Supremo Tribunal Federal, Recurso Extraordinário 80.004/SE. Relator: Min Xavier de Alburquerque, 1 June 1977.
3 Argentine Constitution: art 75, inc 22: 'The Congress is empowered … to approve or reject treaties concluded with other nations and international organisations, and concordats with the Holy See. Treaties and concordats have a higher hierarchy than laws. The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Covenant on Economic,

(i) Human rights treaties need to be differentiated from other international norms. (ii) Human rights treaties do not automatically enjoy constitutional status.

2.1.1 2004 Brazilian constitutional reform: New mechanism to give constitutional status to human rights treaties

The issue of the place of human rights treaties in the hierarchy of laws was at least partially resolved by Constitutional Reform (No 45 of 2004), which introduced the following legal provision:

> International human rights treaties and conventions which are approved, in each House of the National Congress, in two rounds, by three fifths of the votes of the respective members, will be equivalent to constitutional amendments.[4]

In other words, human rights treaties (and only human rights treaties) that go through this process of double approval before both the Chamber of Deputies and the Federal Senate, separately, will have the same status as the Constitution. This procedure transforms the treaty into a measure of constitutional reform after the double approval. Those treaties will not be superior to the Constitution and any conflict of rights should be solved in the same way that any other situation of competing rights is resolved. This process has been used for the first time in 2008, for the approval of the UN Convention on the Rights of People with Disabilities.[5] As a consequence, this Convention has the status of a constitutional norm in Brazil (in line with Position 2 above).

However, the Amendment did not solve the following question: What is the status of human rights treaties that do not go through the process of double approval or that have been approved before the Constitutional Amendment of 2004?[6] The answer to this question shall now be explored.

3 Social and Cultural Rights; the International Covenant on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy, do no repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognised herein. They shall only be denounced, in such event, by the National Executive Power after the approval of two-thirds of all the members of each House. In order to attain constitutional hierarchy, the other treaties and conventions on human rights shall require the vote of two-thirds of all the members of each House, after their approval by Congress'.

4 Constitution, Art 5, inc LXXVIII para 3.

5 Brazil did the deposit of the instrument of ratification at the UN on 1 August 2008.

6 Different from Argentina, Brazil did not include in the constitutional reform a list of human rights treaties that gained constitutional status. It created a solution for the future, but it did not solve the situation of human rights treaties ratified in the past.

2.1.2 Status of treaties ratified before the 2004 Constitutional Reform and those not approved through double approval: New jurisprudence

On 3 December 2008, the Supreme Court adopted a new understanding regarding the issue of the status of human rights treaties. The Supreme Court decided that treaties that have not been approved through the double process are 'inferior to the Constitution but superior to federal laws'.[7] In other words, these treaties have supra-legislative but infra-constitutional status, in line with Position 3 above. This decision was adopted by a majority of five judges (in favour of the supra-legislative but infra-constitutional status of these treaties), while four judges favoured the view that these treaties have constitutional status (Position 2 above). Another two judges did not vote or did not consider this question relevant. In this case, the constitutional rule allowing for civil imprisonment for debtors (*depositario infiel)* was under consideration.[8] This constitutional rule violates article 11 of the International Covenant on Civil and Political Rights (ICCPR) and article 7(7) of the American Convention on Human Rights, which provides unequivocally that '[n]o one shall be detained for debt'. Judge President Mendes summarised the view of the majority of the Court in this matter, by stating: 'If there is a special procedure to give constitutional status to human rights treaties, it means that the treaties that have not gone through this process do not enjoy the same status'.

Justice Gilmar Mendes, referring to comparative law and the 1969 Vienna Convention on the Law of Treaties, proposes that human rights treaties that did not pass the process of double approval in Congress should have supra-legal but infra-constitutional status. The supra-legal but infra-constitutional hierarchy is only applicable to human rights international norms, and not to other treaties (for example those treaties dealing with commercial issues).

In this decision, the Supreme Court finally rejected the interpretation that gives automatic constitutional status to all human rights treaties (Position 2 above), and further rejected the supra-constitutional status of those treaties (Position 1). Its finding is based on article 5(1) and (2) of the Constitution.[9]

7 Brazil Supremo Tribunal Federal, Recurso Extraordinário 466.343-1 SP. Relator: Min Cesar Peluso, 3 December 2008.

8 Constitution, art 5, inc LXVII: 'There shall be no civil imprisonment for indebtedness except in the case of a person responsible for voluntary and inexcusable default of alimony obligation and in the case of an unfaithful trustee'.

9 Constitution, art 5(1): 'The provisions that define the fundamental rights and guarantees have immediate application'; art 5(2): 'The rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party'.

The final solution in this case is quite contradictory in at least one sense. Civil imprisonment for debt is at the same time included in the Brazilian Federal Constitution, and prohibited by the ICCPR and the American Convention. According to the new understanding, those two treaties do not enjoy constitutional status because they were ratified before the recent reform and did not go through the double approval process. To solve this problem, Judge Gilmar Mendes proposes an innovative solution. He states that the ratification of the ICCPR and the American Convention leaves all the infra-constitutional legislation regarding civil imprisonment for debt without effect, making such imprisonment inapplicable for 'lack of regulation', even without affecting the constitutional provision of this form of imprisonment. However, keeping this contradiction in mind, Justice Gilmar Mendes at the end of his vote suggests that this quandary can be solved through the double approval of the ICCPR and American Convention. Once they have unequivocally gained constitutional status, these two treaties would override the constitutional provision allowing for civil imprisonment.

This new understanding of the Supreme Court brings an end to a very long and enthusiastic discussion about the status of international human rights treaties under Brazilian domestic law. This new understanding has been accepted and applied in later decisions of the Supreme Court and other tribunals.[10]

2.1.3 Summary: Normative pyramid

After the recent decision by the Brazilian Supreme Court, discussed above, the normative pyramid in Brazil looks as follows, in order of their place in the legal hierachy:

(1) The Federal Constitution, including human rights treaties that went through the process of double approval (until now only the UN Convention of the Rights of Persons with Disabilities);
(2) Human rights treaties that were ratified before the constitutional amendment or that did not pass the double approval process (enjoying supra-legal but infra-constitutional status);
(3) Federal laws and other international treaties dealing with issues other than human rights;[11] and
(4) Other legal norms.

10 See eg the recent decision of the Superior Tribunal de Justiça, súmula 419 (3 March 2010).
11 This principle was established by the Supreme Court in 1977 in the RE 80.004 (Brazil, Supremo Tribunal Federal, Recurso Extraordinário 80.004/SE. Relator: Min Xavier de Alburquerque. 1 June 1977). In this case, the applicability of a law that was in violation of a commercial convention was at issue**.** Several decisions after 1977 confirm this understanding that is quite peaceful in the doctrine.

2.2 India

The extent to which India recognises international law is dependent upon the nature and source of the relevant international law rule or provision.[12] In respect of treaty law, the position in India is governed by article 253 of the Indian Constitution. In respect of both customary international law and treaties, India is bound by article 51 of the Indian Constitution. Article 51(c) of the Constitution stipulates as follows concerning the role of international law: 'The state shall endeavour to foster respect for international law and treaty obligations in the dealings of organised people with one another'. The wording of this passage is that India is bound to both sources of international law, where the term 'international law' allows for reference to international custom, while the term 'treaty obligations' obviously applies to treaty law.[13] Unfortunately, article 51 is found in Part IV of the Constitution, which is entitled 'Directive Principles of State Policy'. This effectively means that article 51 is not enforceable in any court of law in India, but is a mere guideline that the state should – but need not – follow.

Article 253 of the Constitution reads as follows:

> Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

What this means is that international treaties have no binding authority on domestic law, unless parliament enacts the provisions of a particular treaty into national law. This interpretation was confirmed in *Birma v State,*[14] where the Rajastan High Court held that a treaty was not applicable to domestic litigation, as it had not been enacted into law by the legislature. Following this decision, the Karala High Court in *Xavier v Canara Bank*[15] was tasked with determining whether India's ratification of the ICCPR, which prevents people from being detained for failing to fulfil a contractual obligation, was applicable domestically. The Karala High Court held that international human rights treaties established their own monitoring bodies, where grievances could be heard, and therefore these treaties did not need to be binding domestically. This decision was confirmed by the Indian Supreme Court in *Jolly George Verghese v Bank of Cochin,*[16] where the Supreme Court held as follows:

12 See generally JS Halashetti & Dr Ramesh 'The status of international law under the Constitution of India' *Legal India* (undated) http://www.legalindia.in/the-status-of-international-law-under-the-constitution-of-india (accessed 17 November 2013).
13 C Alexandrowicz *International law in India* (1952) 292; as well as S Kapoor *Human rights under international law and Indian law* (2005) 271.
14 AIR 1951 Raj 127.
15 1969 Ker L T 927.
16 AIR 1980 SC 470.

> India is now a signatory [state party] to this Covenant [ICCPR] and art 51(c) of the Constitution obligates the state to 'foster respect for international law and treaty obligations in the dealings of organised peoples with one another'. Even so, until the municipal law is changed to accommodate the Covenant what binds the court is the former, not the latter.

Consequently, although the executive branch of the Indian government has the authority to enter into agreements, such agreements can only be made law by the Indian legislature.

In summary: The Indian Constitution is not about the status of international law within domestic law. As Bakshi indicates, 'national courts generally interpret statutes so as to maintain harmony with rules of international law', but, at the same time, national law has to be 'respected, even if contrary to international law'.[17] The status of international treaty law is thus, formally speaking, infra-legal (infra-legislative).

2.3 South Africa

The status of international human rights law depends on the status of international law, more generally. As far as international law is concerned, the South African Constitution deals separately with customary international law and international agreements.

Some ambiguity about the status of customary international law existed under South African law before 1993.[18] Any ambiguity has been removed from the present Constitution, which provides that international customary law 'is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.[19] In a state where constitutional supremacy applies, the requirement of consistency with ordinary legislation should not necessarily be viewed as a cause for concern, because the reference to 'Act of Parliament' should be understood as legislation that 'can be reconciled with' the Constitution.[20]

Turning to treaties: Stemming from the Westminster constitutional tradition and based on common law, South Africa has always been considered a dualist country.[21] Before 1993, South Africa was not party to any of the core UN human rights treaties. The question of the constitutional status of international human rights law did therefore not arise in that era. Under the present Constitution, the system of dualism is as a general rule retained, but an exception is introduced. A treaty 'becomes law in the Republic when it is enacted into law by national legislation; but a self-

17 PM Bakshi *The Constitution of India: Selective comments* (2007) 91.
18 J Dugard *International law: A South African perspective* (2005) 53.
19 Sec 232.
20 See M Olivier 'The status of international law in South African municipal law: Section 231 of the 1993 Constitution' (1993-1994) 19 *South African Yearbook of International Law* 12.
21 Dugard (n 18 above).

executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.[22] The issue of 'self-execution' is considered more carefully in part 5 below.

Surprisingly, perhaps, the Constitution is not very clear about the status that international treaties enjoy. As seen above, 'self-executing' treaties enjoy an infra-legislative (and thus also infra-constitutional) status. This position does not even feature in the Brazilian typology discussed above. However, this status can be explained by virtue of the fact that self-execution would only effectively come into play when there is no specific legislation dealing with a particular matter. It could further be observed that the potentially negative effect of the infra-legislative status should effectively be curbed by the fact that any 'Act of Parliament' must be interpreted under a regime of constitutional supremacy,[23] leading to the conclusion that legislation should be assumed to be in line with the Constitution or, if it is not, that it may be brought into line with constitutional standards.

Other treaties, including human rights treaties, which have been incorporated into domestic law presumably have a status different to and higher than ordinary legislation. It should be pointed out here that all law, including the Constitution, must be interpreted consistently with international law, if such an interpretation is reasonably allowed.[24] However, if there is a clear conflict between an incorporated treaty and the Constitution, the Constitution will prevail, in line with the principle of constitutional supremacy.

3 Process of adoption and domestication of treaties

3.1 Brazil

The ratification of international treaties under the Brazilian Constitution involves the Executive Power and the National Congress, and proceeds through the following phases:

Signature: The President, who is the main state entity responsible for foreign policy, negotiates and signs international treaties.[25]

22 Sec 231(4).

23 Any interpretation of legislation also has to be commensurate with section 233, which compels courts to give preference to an interpretation that can reasonably be understood as being in line with international law.

24 Sec 233.

25 Constitution, art 84: 'The President of the Republic shall have the exclusive power to …VIII - conclude international treaties, conventions and acts, ad referendum of the National Congress'.

Approval: Both houses of the National Congress have to approve the treaty. The Executive Power is responsible for submitting the treaty for consideration by Congress.[26] The House of Representatives starts the analysis, and once it has approved the treaty, it goes to the Senate for its approval. After approval by the Senate, the President of the Senate signs what is called a *decreto legislativo*, which is published in the *Diario Oficial da União*.

Ratification: After approval by Congress, the Executive may formally (or 'internationally') ratify the treaty. This is the act that binds Brazil at an international level.

Promulgation: After the approval of Congress, the Executive Power 'promulgates' the treaty through a decree, with the signature of the President and the Minister of Foreign Affairs. This decree includes the translation of the treaty into Portuguese.

Implementation/enforcement: The Ministry of Foreign Affairs, the Supreme Court and the majority of Brazilian scholars believe that the domestic applicability of the treaty only occurs after the presidential decree has been promulgated (and not at the moment of international ratification).[27] In the Brazilian domestic jurisdiction, treaties are normally referred to with reference to the presidential decree.

3.2 India

Article 73(b) of the Indian Constitution reads as follows:

> Subject to the provisions of this Constitution, the executive power of the Union shall extend to the exercise of such rights, authority and jurisdiction as are exercisable by the government of India by virtue of any treaty or agreement.

This article, read together with article 253 of the Indian Constitution, clearly demarcates the various roles of the state organs in respect of international law. The executive is free to sign and subsequently ratify treaties, but the implementation and domestication of treaties rests solely with the legislative.

An illustration of this position is presented by the matter of *Xavier v Canara Bank*:[28] Although the executive branch of the Indian government signed and ratified the ICCPR, the legislature did not incorporate the treaty into domestic law. An Indian citizen citing a violation of a right found in the

26 Constitution, art 49: 'It is exclusively the competence of the National Congress (i) to decide conclusively on international treaties, agreements or international acts which result in charges or commitments that go against the national property'.

27 See eg Ministry of Foreign Affairs: http://www2.mre.gov.br/dai/005.html (accessed 28 April 2012).

28 1969 Ker L T 927.

ICCPR would therefore have to approach the UN Human Rights Committee for a remedy and not domestic Indian courts, because the Indian judiciary lacks the jurisdiction to hear the matter.

3.3 South Africa

In the pre-1993 dispensation, the executive had the exclusive competence to decide whether the country would become party to an international agreement. Under the present Constitution, the 'negotiation and signing' of treaties remain the executive's exclusive responsibility.[29] A distinction is drawn between technical-administrative agreements and those not requiring ratification, on the one hand, and those requiring ratification, on the other. While agreements in the first category only need to be 'tabled' in Parliament,[30] those in the second only become binding once they have been 'approved' by both houses of Parliament.[31] Approval takes the form of a resolution approved by a majority vote by both houses of Parliament, the National Assembly and National Council of Provinces.[32]

To find direct domestic application, non-self-executing treaties have to be domesticated through legislation. An example of such legislation is the Children's Act 38 of 2005, which domesticates the Hague Convention on Inter-Country Adoption, giving it the 'force of law'. Section 256 of the Act provides as follows:

(1) The Hague Convention on Inter-Country Adoption is in force in the Republic and its provisions are law in the Republic.
(2) The ordinary law of the Republic applies to an adoption to which the Convention applies but, where there is a conflict between the ordinary law of the Republic and the Convention, the Convention prevails.

In other instances, for example in respect of the Child Justice Act (75 of 2008), there is no whole-sale domestication. Instead, the preamble to the Act refers to the CRC and the African Charter on the Rights and Welfare of the Child, but only as part of what is 'in broad terms' taken 'into account' to guide the 'incremental' creation of 'appropriate' procedures and mechanisms for children in conflict with the law.

29 Sec 231(1). For a thorough exposition of these processes, see E De Wet 'South Africa' in D Shelton (ed) *International law and domestic legal systems: Incorporation, transformation, and persuasion* (2011) 567 570-73.
30 Sec 231(3).
31 Sec 231(2).
32 See J Church *et al Human rights from a comparative and international perspective* (2007) 181.

4 International and foreign law as interpretive aid

4.1 Brazil

Compared to other jurisdictions, constitutional debates in Brazil have given limited importance to public international law. The only rules in the 1988 Federal Constitution regarding international law refer to 'treaties', with no reference to other sources, including customary international law. Even so, the rules dealing with treaties are exclusively dedicated to regulate treaty-making power.

In this context, the academic debate related to this issue has been focused on the hierarchy of treaties, and particularly of human rights treaties. As Francisco Resek points out, until recently the majority of scholars and judges were of the view that human rights treaties were 'alien' and somehow 'imposed' on Brazil by foreign nations.[33] This debate was partly premised on the perception of the negative influence of foreign or 'outside' interference. These views undermined the coherence between international obligations and their domestication.[34]

There are no rules in the Brazilian Constitution regarding the use of international law or international jurisprudence for interpretative guidance. It is thus not surprising that this issue has not yet been the subject of any in-depth research. The perception of most commentators is that there are limited references to international law in Brazilian jurisprudence, and that there is almost no reference to the decisions (or 'jurisprudence') of supra-national bodies, such as the Inter-American Human Rights Commission or Inter-American Court of Human Rights.

Guilherme Amorim conducted research on the use of foreign precedents by the Brazilian Supreme Court, including its reliance on decisions of supra-national bodies and foreign Supreme Courts.[35] He notes that the Supreme Court is increasingly moving towards greater internationalisation. While the Court quoted foreign precedents in 45 decisions in the period of almost 50 years between 1962 and 2009, it handed down 33 decisions featuring foreign precedents in the five years between 2005 and 2009. On the basis of an analysis of these decisions, Amorim concludes that the STF uses foreign precedents in a non-systematic way, and identifies the Supreme Courts of the United States of America and Germany as the most quoted sources.[36]

33 F Rezek, quoted by A Ramos Tavares *Curso de direito constitucional* (2002) 384. The translation is ours.
34 As above.
35 G Amorim Campos Da Silva 'O uso de precedente estrangeiro pelo Supremo Tribunal Federal. Uma Teoria de Unificação do Direito Constitucional Material' Doctoral thesis, Pontifícia Universidade Católica de São Paulo, PUC – SP, 2009.
36 As above.

Three decisions of the STF stand out for their treatment of international law, and are highlighted here. The three cases refer to important human rights issues: the definition of the crime of torture; the demarcation of indigenous lands; and the exercise of freedom of expression.

In the first of these, case HC 70.389 – SP, decided in 1994,[37] the applicability of a federal norm that punishes torture committed against children and adolescents was under consideration.[38] One of the contentious issues was the lack of clarity of the definition of the crime of torture in the federal norm. In this case, the vote that led the majority of the Court quoted international treaties, including the UN Convention against Torture, the Inter-American Convention to Prevent and Punish Torture, and the Inter-American Convention on Human Rights, as 'complementary' norms. Justice Celso de Mello held that those international norms aided in the adequate understanding of the characteristics of the crime of torture as established in Law 8.069.

The second case, decided in 2009, is in all likelihood one of the Supreme Court's most important cases, and probably the one that has thus far generated the most media attention and public debate.[39] In this case, a declaration of unconstitutionality of the decree that regulates the demarcation of indigenous territories, as well as the invalidation of the demarcation of an indigenous territory in the State of Roraima (the Raposa Serra do Sol territory), was requested. The final decision upheld the constitutionality of the decree and maintained the demarcation of the indigenous land of Raposa Serra do Sol, although it also created some restrictions to future demarcations. In this decision of 652 pages, several justices used international law in their votes, quoting ILO Convention No 169 and the UN Declaration on the Rights of Indigenous Peoples. Justice Menezes Direito also quoted the decision of the Inter-American Court in the case of *Awas Tigni v Nicaragua*[40] in support of the contention that, if the STF decided against the demarcation, the country could suffer international sanctions.

Finally, in a third and more recent decision, Justice Gilmar Mendes for the first time quoted an advisory opinion of the Inter-American Court of Human Rights[41] as a complementary argument in support of the unconstitutionality of the Press Act, which had been passed during the last dictatorship. Justice Mendes, President of the STF at the time, also quoted the report of the Special Rapporteur of the Inter-American Human Rights Commission for

37 Brazil Supremo Tribunal Federal, Habeas Corpus 70.3890-SP. Relator: Min Marco Aurelio, 23 June 1994.
38 Art 233 of Children of Adolescent Act, Law 8.069, 1990.
39 Brazil Supremo Tribunal Federal. Petição 3388/RR. Relator: Min Carlos Britto, 19 March 2009.
40 *Mayagna (Sumo) Awas Tingni Community v Nicaragua* Inter-American Court of Human Rights Ser C No 79 (2001).
41 Inter-American Court of Human Rights, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of 13 November 1985. Series A No 5.

Freedom of Expression[42] in support of his arguments on the unconstitutionality of the rule that establishes the need for graduation in journalism as a precondition to work as a journalist.

4.2 India

There are no express provisions contained in the Constitution dealing directly with the relationship between international law and municipal law.

As far as customary international law is concerned, the courts have applied such international rules in the cases of sovereign immunity and more recently in environmental litigation. Arguably, there is no support in the Constitution for upholding the doctrine of incorporation – at least as far as customary international law is concerned.[43] On this basis, the Supreme Court in *Vellore Citizens Welfare Forum v Union of India*[44] accepted the precautionary principle and the 'polluter pays' principle as part of the environmental law of India as having acquired the status of 'well-established principles'. The Court further reiterated that it 'is almost an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts of law'.[45]

Although there is no stipulation in the Indian Constitution about the role of international law in interpreting national legislation and the Constitution itself, the Supreme Court has indicated that international law may be used as an interpretative guide: 'Every statute is to be interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law'.[46]

Unlike the division of human rights into the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), in 1976, the Supreme Court of India held that the fundamental rights and directive principles of state policies in the Constitution (Part III and Part IV) were indivisible, and that neither part was superior to the other.[47] The Court held

42 Brazil Supremo Tribunal Federal, Recurso Extraordinario 511, 961. Relator: Min Gilmar Mendes, Brasília, 17 June 2009.

43 NK Singh 'The Indian Constitution and customary international law: Problems and perspectives' (2000) 81 *The Student Advocate* 95.

44 (1996) 5 SCC 647.

45 As above.

46 CJ Latham, quoted with approval in *Gramophone Company of India Ltd v Birendra Bahadur Pandey* 1984 SCR (2) 664 673.

47 *State of Kerala v NV Thomas* (1976) 2 SCC 310 367. As per Justice Bhagwati in *Francis Coralie Mullin v Administrator Union Territory of Delhi* 1981 AIR 746: This principle of interpretation which means that a constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilised but remains flexible enough to meet the newly emerging problems and challenges, applies with greater force in relation to a fundamental right enacted by the Constitution.

that in building up a just social order, it is sometimes imperative that the fundamental rights should be subordinated to the directive principles.

Although the Indian Constitution does not further explicitly provide for judicial reliance on comparative foreign law, the Indian Supreme Court has over the years shown a very strong inclination to refer to and find interpretative guidance in the constitutions of other countries and in the decisions of the courts of these countries. A very clear preference for countries and courts from the Anglo-American or common law traditions may be discerned. Amongst these countries, the United States, England and Wales, as well as Canada, stand out. However, there has been increased reliance on the South African Constitution and the judgments of the Constitutional Court after 1994. In *Ashoka Kumar Thakur v Union of India*,[48] the Indian Supreme Court, for example, referred to the South African Constitution. By far the most extensive example of reference is found in *Kuldip Nayar v Union of India*,[49] in which the Supreme Court placed extensive reliance on the South African Constitutional Court's judgment in *New National Party of South Africa v Government of South Africa*,[50] to the extent of quoting no less than 15 paragraphs in full text from that judgment. Thus far, no reliance by the Indian Court on its Brazilian counterpart could be identified.

It is not only the Indian Supreme Court that has placed reliance on the South African precedent. As is more fully discussed elsewhere in this volume, the New Delhi High Court in *Naz Foundation v Union of India*[51] found guidance in the South African Constitutional Court's judgment relevant to the issue before it: the constitutionality of the criminalisation of consensual same-sex acts between consenting adults in private, under section 377 of the Indian Penal Code.[52]

4.3 South Africa

4.3.1 International law as interpretive aid

Of the three Constitutions under consideration, the South African Constitution deals most prominently and explicitly with the role of international law in the process of interpretation. Two constitutional provisions are particularly relevant: sections 39(1) and 233. The former deals with the interpretation of the *Bill of Rights* itself, while the latter (as well as section 39(2)) deal with the interpretation of *all legislation*. Both address the role of international law, but in different ways.

48 2007 INSC 334 (29 March 2007).
49 2006 INSC 512 (22 August 2006).
50 1999 3 SA 191 (CC).
51 High Court of Delhi at New Delhi, 2 July 2009; see http://www.indiankanoon.org/doc/1801037 (accessed 28 April 2012).
52 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

Section 39(1) of the Constitution guides the interpretation of the Bill of Rights. It reads as follows:

> When interpreting the Bill of Rights, a court, tribunal or forum –
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law.

A clear distinction is thus drawn between 'international' and 'foreign' law. 'International law' refers to public international law, such as treaties adopted under the auspices of intergovernmental organisations (IGOs), the interpretation of these treaties by international courts or quasi-judicial treaty bodies, and customary international law. It encompasses both the global level, where the United Nations (UN) is the main IGO, and the regional level, with the African Union (AU) as the main IGO on the African continent.

'Foreign law' refers to the law (such as legislation and case-law) of other states. While the Constitution *permits* the consideration of foreign law (section 39(1)(c)), it *compels* all courts to consider international law when interpreting the Bill of Rights (section 39(1)(b)). This distinction may not be difficult to explain if 'international law' refers to obligations of a binding nature (treaties explicitly accepted as binding, or customary international law). However, the *obligation* to 'consider' treaties to which South Africa is not a party, or to 'consider' non-binding 'soft law' standards are more difficult to justify.

Unsurprisingly, South African courts, including the Constitutional Court, have invoked international human rights law in a considerable number of cases. The discussion in this chapter can therefore not do justice to the variety of the case law and scholarly contributions on the topic.[53] The courts have interpreted the term 'international law' to encompass all relevant international law – both treaties and non-binding instruments.[54] In other words, not only human rights treaties such as the ICCPR or African Charter on Human and Peoples' Rights (African Charter), to which South Africa has become a state party, but also treaties only signed, and treaties that South Africa is not even eligible to sign or ratify, such as the European Convention on Human Rights, are included. Non-binding 'soft law' instruments, such as declarations and the General Comments issued by treaty bodies, are also included. In *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development,*[55] the Constitutional Court for example relied on the Guidelines on Justice Matters involving Child Victims and

53 See eg J Dugard (n 20 above) 338, describing judicial reliance on international human rights law as 'common place'; he also cites a long list of relevant scholarly writing.
54 *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.
55 2009 (7) BCLR 637 (CC).

Witnesses of Crime, elaborated by the UN Economic and Social Council, to arrive at an understanding of how a child's best interests are to be shielded during criminal trials.[56] These Guidelines are not binding as such, but contain 'good practice on the consensus of contemporary knowledge and relevant international and regional norms, standards and principles'.[57]

The compulsion to 'consider' non-binding international law may be better understood against the background of a pervasive post-1993 master narrative, which places emphasis on the Constitution as a departure from an insular and isolationist apartheid past, towards the celebration of a constitutional homecoming as a respected member of the international community. It may also be explained by the 'internationalisation' of the legitimacy of particularly the Constitutional Court, in that the need for international conferral located at least in part the legitimacy of constitutional interpretation in the international legal regime. It further firmly positions the South African courts as part of a process of globalised and increasingly globalising judicial dialogue.

Despite the language of compulsion in article 39(1)(b), courts actually quite often showed no indication of having 'considered' international law in relevant cases, particularly where human rights treaties were arguably of great relevance. The failure of courts to indicate any engagement with international law begs the question whether the courts should explicitly signal that they had in fact 'considered' international law, even when they do not rely on it. Read literally, the duty to 'consider' is quite onerous, and a strict application of section 39(1)(b) would require an indication that international law had been considered, even if it was found not to be of relevance or importance. This position cannot be assumed from silence of the judgment about international law.

The content of the requirement to 'consider international law' is not far-reaching: Courts have to consider (and not to *apply* or *enforce*) international law. Despite this relative minimalist obligation, there is little evidence in judgments of courts' engagement with international law. One of the reasons for this dearth of reliance may be that reference to international human rights law is often deemed unnecessary, as many of the relevant norms have already seeped into the South African Bill of Rights. Indeed, international human rights law in no small measure inspired the drafting of the South African Constitution, and in particular the Bill of Rights. In *Director of Public Prosecutions, Transvaal*[58] the Constitutional Court, for example, noted that section 28(2) of the Bill of Rights, which enshrines the best interests of the child, was 'no doubt inspired by international and regional instruments',[59]

56 Paras 78-79.
57 Quoted in para 78 of the case.
58 n 55 above.
59 Para 76.

citing the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child (African Children's Charter).

While it is true that the Bill of Rights reflects many of the provisions of international human rights treaties, in particular the ICCPR, this is not a sufficient explanation for the apparent judicial reluctance to enter into a conversation with and assess the relevance of international human rights standards. Particularly when there are close similarities between the wording of constitutional and international texts, the need to refer to interpretations of these very provisions becomes pronounced.

When the Constitutional Court in fact did make reference to international law, it tended merely to restate the provisions of treaties, often enumerating treaty provisions while highlighting the similarities of differences between these provisions and those under the South African Bill of Rights. More often than not, international *treaties* are referred to, rather than the more *insightful interpretations of these treaties* by relevant tribunals and treaty bodies.

Section 39(1)(b) creates an expectation not merely of referral to international treaties, but also to precedent, as examples of outcomes of the application of provisions, similarly worded to the South African Constitution, in concrete cases. In fact, it seems more important that courts engage with and assess the persuasiveness of the reasoning in comparable cases than merely pointing to the similarities (or dissimilarities) in the wording between the Bill of Rights and other human rights instruments. In other words, it is the judicial elaboration by treaty bodies and international tribunals, rather than the legislative elaboration of standards, that could provide meaningful guidance to South African courts.

South African courts have from time to time indeed relied on such interpretations found in the 'General Comments' on UN treaties, and on the jurisprudence of UN and regional human rights bodies and courts. In *Director of Public Prosecutions, Transvaal,*[60] for example, the Constitutional Court relied on General Comment No 5 of the Committee on the Rights of the Child.[61]

The courts made less use of the African Commission on Human and Peoples' Rights' resolutions and decisions. The judgment in *City of Johannesburg v Rand Properties (Pty) Ltd* provides an example of a missed opportunity to do so.[62] In the judgment, Jajbhay J noted that the African Charter does not include a right to housing, but argued that the right to life and to health 'provides a basis for the assertion' of such a right. This very line

60 n 55 above.
61 Para 77.
62 2006 (6) BCLR 728 (W).

of reasoning informed the Commission's decision in the *Ogoniland* case,[63] and could have been cited in support of the judge's argument.

Even if the term 'international law' is interpreted to include both binding and non-binding law, in the sense that all these sources must be considered, it would still be important to distinguish between the various sources when it comes to their weight and influence in the interpretative process. Seemingly subscribing to this logic, Yacoob J in *Republic of RSA v Grootboom*[64] underlined that 'the weight to be attached to any particular principle or rule of international law will vary'.[65] A major point of criticism is that the Court has often not done so, but has on occasion treated all international law more or less on a par.[66] This becomes particularly problematic if one takes into account that the Court not infrequently relied on instruments that South Africa is not and cannot become party to, such as the European Convention, as interpreted by the European Court of Human Rights. As De Wet points out, different weight has to be attached to an AU treaty, ratified by South Africa, and a non-binding Council of Europe instrument, such as the European Charter for Regional or Minority Languages.[67]

Initially, the Court did not pay much heed to the human rights instruments of the African Union: the African Charter, the Protocol to the African Charter on the Rights of Women in Africa and the African Children's Charter. Neglect of the African Charter is also striking in the *First Certification* case,[68] where extensive reference is made to other constitutions and international instruments,[69] while the African Charter is mentioned twice: once as part of some background on developments in international human rights,[70] and once to support the proposition that a right to intellectual property is rarely recognised in regional human rights conventions.[71] Blatant disregard for the African Charter equally appears from the *Second Certification* case,[72] where the Court did not include the Charter in its survey of freedom of trade under foreign and international law.[73]

63 *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria, African Commission on Human and Peoples' Rights,* Comm No 155/96 (2001).
64 2001 (1) SA 46 (CC).
65 Para 26.
66 E de Wet 'The "friendly but cautious" reception of international law in the jurisprudence of the South African Constitutional Court: Some critical remarks' (2004–2005) 28 *Fordham International Law Journal* 1529 1534.
67 De Wet (n 66 above) 1542-3.
68 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 199*6 1996 (4) SA 744 (CC).
69 *First Certification* case paras 71 & 73.
70 *First Certification case* para 50, fn 46.
71 *First Certification* case para 75, fn 67.
72 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa 199*6 1997 (2) SA 97 (CC).
73 *Second Certification* case paras 18-21.

Since South Africa had become a state party to the African Charter, this tendency changed very gradually. In *AZAPO v President of the RSA,*[74] the South African Constitutional Court had to consider the constitutionality of a provision in the Promotion of National Unity and Reconciliation Act,[75] which precluded the civil and criminal liability of persons granted amnesty under the Act. The argument on behalf of the applicants was that such a preclusion of liability flew in the face of the constitutional guarantee of victims to have justiciable disputes settled by a court of law.[76] Finding against the applicant, the Court held that the right of access to courts had been qualified by the 'Post-amble'[77] of the 1993 Constitution, in terms of which Parliament was required to adopt amnesty legislation. The Court referred to the four 1949 Geneva Conventions and the two 1977 Protocols thereto, but not to the African Charter. Having exhausted local remedies, the applicants could therefore have availed themselves of the protection under article 7(1) of the African Charter which states as follows: 'Every individual shall have the right to have his cause heard', comprising 'the right to an appeal to competent national organs against acts of violating his fundamental rights'.[78] The most plausible explanation for the Court's failure to make reference to the African Charter may be that South Africa acceded to the Charter on 9 July 1996, some time after the Act was adopted, and the fact that the judgment in the case was delivered on 25 July 1996, only two weeks after South Africa had become a state party to the Charter.

Due to their open-ended formulation, the rights in the African Charter may lead to diverging interpretations, especially when the Commission has not given them more concrete content in resolutions or decisions. Used as an interpretative tool, international law may be invoked not only to protect, but also to restrict litigants' benefits under the Constitution. In *Volks NO v Robinson*,[79] for example, the question before the Constitutional Court was whether the Maintenance of Surviving Spouses Act was constitutional in so far as it allowed surviving spouses, and not partners in a permanent life partnership, to benefit from the estate of their deceased spouse. In support of his reasoning that the state had a duty to protect the institution of marriage and therefore could afford protection to married persons that is not afforded to others (such as long term unmarried partners), the Court relied on the emphasis placed on the family under the African Charter, and the right to marry provided for in the ICCPR. However, this interpretation is disputable. The concept of 'family' under the African Charter is not defined, and arguably leaves room for the inclusion of 'heterosexual life partners', especially given that the Charter does not include a 'right to marry'.

74 *AZAPO v President of RSA* 1996 (4) SA 672 (CC).
75 Promotion of National Unity and Reconciliation Act 34 of 1995, sec 20(7).
76 Constitution of the Republic of South Africa, 1993, sec 22.
77 Titled 'National Unity and Reconciliation'.
78 Art 7(1)(a).
79 2005 (5) BCLR 446 (CC) paras 82-85.

Clearly contextualised in a broader African framework, *Kaunda v President of South Africa*,[80] which interrogated whether the South African government has a duty to ensure the right to a fair trial in another African country of nationals who were alleged mercenaries, invoked the African Charter more pertinently. While the majority mentions the Charter, fleetingly, in support of its conclusion that diplomatic protection is not regarded as a human right, the minority places much stronger reliance on and gives more prominence to the Charter in support of its finding that the alleged mercenaries' extradition would lead to an unfair trial. Similarly, in *Doctors for Life International v Speaker of the National Assembly,*[81] both the majority and minority cited international law in support of their conclusions about the scope of public participation that is required for law making. The majority, which required substantial direct participation, found support for its reasoning in the ICCPR and the African Charter.[82] In contrast, the minority found support in 'all' international instruments for its conclusion that indirect public participation 'without any direct component' is sufficient for valid law making.[83]

Other AU treaties are also invoked as interpretative sources. In *Bhe v Khayelitsha Magistrate* (*Bhe* case),[84] the South African Constitutional Court declared unconstitutional and invalidated the rule of male primogeniture as it applied to the African customary law of inheritance. Making reference to provisions of the African Children's Charter, the Court emphasised that it did so 'in interpreting' the relevant provision of the South African Constitution.[85] In a number of other judgments, the African Children's Charter was referred to, often as confirmation of the 'best interest of the child' principle in the South African Constitution,[86] but sometimes more purposively.[87] However, neither in the *Bhe* case, nor in *Shilubane v Nwamitwa*[88] did the Constitutional Court refer to the Protocol to the African Charter on the Rights of Women in Africa in deciding issues relating to non-discrimination against women in a customary law context.

Still, there are instances where the Court could have placed more reliance on African regional human rights instruments. In her analysis of the

80 2005 (4) SA 235 (CC).
81 2006 (12) BCLR 1399 (CC).
82 *Doctors for Life International* 1433-1434; the African Charter, arts 9, 13 & 25 are cited.
83 *Doctors for Life International* 1505H-I.
84 2005 (1) BCLR 1 (CC).
85 Para 55.
86 See eg *B v M* 2006 (9) BCLR 1034 (W) para 137.
87 See eg *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T), in which the CRC and the African Children's Charter are referred to as sources of the right to education and health care of children (para 24). After noting that South Africa subscribes to the principles in these treaties, De Vos J warned that 'all these lofty ideas become hypocritical nonsense if the policies and sentiments are not translated into action' (para 30).
88 2009 (2) SA 66 (CC). For a related discussion, see JD Mujuzi 'The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: South Africa's reservations and interpretive declarations' (2008) 12 *Law, Democracy & Development* 41, the Court referred to the Protocol only in two footnotes (footnotes 57 and 58).

Christian Education case, De Wet argues that by placing interpretive reliance on the European Court of Human Rights, and not on very relevant specified provisions of the African Children's Charter, the Court opens itself to the critique that it entrenches 'the image of human rights as a set of primarily Western values'.[89]

The Court is in need of a more 'methodological approach' to the role of international law in its jurisprudence.[90] A distinction between two categories of 'international law' is suggested: First, the Court should consider and attach weight to treaties ratified by South Africa and enacted into domestic legislation, as an embodiment of its binding international obligations and the general dualist approach followed; international treaties ratified but not domesticated; and customary international law. All these sources give rise to binding obligations on South Africa, either viewed from a domestic or international angle. A second category of 'international law' would be those treaties South Africa has not or cannot ratify, as well as soft law standards. Although these sources are non-binding, they may be persuasive in the interpretive process. However, the source of their persuasiveness is located not in the country's binding international commitments, but more in the nature, authority and suitability of these norms.

Section 39 (rather than section 233) has by far been the most prominent basis for the judgments of courts dealing with international human rights law. This should hardly be surprising, given the compulsion placed by section 39(1)(b) on all courts to consider international law when adjudicating cases involving the Bill of Rights. Section 233 of the Constitution deals with the role of international law in interpreting legislation, more generally. It reads as follows:

> When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

4.3.2 Foreign law as interpretive aid

Despite the fact that courts have the discretion to consider foreign law under section 39(1)(c), reliance on foreign law has been much more frequent and elaborate, especially in the early years of the Constitutional Court's existence. This Court has more frequently relied on legislation and case law of other countries than on international treaties and jurisprudence. In the process, one can talk of the evolution of a theory of constitutional comparison in respect of foreign law, but it is much more difficult to discern such an attempt

89 De Wet (n 66 above) 598.
90 Church *et al* (n 32 above) 218; De Wet (n 66 above) 1541-1546.

as far as international law is concerned.[91] The preference for foreign law is in all likelihood linked to legal tradition and legal culture. South African lawyers have been and still are schooled in a long-standing tradition of comparative law, particularly in the sphere of private law. A lack of competence or confidence may account for the failure of a similar theoretical engagement with the public law sphere. In its consideration of foreign law, including case law, the Constitutional Court has on numerous occasions cautioned against injudiciously or uncritically following a foreign decision.

Similar to the Indian Supreme Court, the South African Constitutional Court shows a predilection for referring to and finding interpretive guidance in the constitutions and courts following the Anglo-American tradition. This preference is no doubt informed by a shared language, a shared legal tradition, and the approach of most legal educators in South Africa. The most prominent countries in this broad circle are Canada, England and the United States. Although less prominent, Australia, Namibia, New Zealand, India, Ireland, Sri Lanka and Zimbabwe should be added to this list. Although 'African jurisprudence' does not feature prominently in the Court's judgments, when it does – as in the *Bhe* case which deals with an aspect that resonates strongly with other African experiences – reliance is exclusively on 'common law' jurisdictions.[92]

Only one non-common law country, Germany, features with any degree of prominence. This position may be explained with reference to the prominent and active jurisprudence of the German Constitutional Court, a long-standing tradition of educational exchange between South Africa and Germany, a shared history of 'totalitarianism, the degradation of human dignity and the denial of freedom and equality',[93] and the fact that this Court's judgments have become available in translation.

To some extent mirroring the position in India, the South African Constitutional Court has on occasion referred to the Indian Constitution and the Supreme Court's decisions. However, the reliance by the South African Court is much more frequent and significant.[94] In *Soobramoney v Minister of Health (KZN)*,[95] the Court found guidance in *Paschim Banga Khet Mazdoor Samity v State of West Benghal*[96] when it drew an important distinction

91 See eg the article by then emeritus Constitutional Court judge, LWH Ackermann 'Constitutional comparativism in South Africa' (2006) 123 *South African Journal on Human Rights* 497.

92 See *Bhe* paras 192-210, where the case law of Nigeria, Tanzania, Ghana and Zimbabwe is analysed.

93 *National Coalition for Gay and Lesbian Equality v Minister of Justice* para 92.

94 In addition to the case discussed below, see also *Zantsi v Council of State, Ciskei* 1995 10 BCLR 1424; 1995 4 SA 615 (CC), para 4; *Case v Minister of Safety and Security* 1996 5 BCLR 608; 1996 3 SA 617 (CC), paras 63, 72, 78; *S v Dodo* 2001 5 BCLR 423; 2001 3 SA 382 (CC), para 32; and *Van Rooyen v S* 2002 8 BCLR 810; 2002 5 SA 246 (CC), para 225, reference in footnote.

95 1997 (12) BCLR 1696 (CC).

96 1996 AIR SC 2426.

between the right to life, to 'access to medical treatment' and to 'emergency medical treatment', and to define the concept 'emergency treatment'.[97] In *Minister of Health v Treatment Action Campaign*,[98] the Constitutional Court's preparedness to issue a far-reaching remedial order (in the form of a 'structural interdict') was strongly influenced by the position in India, as set out in *Metha v State of Tamil Nadu*.[99] In *S v Mamabolo*,[100] the potential conflict between the crime of 'scandalising the court' and the right to freedom of expression was at issue. In his leading judgment, Kriegler J undertakes a survey of the common law jurisdictions mentioned above, as well as Mauritius and Hong Kong. In respect of India, the Supreme Court case of *Narmada Bachao Andolan v Union of India* is referred to.[101] In his separate judgment, Sachs J quotes Chief Justice Gajendragadkar, in support of his view that the power to punish contempt should be exercised cautiously, wisely and with circumspection.[102] In *Fose v Minister of Safety and Security*,[103] the South African Constitutional Court found guidance for its approach to the issue of constitutional damages in the judgment in *Nalibait Behera v State of Orissa*.[104]

In a number of instances, the South African Constitutional Court referred to, but did not follow, the approach of the Indian Supreme Court. One such case is the Constitutional Court's decision in *S v Makwanyane*,[105] declaring the death penalty unconstitutional, in which the South African Court referred to and discussed the Indian Court's decision on the same issue in *Bachan Singh v State of Punjab*.[106] The Constitutional Court noted that the Indian Court's decision not to declare the death penalty unconstitutional was based on differently-worded constitutional provisions, in particular. The Court further noted that the onus of proof in the two judicial systems differ, with the state bearing the burden to justify the rationale for this form of sentence in South Africa, while the petitioners before the Indian Courts had to show that this sentence was 'totally devoid of reason or purpose'.[107] One of the Supreme Court justices, Bhagwati J, dissented. Although this fact is only mentioned in a footnote, the South African judges agreed with his view.[108]

The South African Constitutional Court has not yet referred to any judgment of the Brazilian Supreme Federal Tribunal.

97 *Soobramoney* para 18.
98 2002 (10) BCLR 1075 (CC).
99 (1996) 6 SCC 756.
100 2001 (5) BCLR 449 (CC).
101 (1998) 8 SCC 308.
102 *Mamabolo* para 78.
103 1997 (7) BCLR 851 (CC).
104 1993 AIR 1960.
105 1995 (6) BCLR 665 (CC).
106 AIR 1980 SC 898.
107 *Makwanyane* para 78.
108 *Makwanyane* note 104.

'Consideration' of foreign law does not mean uncritical acceptance. The Constitutional Court on numerous occasions underlined that it will take into account the comparability between the relevant South African and foreign laws, in the light of textual and contextual similarities and dissimilarities.[109]

Over time, a declining tendency of reliance on international law, and particularly foreign law, may be discerned. Some reasons for this trend could be that the South African Constitutional Court has gained more confidence, and is increasingly relying on its own precedents when disposing of cases. The declining trend may also be ascribed to the tendency of the Court to write less elaborate and extensively-reasoned and substantiated judgments – perhaps motivated by an increasingly heavy work load.

5 Judicial application of international human rights law as enforceable law

5.1 Brazil

5.1.1 Domestication of international norms – Non-self-executing: Need for a presidential decree

There is consensus amongst scholars and judges in Brazil that international norms are only applicable after the publication of a presidential decree. The Supreme Court adopted this understanding in 1971 in its judgment RE 71.154.[110] In this matter, the applicability of an international commercial convention regarding cheques was under consideration. This jurisprudence was confirmed in 1998 in a case in which the applicability of a treaty adopted in the context of MERSOCUR regarding the implementation of precautionary measures was under consideration. This treaty (*Protocolo de Ouro Preto sobre Medidas Cautelares*) was approved by Congress and ratified. However, because of the lack of a presidential decree, the Court unanimously decided that it was not applicable.[111] It was the understanding of the Supreme Court that after the publication of the presidential decree, there is no need for an additional law that incorporates the international norm. After the decree, the treaty is directly applicable.

There is no Supreme Court decision regarding other sources of international law, such as international customary law.

109 See eg *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) 216H; *Bernstein v Bester NO* 1996 (2) SA 751 (CC) 722 and further.

110 Brazil Supremo Tribunal Federal, Recurso Extraordinário 71.154/PR. Relator: Min Oswaldo Trigueiro 4 August 1971.

111 Brazil Supremo Tribunal Federal**,** Carta RogatóriaCR 8279 AgR/AT – Argentina, Relator(a): Min Celso de Mello, 7 June 1998.

5.1.2 Treaties are subject to control of constitutionality

It is interesting to highlight that treaties could be declared unconstitutional. Article 102, inc III.c of the Federal Constitution allows for extraordinary appeal to the Supreme Court against a decision that declares the 'unconstitutionality of a treaty or a federal law'. This understanding was confirmed by the Supreme Court in 1997 (ADI-MC 1.480), in which the applicability of International Labour Organisation Convention No 158 was discussed. In that case, the Supreme Court insisted on the supremacy of the Constitution and the possibility of constitutional control of any international treaty ratified by Brazil.[112]

5.2 India

Over the last few years, many scholars have argued for the enforcement of international human rights norms by domestic courts. These are, however, largely normative claims, and only a few scholars have supported their arguments with empirical claims.[113] Scholars across Africa, Latin America, Europe, Australia, Canada and the United States have argued for the enforcement of international human rights norms by the domestic courts, yet there is no such argument advanced by scholars within India.

Regarding the enforcement of customary international law in India, the Supreme Court in *Peoples' Union for Civil Rights v Union of India*[114] held that it is an accepted proposition of law that the rules of customary international law, which are not contrary to the municipal law, shall be deemed to be incorporated in domestic law. In this case, the Supreme Court observed as follows:

> It is almost an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law.[115]

The general rule about the domestic enforcement of international treaties is set out as follows by the Constitution Bench of the Supreme Court in *State of West Bengal v Kesoram Industries Ltd*:[116] 'A treaty entered in to by India cannot become [the] law of the land and it cannot be implemented unless

112 Brazil Supremo Tribunal Federal, Medida Cautelar na Ação Direta de Insconstitucionalidade 1.480/DF. Relator: Min Celso de Mello, 4 September 1997.

113 See eg TT Hansen 'Implementation of international human rights standards through the national courts in Malawi' (2002) 46 *Journal of African Law* 31; RF Oppong 'Re-imagining international law: An examination of recent trends in the reception of international law into national legal systems in Africa' (2006) 30 *Fordham International Law Journal* 296.

114 AIR 1997 SC 568.

115 AIR 1997 SC 568.

116 AIR 2005 SC 1644 para 4.

parliament passes a law as required under article 253.*'* In *Vishakha v State of Rajasthan*,[117] the Supreme Court reiterated that various international covenants, particularly those to which India is a party, may be used as interpretive tools to steer the development of national law. However, the dividing line between using international law as an 'interpretive aid' and 'applying' or 'enforcing' treaty provisions is not rigid. The Court observed as follows:

> Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.

On this basis, the Court found that the rights under the Indian Constitution, while not dealing explicitly with this topic, encompass the prohibition of sexual harassment:

> The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the fields when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.[118]

In support of this approach, the Indian Supreme Court relied on the decision of the High Court of Australia, in which it was held that ratification of an international treaty created the 'legitimate expectation of its observance in the absence of contrary legislative provision'.[119]

Regarding the international trade law rules, in *RM Investment and Trading Co Pvt Ltd v Boeing Co*,[120] the Supreme Court stated that it is to be borne in mind that the Foreign Awards (Recognition and Enforcement) Act, 1961 (now repealed) facilitates the international trade and promotion thereof by providing for the speedy settlement of disputes arising in such trade through arbitration. The Supreme Court in *Bishambhar v State of Uttar Pradesh*[121] further held that in the exercise of the inherent sovereign powers of the state, parliament can even enact laws for extra-territorial operation.

There is no difficulty upholding the applicant's request when the domestic legislation is subsequently enacted giving effect to the international treaty or covenant such as the enactment of the Juvenile Justice (Care and Protection of Children) Act, 2000 in pursuance of obligations under the Convention on the Rights of the Child, 1989. But when there is no subsequent

117 (1997) 3 SCC 433.
118 As above.
119 *Minister for Immigration and Ethnic Affairs v Tech* 128 ALR 535.
120 (1994) 4 SCC 541; 1994 1 Arb. LR 282.
121 AIR 1982 SC 32.

domestic legislation, should the Supreme Court of India still enforce those obligations under the relevant international covenant or treaties?

There are generally two scenarios before the Court. In the first scenario, the international treaty relied upon by the one of the parties to the case has been ratified by the executive. The Supreme Court has recognised the obligation of the state once it ratifies an international treaty to take all necessary measures such as enacting legislation at the domestic level in consonance with treaty obligations. When there is no domestic law giving effect to the provisions of the international treaty or a covenant, the Supreme Court has indirectly enforced them into the domestic law. This is arguably in consonance with the obligations of the judiciary in engaging the responsibility of the state party to an international human rights instrument.[122]

In the second scenario, a relevant international treaty or covenant has not been signed or ratified by the executive. Where the executive has not ratified a relevant international human rights instrument, the Supreme Court has relied on the customary international principles in enforcing the international human rights norms. Thus, two situations could arise before a domestic court in terms of question of enforcement of international human rights norms:

(a) where the executive has signed and ratified an international human rights instrument but not enacted a domestic legislation enforcing its obligations under the relevant treaty; or

(b) where the executive has not signed or ratified an international human rights instrument.

In the first situation, the task before the Court is relatively easy as the Court is simply fulfilling its obligations in enforcing international human rights norms, which is done either by *mentioning, following* or *supporting* international human rights norms. Mostly, the Court has used international human rights norms as a *support* of its decision. Whether it is a question of interpretation of pre-constitutional legislation or the fundamental rights in the Constitution of India, the Court has referred to international human rights norms for the purpose of clarifying the ambiguities in the legislation. The objective of the Court in interpreting domestic law in consonance with international human rights norms is to uncover the values inherent within the domestic law and to promote universal values. In this way, the Supreme Court plays an important role in 'legal internalisation' or 'norms convergence' of international human rights norms as they are incorporated through the judicial interpretation into domestic law.[123]

122 General Comment No 31[80] Nature of General Obligations Imposed on State Parties to the Covenant, 26 May 2004; n 25.

123 HH Koh '1998 Frankel lecture: Bringing international law home' (1998) 35 *Houston Law Review* 642; see also HH Koh 'How is international human rights law enforced?' (1999) 74 *Indiana Law Journal* 1397.

With regard to the second situation, it is argued that the real challenge before the Court is to enforce obligations under certain international human rights instruments which have not been ratified by the executive. The Court is called upon to decide whether a particular human right in dispute has become part of the customary international law or not. So, the challenge before the Court is to define the customary international law in this situation. If the Court comes to a finding that a particular human right forms part of customary international law, and there is no conflicting domestic law, the Court should enforce those international human rights norms. In this situation, the Court *follows* international human rights norms.

In a plethora of decisions, such as *Maneka Gandhi v UOI*,[124] *MS Hoskot v State of Maharashtra*[125] and *Hussainara Khatoon v Home Secretary, State of Bihar*,[126] the Supreme Court has reiterated the importance of recognising international human rights law.

Further, in important decisions such as *Randhir Singh v Union Of India*,[127] *MC Mehta v Union Of India*,[128] *Vishakha v State of Rajasthan*,[129] *MC Mehta v State of Tamil Nadu*[130] and *Apparel Export Promotion Council v AK Chopra*,[131] the Supreme Court has accepted the principles laid down in various international conventions on human rights and environmental issues such the UN Conference on the Human Environment, the Convention on the Elimination of All Forms of Discrimination Against Women, the ILO Seminar held at Manila in 1993, the International Covenant on Economic, Social and Cultural Rights, 1960 and the Convention on the Rights of the Child, 1989.

The relevant policy of the Court was outlined in *Gramaphone Company of India Ltd v Birendra Bahadur Pandey*.[132] National courts, being organs of the nation state and not organs of international law, must per force apply national law if international law conflicts with it. However, the courts are under an obligation, within legitimate limits, to interpret the municipal statute so as to avoid confrontation or conflict with the comity of nations or well-established principles of international law. Hence, it can be seen that international law is being implemented by all courts including the apex court. Thus, when the Supreme Court itself applies international law provisions through recognition of various conventions and treaties, subordinate courts are obliged to implement such international treaty provisions as well.

124 AIR 1978 SC 597.
125 AIR 1978 SC 1548.
126 AIR 1979 SC 1360.
127 AIR 1982 SC 879.
128 AIR 1987 SC 965.
129 (1997) 6 SCC 241.
130 AIR 1997 SC 699.
131 (1999) 1 SCC 759, 776.
132 AIR 1984 SC 667.

5.3 South Africa

The introduction, in the present Constitution,[133] of the notion of 'self-executing' treaties and treaty provisions opens the door for the use by South African courts of human rights treaties as a self-standing and direct source of remedies. A treaty provision is 'self-executing' if it is capable of direct enforcement on the basis of the wording and intention of that particular provision.[134] Still, its actual self-execution arguably depends on some domestic legal rule or principle allowing for its internal domestic effect without the prerequisite that the treaty should have been incorporated into national law.[135]

Since the entry into force of the current Constitution, only one South African case dealt head-on with this issue. Justice Yacoob did remark, in the *Grootboom* case, that 'where the relevant principle of international law binds South Africa, it will be directly applicable',[136] but perhaps he was referring to the 'applicability' of domesticated treaties rather than to the issue of self-execution. This reticence may in part be due to the fact that the Bill of Rights contains a relatively comprehensive catalogue of rights. Self-executing provisions are most likely to be invoked only to supplement existing domestic legal protection. If domestic law exists, including rights protected under the Constitution, international law should be relied upon to steer the interpretation (thus, serving as interpretive guide) rather than as a self-executing provision of law (thus, as a source of a remedy). Only when a treaty provision enlarges the scope of available protection, while being consistent with the Constitution, will the need arise to render its provisions self-executing.

A further factor contributing to the non-use of this possibility is the generally critical and even dismissive view of South African commentators on the provision allowing for self-execution of treaties. In Van der Vyver's view, this 'exception' is 'entirely nonsensical and can best be ignored'.[137] Unfortunately, the substantiation of his view is rather terse. In his opinion, the introduction of the notion of 'self-execution' is an inappropriate importation into South African law, probably from America, based on the distinction between 'international treaties' and 'international agreements', which in his view does not exist in South Africa. He concludes his brief argument with the rather contentious statement that 'all international treaties are non-self-executing'.[138] De Wet also suggests that all treaties

133 Sec 231(4).
134 Note the formulation of sec 231(4): '*[A] self-executing provision* of an agreement' (emphasis added).
135 See eg EM Ngolele 'The content of the doctrine of self-execution and its limited effect in South African law' (2006) 31 *South African Yearbook of International Law* 141 157.
136 Para 26.
137 JD van der Vyver 'Universal jurisdiction in international criminal law' (1999) 24 *South African Yearbook of International Law* 117 130-131.
138 Van der Vyver (n 137 above) 131 n 18.

would in practice be regarded as non-self-executing, based in the main on the assertion that 'treaties do not serve as a direct basis for litigation between private parties', leaving a potential litigant who invokes a self-executing treaty provision without legal standing.[139] However, it may be argued that the requisite standing is derived from the Constitution *as such* (section 231(4)) and not the relevant treaty. Although invoking self-execution may not often be appropriate, its application should not be denied on the basis of a diffident adherence to established doctrine.

The opportunity to bring more clarity and declare a provision in an international human rights treaty came in *Claassen v Minister of Justice and Constitutional Development*.[140] In this case, the High Court considered whether a provision of the ICCPR was self-executing under South African law. Put differently, the Court considered whether a provision of an international treaty could be used as the basis for a legal remedy, without that provision having been domesticated through South African national legislation. This question arose because article 9(5) of the ICCPR, which guarantees to any person who had been detained unlawfully an 'enforceable right to compensation', has no equivalent in the South African Bill of Rights. Unfortunately, the Court answered the question in the negative, and did nothing to provide greater clarity. Killander's argument that article 9(5) is specific enough to be applied as a self-executing provision should have been followed, thus allowing a provision of the ICCPR to be self-executing.[141]

6 Conclusion

Greater internationalisation has occurred in the three countries under discussion, and impacted on the role of international and foreign law in each of them. The discussion above aims to assist lawyers and policy makers in each of these states to better understand the way in which the other two states have dealt with international and foreign law. It is anticipated that there would in future be more frequent reference to and reliance on each other's approaches, and also more attempts to explore the compatibility of the appropriate laws and jurisprudence of the other states.

The place and status of international law is different in each of the three states. Brazil has traditionally been and still is monist. In line with a simplistic understanding of this tradition, it was for long accepted that all treaties automatically become part of national law and had the same status as federal laws. Following regional trends in the Americas, constitutional reform of 2004 endowed *constitutional* status on human rights treaties once the two Houses

139 De Wet (n 66 above) 578, 587.
140 2010 (6) SA 399 (WCC).
141 M Killander 'Judicial immunity, compensation for unlawful detention and the elusive self-executing treaty provision: *Claassen v Minister of Justice and Constitutional Development* 2010 (6) SA 399 (WCC)' (2010) 26 *South African Journal on Human Rights* 338.

of Congress had approved them. The remaining uncertainty was only removed when a 2008 decision of the Supreme Court decided that human rights treaties ratified but not approved by parliament enjoy supra-legal but infra-constitutional status. The judiciary should on this basis engage in 'control of conventionality' of national law and policy, and in the process pre-empt the submission of cases to the UN bodies, or the Inter-American Commission and Court. India follows the dualist tradition. Strictly speaking, treaties can only be invoked as national law once their provisions have been explicitly domesticated. In practice, however, courts have interpreted national law as far as possible in line with international obligations. South Africa falls somewhere in-between. Traditionally a dualist country, the predominant position is still that treaties have to be domesticated before they form part of national law. However, by introducing the possibility of 'self-executing treaties', the Constitution effectively places South Africa in the position of a monism-dualism hybrid. South Africa's position on international law is far more complex than the clear invocation of international law in the Constitution would suggest. While the typical dualistic nature of the state purveys the enforcement and adoption of treaties, very few of these treaties are actually domesticated. South Africa's core strength comes from the use of international law as an interpretive tool, rather than as a source of a remedy (that is, as directly applicable or enforceable rights).

Only the South African Constitution extends an explicit mandate to courts to make use of ('consider') international law as an interpretive tool. As can be expected, the South African Constitutional Court has more frequently referred to international law than the other courts. However, the other two apex courts have not negated international law as a guide in their interpretive endeavours. Even if the South African Court refers more frequently to international law, it did so without any great analytical rigour, and still suffers from a lack of a clear methodological approach to international law. Only in a handful of cases was international law not merely catalogued in a relatively formulaic way, to support the reasoning of the Court. Although South Africa has utilised international law most exhaustively when deciding complex human rights matters, the same cannot be said for the use of international law in other matters.

It is possible that the recent development about the status of international law in Brazil may generate more interest amongst scholars and judicial officers about the jurisprudence of international courts and bodies (such as the Inter-American Commission on Human Rights or the UN Committees). This new understanding will require an effort of systematisation and dissemination of the jurisprudence of the relevant international bodies that are now not easily available and generally not organised in a way that simplifies its quotation.

India's interest in international law has always been profound with the progress and development of international relations in various parts of the

world. This is inter alia reflected in a number of recent decisions of the Supreme Court of India in which it has been compelled to refer to developments in international law. The fact that successive governments have been vigorously pursuing policies of liberalisation, calling for greater integration into the world economy, is only going to increase the intervention of international law in the national life. It is, therefore, imperative that not only the lawyers, policy makers, bureaucrats and academicians need to have a sound understanding of the subject, but it is more important that the judiciary become aware of the interface between international law and municipal law and harmonise the implementation of both laws.

The extent to which foreign law (legislation and particularly case law) features in the three apex courts also differs markedly. Again, it is the South African Constitutional Court that most frequently makes reference to and places reliance on the judgments of foreign courts, in particular those from the Anglo-American tradition. This dominance has its root in a constitutional mandate (albeit one allowing a discretion). The choice of specific countries is informed by a shared language, a common legal tradition, and long-standing educational and other institutionalised inter-country links. Although it lacks a similar mandate, the Indian Supreme Court has also over many years found interpretive guidance in the judgments of courts from many countries, but also mostly from those sharing an Anglo-American jurisprudential tradition. This similarity with the approach of the South African Court highlights the importance of precedent in the common law tradition. It is then perhaps not surprising that the apex courts of the two countries have found reason to rely on each other's judgments. Following the civil law tradition, the Brazilian Supreme Court has been much less inclined to place interpretive reliance on other courts. However, there are some instances in which the Court did so, and some evidence of a rapid increase in this regard. One of the main reasons why the Brazilian Court has not found guidance in the Indian and South African courts is no doubt inaccessibility based on language, as well as the different formal and informal legal traditions. However, the fact that the Court did place reliance on the jurisprudence of US courts, including the US Supreme Court, shows that linguistic factors do not provide a full explanation for the lack of South-South judicial dialogue.

PART C: SPECIFIC RIGHTS AND THEMES

PART C: SPECIFIC RIGHTS AND THEMES

Gender

CHAPTER 9

THE ROLE OF THE BRAZILIAN SUPREME COURT IN THE IMPLEMENTATION OF WOMEN'S RIGHTS: BRIDGING CONSTITUTIONAL NORMS AND REALITY

Daniela Ikawa

1 Introduction

Women's rights were originally conceived as an opposition to patriarchy. As such, those rights were and are mainly grounded on a binary perception of gender inequality, that is, on the antagonism between men and women.[1] A binary perception of inequality strengthens the position of women, as it universalises the demands of the group as having a single set of demands. However, a binary perception also hides the positions of those women who do not necessarily fit the reference implicitly adopted by the feminist movement in its inception: the reference of a high or middle class white heterosexual woman.

The binary perception of inequality highlighted the violations against women's rights taking place in two distinctive spheres of social life: the public and the private spheres. In Brazil, that binary approach can be found in the various phases of the feminist movement in the last century, as an opposition to the traditional (private) place of women in society: in the search for citizenship (political representation, education and sexuality) in the late nineteenth century and in the early twentieth century;[2] in women's (sometimes armed) fight against dictatorship in the 1960s and 1970s,[3] and in

1 SN Mengehel *et al* 'Histórias de resistência de mulheres negras' (2005) 13 *Estudos Feministas* 568; and SG Costa 'Movimentos Feministas, Feminismos' (2004) 12 *Revista Estudos Feministas* 25.

2 C Otto 'O feminismo no Brasil: Suas múltiplas faces' (2004) 12 *Revista Estudos Feministas* 209; avaiable at http://www.scielo.br/scielo.php?pid=S0104-026X2004000200015&script=sci_arttext&tlng=pt (accessed 13 December 2013).

3 CA Sarti 'O feminismo brasileiro desde os anos 1970: Revisitando uma trajetória' (2004) 12 *Revista Estudos Feministas* 35 37. Between the 1937 coup and 1970 the feminist movement in Brazil was quite silent. Otto (n 3 above); and V Montecinos 'Feministas e tecnocratas na democratização da América Latina' (2003) 11 *Revista Estudos Feministas* 351 360, 361

the movement for a democratic constitution that recognised the rights of women to equality in employment and in the family life in the 1980s.[4]

In the late 1980s and the 1990s, however, the feminist movement in Brazil went beyond the binary perspective, following a trend that had already started elsewhere. The feminist movement not only became more professionalised, but also 'atomized',[5] including issues of inequality amongst women. Women started to be regarded not as a purely universal category, but as white, black, indigenous, poor, rich, heterosexual, and homosexual. In this sense, the feminist movement in Brazil began to recognise that different groups of women faced discrimination in different forms and often each of those forms required different legal responses.

The Brazilian Supreme Court has addressed two main issues regarding women's rights in Brazil: discrimination in employment (the maternity leave case) and reproduction (the abortion case). Both issues were addressed from a binary perspective, as they contested the traditional role of women in a patriarchal society with a special focus on the role of women as child bearers. These decisions have or can have great relevance in adapting laws (in the reproduction case, criminal laws) and institutions (in the employment case, the social security system) to the principle of gender equality. They are, however, not sufficient.

The challenges for the Supreme Court on women's rights rely, therefore, not only in strengthening its work on patriarchy-focused cases of gender discrimination, but also in addressing issues of gender discrimination that consider the difference amongst women's identities. This is not an easy task. It requires a fine balance between universalisation of women's demands as a group, on the one hand, and the consideration of particular demands of women situated in different contexts, regarding race, class, sexual orientation, and origin, amongst others.

In part 2 of this article we will discuss the Supreme Court's role in extending the idea of rights beyond the letter of the law to encompass the very implementation of rights. We will analyse two cases: the maternity leave case and the abortion case. Brazil has enacted laws which have promoted gender equality on paper. However, those laws have not been sufficient to eliminate gender inequality in society. One of the missing links to promote gender equality is the adoption of an extended and less formalistic concept of rights by the courts. In this vein, there is still a lot to be done in enforcing women's rights from a binary perspective. In part 3 we will analyse the challenges ahead: strengthening equality between men and women and

4 For instance, women's status in the family significantly changed with the 1988 Constitution, as the Constitution recognised that the 'rights and the duties of marital society shall be exercised equally by the man and the woman' (article 226). In the field of employment, the Constitution established a state duty to protect the labour market for women through specific incentives (article 7, XX).

5 Sarti (n 3 above) 42.

addressing a non-binary perspective of gender inequality with a focus on race and poverty. We will therefore propose a further expansion of the concept of women's rights to encompass diversely situated women. And with that, we will go back to the intersections between gender, race and poverty raised by Sandy Fredman in her piece on gender discrimination in South Africa.[6]

2 The Supreme Court's role in extending the concept of rights

In order to address major issues of gender discrimination, Brazil has adopted a number of laws regarding gender equality in public and private spheres. Gender inequality is, however, still prevalent. One of the main goals of the Supreme Court regarding women's rights is actually bridging this gap between existing laws and social change, by adopting an extended and less formalistic concept of rights, that is, by adopting a concept that reaches beyond the legal text to the actual implementation of rights.

2.1 Positive law

As to the public sphere, Brazil has enacted protective laws in the fields of employment and political representation, amongst others. Besides the general provision on gender equality (article 5, I), the 1988 Brazilian Constitution establishes, for instance, that women's equality in employment should be protected through specific incentives (article 7, XX) and the payment of salaries during maternity leave should be guaranteed (articles 6, 7, XVIII, 201, II, and 203, I). This is a departure from the general understanding of the law until the 1960s,[7] which conditioned, for instance, married women's work to the husband's authorisation (even if that authorisation was presumed).[8] Currently, the labour code complements the 1988 constitutional norm, by reaffirming the possibility of adopting incentives (article 373-A), prohibiting gender discrimination in hiring and promotion practices (article 373-A), requiring the establishment by companies of kindergartens for breastfeeding (article 389), guaranteeing full salary during maternity leave (article 393), and maternity leave in cases of adoption (article 392-A). With respect to political participation, a federal law (9504/1997) established in its article 10 that each political party should assure 30 per cent of candidacies of each sex.

As to the private sphere, Brazil has enacted laws on family issues, civil unions, and domestic violence, amongst others. The Brazilian Constitution

6 S Fredman 'Gender and transformation in the SA Constitutional Court' (Chapter 11 below).
7 Law 4.121/1962 changed the 1916 Civil Code (article 233, IV) to allow married women to work without the husband's authorisation.
8 In 1943, the Labor Code established the rule that the husband's authorisation should be presumed (article 446). However, the husband could contest that presumption in order to annul a work agreement.

establishes that the 'rights and duties in the marital society shall be exercised equally by the man and the woman' (article 226).[9] It also establishes that the state should create protective mechanisms against domestic violence (article 226). Finally, it recognises civil unions (article 226). Besides the adoption of specific laws on domestic violence (11340/2006) and civil unions (9278/1996), Brazil also enacted a new civil code (10406/2002) that clarifies that the heads of the family are both the man and the woman (articles 1567-1569). In the new code the concept of *pater familias* was replaced by the concept of family power (articles 197, 1583, 1618 and others).

In this sense, gender discrimination issues addressed by Brazilian laws are considerably similar to the ones taken to South African courts in the last decades, as highlighted by Sandy Fredman in her contribution to this book:[10] discrimination in marriage, vulnerability of women in co-habiting relationships, domestic violence, and maternity-related issues. Also in Brazil the husband was in charge of the joint patrimony until 1977;[11] women in co-habiting relationships had very few rights recognised until the 1990s; and state tolerance towards domestic violence continues to be such a serious problem that it was the subject of a report of the Inter-American Commission of Human Rights in 2001.[12] The IACHR established that 'the State has adopted a number of measures intended to reduce the scope of domestic violence [but] these measures have not yet had a significant impact on the pattern of State tolerance of violence against women'.[13]

In spite of the legal advances, legal improvements have not been sufficient to address gender inequality in Brazil.

2.2 Insistent inequality

Brazil's 2007/2008 gender-related development index was 0,798.[14] As to employment, the estimated earned income amongst women was 6,204 dollars, while it was 10,664 dollars amongst men.[15] Women's earned income was equivalent to 58 per cent of the male earned income.[16] The economic

9 Law 4.121/1962 was not sufficient to establish that equality. It still established, for instance, that the husband was the head of the family (article 233, 1916 Civil Code, as modified by the 1962 law).
10 n 6 above.
11 Married women were actually considered relatively incapable of performing any civil acts. They were in the same category as children between 16 and 21 years of age (article 6, 1916 Civil Code). The latter situation changed only by law 4.121/1962. However, that law did not change the fact that the husband was the one to manage the joint patrimony (article 233, II, 1916 Civil Code). The husband's management was modified only by law 6.515/1977, changing article 240, 1916 Civil Code.
12 Inter-American Commission of Human Rights. Case 12051, Report 54/01, para 3. http://www.cidh.org/women/Brazil12.051.htm (accessed 23 July 2009).
13 Report 54/01 (n 12 above) para 60.3.
14 UNDP, 2007/2008 Human Development Report 'Gender-related development index' http://hdrstats.undp.org/en/indicators/269.html (accessed 22 July 2009).
15 As above.
16 As above.

activity rate of women was 71 per cent of the male activity rate.[17] With respect to political participation, women had only 9,3 per cent of seats in the parliament,[18] and only 34 per cent of legislators, senior officials and managers between 1999 and 2005 were women.[19] The first woman was elected to parliament in 1933.[20] The first woman was nominated to the Brazilian Supreme Court only in 2000.

Although more specific numbers in the fields of employment and reproduction will be highlighted later in this article, it is already possible to affirm that there is a dire need to implement gender equality norms in Brazil; and this is exactly where the Brazilian Supreme Court can exert a key influence, by adopting an extensive concept of rights.

2.3 Bridging norms and reality: Maternity leave and abortion

The Brazilian Supreme Court has recently addressed two main issues regarding women's rights in Brazil: the public issue of discrimination in employment and the private issue of reproduction. In the first case the Court considered an apparently neutral Constitutional Amendment as partially unconstitutional because of its discriminatory results. The consideration of discriminatory results of apparently neutral legal provisions is still an innovation in Brazilian jurisprudence. In the second case, decided in 2012, the Court decided to consider an extremely controversial issue, the interruption of pregnancy, by opening the process of constitutional interpretation to specialists and civil society organisations. In both cases there was or there is a potential for expanding the concept of rights, to encompass considerations of implementation towards more egalitarian treatment and collective reasoning.

2.3.1 Discrimination in employment: The case of maternity leave

There is considerable gender inequality in the Brazilian job market. Besides the inequality rates mentioned in item 2.2 above, the Brazilian Institute of Geography and Statistics (*Instituto Brasileiro de Geografia e Estatística* – IBGE) emphasises that in the major metropolitan areas in Brazil, 57,7 per cent of the unemployed are women. Forty per cent of women work in the formal job market (under a formal contarct of employment), while approximately 50 per cent of men are in this situation. Also, more women (37 per cent) than men (one third) fail in contributing to the social security system. According to the IBGE, disparities are not, however, explained by differences in education; 59,9 per cent of employed women had 11 years or more of education in 2008, while only 51,9 per cent of men had the same level of education. Women with

17 As above.
18 As above.
19 As above
20 As above.

a university degree earned 60 per cent of what men with a university degree earned.[21]

This is the context in which the Brazilian Supreme Court in the ADI 1.946-5/DF unanimously considered partially unconstitutional the Constitutional Amendment n 20/1998 (art 14). The Court understood that the ceiling to social security benefits established by the twentieth Amendment should not be applied to salaries during maternity leave.[22] The Court understood that if this ceiling were applied to the salary of women on maternity leave, employers would have to cover the costs of the salary surpassing 1200 reais. According to the Court, the latter would foster further discrimination against women in employment: Employers would be more opposed to hiring women and paying women salaries above to 1200 reais.[23] Applying article 14 to maternity leave would, therefore, result in the violation of article 7, XXX,[24] of the 1988 Constitution, which prohibits discrimination between men and women.

The Court also added:

> [W]e cannot assume that law makers intended to revoke art. 7, XVIII[25] when they adopted article 14 of the Constitution Amendment n. 20/1998 … We would be moving backwards in social security matters, [if we applied a ceiling to maternity leave salaries].[26]

In this decision the Supreme Court addressed two issues that contested a liberal view of the judicial branch, a view which is strongly detached from the idea of distributive justice. First, the Court adopted a more complex concept of separation of powers, which is necessary for the application of economic and social rights. It contested – and, by doing this, it intervened in – a distribution of the social security limited resources that discriminated against

21 PM de Emprego 'Algumas características da inserção das mulheres no mercado de trabalho' Recife, Salvador, Belo Horizonte, Rio de Janeiro, São Paulo e Porto Alegre, 2003-2008, Rio de Janeiro: IBGE, 2008, 3, 13 and 16 http://www.ibge.gov.br/home/estatistica/indicadores/trabalhoerendimento/pme_mulher/Suplemento_Mulher_2008.pdf (accessed 23 July 2009).

22 Art 14: 'O limite máximo para o valor dos benefícios do regime geral de previdência social de que trata o art. 201 da Constituição Federal é fixado em R$1.200,00 (um mil e duzentos reais), devendo, a partir da data da publicação desta Emenda, ser reajustado de forma a preservar, em caráter permanente, seu valor real, atualizado pelos mesmos índices aplicados aos benefícios do regime geral de previdência social'. Translated as follows (by author): 'The maximum value of benefits for the General Social Security System mentioned in art. 201 of the Federal Constitution is fixed at R$1,200.00 (one thousand and two hundred reais). It shall, from the date of the publication of this Amendment, be readjusted in order to preserve, permanently, its real value, adjusted by the same indices applied to all the benefits of the General Social Security System.'

23 (Supremo Tribunal Federal (Brazilian Supreme Court), ADI 1946-5/DF, 3/4/2003, 52, para 10).

24 The constitution prohibits 'any difference in wages, in the performance of duties and in hiring criteria by reason of sex, age, colour or marital status'.

25 The constitution establishes that urban and rural workers have the right to 'maternity leave without loss of job and of salary …'.

26 Supremo Tribunal Federal (Brazilian Supreme Court), ADI 1946-5/DF, 3/4/2003, 123.

women. In this vein, the Court balanced issues of distributive justice and recognition. Second, the Court balanced issues of distributive justice and recognition, by extending the concept of rights to encompass not only the letter of the law, but also the results in terms of resource distribution and discrimination. The letter of article 14 of the 20th Amendment was after all apparently neutral.

As to the first issue, the Court understood the need of contributing to a fair distribution of social security resources in a context where resources are limited. A preliminary decision emphasised, for instance, the concerns of a congressman that 'amount[s] exceeding the ceiling of 1200 reais [could] not be … supported [anymore] by the Social Security System'.[27] The ceiling imposed by article 14 of Amendment 20/1998 was therefore considered constitutional by the Court as a general rule. However, the Court understood that imposing that ceiling to salaries of women during maternity leave and forcing employers to bear the payment of the amount exceeding that ceiling would cause an increase in gender-based discrimination in the field of employment. Although the rule established by article 14 seemed neutral and non-discriminatory, an assessment of the impact of that rule showed a potential for further discrimination against women.

As to the second issue, the Court used a concept of indirect discrimination, not yet common in Brazilian courts, broadly to define a social right: the right to integral salaries during maternity leave. It also assessed the potentially discriminating impact of an apparently neutral provision, in order to consider a constitutional amendment partially unconstitutional.[28]

2.3.2 Violation of women's rights in reproduction: Interruption of pregnancy

As mentioned in the introduction, discrimination against women has been mainly grounded in Brazil on the binary opposition between men and women and between the public and the private spheres. In the maternity leave case, mentioned above, the connection between the public and the private

27 On the comment made by Michel Temer. Supremo Tribunal Federal (Brazilian Supreme Court), ADI 1946-5/DF, 29/4/1999 70, para 2, preliminary decision, which suspended the application of art 14 to maternity leave.

28 In another case involving gender discrimination in employment, ADI 2487-6/SC (30/8/2007), the Brazilian Supreme Court decided on the constitutionality of a state law of Santa Catarina, which not only prohibited gender-based discrimination in the field of employment (following the federal constitution and the federal labor law), but also established administrative sanctions against employers who did not comply with the norm. Although the state law was considered to be clearly unconstitutional (the federal government is the one in charge of legislating on labor law and inspection), there were comments by justices, supporting the law's content. Marco Aurélio Mello, for instance, mentioned that he was 'almost daring […] to propose the text of the state law to the national congress as an inspiration for a future federal law'. Other justices discussed the possibility of considering the state law only partially unconstitutional, excluding its sanctions, but concluded that then the state law would lose its main provisions. Supremo Tribunal Federal (Brazilian Supreme Court), ADI 2487-6/SC, 30/8/2007 208, 210 and 211.

spheres was especially acute, because the Court dealt with a maternity-related discrimination in the public sphere of employment. That decision is relevant, therefore, not only because it recognised indirect gender discrimination in employment, that is, in the public sphere. It is also relevant because it is one step further in better organising the public sphere[29] so that gender-based inequalities in both the public and the private spheres are overcome. The Court implicitly understood in that case that maternity duties should be shared by society through better laws and public institutions, in order to tackle gender discrimination in Brazilian society. In other words, by adopting that understanding the Court contested the extent of women's role as child bearers.

The Brazilian Supreme Court has more recently, however, adventured in the core of the private sphere, by considering admissible a case of abortion.[30] Because of the high risks to women's health, feminist organisations in the 1990s started to consider the high rates of unsafe abortions in Brazil as an issue of public health.[31] Abortion was the fourth cause of maternal death in Brazil between 2002 and 2004.[32] This problem is, moreover, unequally distributed amongst Brazilian women: High mortality rates resulting from unsafe abortions reflect mainly a problem of poor and black women.[33]

The case decided by the Brazilian Supreme Court is not, however, a usual case of abortion. Some Supreme Court Justices have actually questioned whether this is an abortion case or merely a case about a criminally atypical conduct concerning the interruption of pregnancy, when the fetus has no

29 As emphasised by Suely Gomes Costa, public social services towards children and the elderly have been discarded in favor of a domestic structure that is mainly maintained in higher classes by poor women, who work as domestic employees. Costa (n 2 above) 29.
In this regard, see also Montecinos (n 4 above). She affirms that women's reproductive roles have been again disregarded in the privatisation of social security systems.Public structures should therefore be better organised in order to replace the domestic structure, allowing rich and poor women to move from the private to the public sphere.

30 Supremo Tribunal Federal (Brazilian Supreme Court), ADPF 54-8/DF, 20/10/2004.

31 L Scavone 'Políticas feministas do aborto' (2008) 16 *Revista Estudos Feministas* 675 676-7.

32 Committee on the Elimination of Discrimination against Women, Responses to the list of issues and questions with regard to the consideration of the sixth periodic report, Brazil, CEDAW/C/BRA/Q/6/Add.1, 4 May 2007 25. Also, according to the Committee, the '[i]llegal practice of abortion in Brazil precludes the existence of reliable statistics to support more precise and specific public policies targeting the different regional realities and age groups in which unwanted pregnancies are more prevalent. In 2006, 2067 legal abortions were performed, in conformity with Art. 128 of the Brazilian Penal Code, which addresses the risk of life to women and pregnancies resulting from rape. In the period from 2004 to 2006, the Unified Health System registered 243.988 (2004), 241.019 (2005) and 222.135 (2006) women who were submitted to curettage post-abortion. Such practice is the second most common obstetric procedure in hospitals and clinics, behind only of normal childbirth (eutocia). Financially, it represents approximately R$ 35 million annually.'.

33 On poor women, see the opinion of Justice Ellen Gracie. Supremo Tribunal Federal (Brazilian Supreme Court), ADPF 54-8/DF, 20/10/2004 (plenary decision on admissibility) 205-6.
On black women, see CEDAW (n 32 above): '[D]eath rates due to abortion [are] more frequent among African-descendant women'.

chance of surviving.[34] The case can be described as the following. The Brazilian Criminal Code establishes that abortion is a crime with only two exceptions: to save the life of the mother or when pregnancy results of a criminal act. The case before the Supreme Court involves neither of the latter exceptions. It deals instead with the interruption of pregnancy when the fetus is anencephalic and, therefore, has no chance of surviving.[35] Plaintiffs claimed that in such a case, criminalising the interruption of pregnancy is a violation of articles 1, IV (principle of dignity); 5, II (principle of liberty and authonomy); 6 (right to health); and 196 (right to health) of the 1988 Constitution. The violation would be even more serious as anencephaly can allegedly be identified with complete 'certainty from the eighth week of pregnancy on'.[36]

The Supreme Court issued two preliminary decisions in the anencephaly case: (a) first an individual decision recognising a constitutional right of women to interrupt pregnancy in cases of anencephaly and suspending criminal procedures against those who had interrupted or had helped interrupting pregnancy of anencephalic fetuses;[37] and (b) second a plenary decision temporarily revoking the recognition of a constitutional right, but maintaining the suspension of criminal procedures in such cases.[38] In 2012, the Supreme Court decided the merits of the case, allowing interruption of pregnancy in cases of anencephaly.

The circumstances of the case emphasise the balance between the mother's rights to health, privacy, liberty, and not to be subject to inhumane suffering, on the one hand, and the momentary life of a being with no potential to survive, on the other.[39] The circumstances of the case show, therefore, why this is an example of gender discrimination. Here the

34 See, for instance, Carlos Britto's opinion, Supremo Tribunal Federal (Brazilian Supreme Court), ADPF 54-8/DF, 20/10/2004 122. See also Sepulvida Pertence's opinion, Supremo Tribunal Federal (Brazilian Supreme Court), ADPF 54-8/DF, 20/10/2004 227-228.

35 On 28 May 2009, 'obstetrician doctors, genetic and fetal specialists assured the Supreme Court that anencephalic fetuses have no chance of surviving': M Gallucci 'STF deve aprovar aborto de anencéfalo por 11 a 0, diz ministro' *O Estado de S. Paulo Online* 28 August 2008, 17:42. http://www.estadao.com.br/vidae/not_vid232485,0.htm (accessed 1 June 2009). The lethality of anencephaly convinced Cláudia Werneck, founder of an organisation of persons with disabilities (Escola de Gente), that anencephaly is not a disability, and that 'interrupting pregnancy in this case is not a violation to the right to life': D Abreu 'STF continuará audiência sobre aborto por anencefalia no dia 16' *Globo.com* 4 September 2008 http://g1.globo.com/Noticias/Brasil/0,,MUL748357-5598,00-STF+CONTINUARA+AUDIENCIA+SOBRE+ABORTO+POR+ANENCEFALIA+NO+DIA.html (accessed 1 June 2009).

36 Citing Doctor Heverton Peterssen, Brazilian Society of Fetal Medicine, Justice Marco Aurélio Mello emphasised that nowadays: 'anencephaly can be diagnosed with one hundred percent of certainty from the eighth week of pregnancy on. This was not possible in 1940s, when the Brazilian Criminal Code was enacted' see Gallucci (n 35 above).

37 Tribunal Federal (Brazilian Supreme Court), ADPF 54-8/DF, 21/06/2004.

38 Tribunal Federal (Brazilian Supreme Court), ADPF 54-8/DF, 20/10/2004.

39 In this vein, Justice Carlos Britto commented: '[i]n this moment I still think that the main issue here, above all, is the gender issue. We are a culturally chauvinist society ... If men could become pregnant, I have no doubts to affirm that abortion would not be a crime in any circumstances ... Are we discussing here a right ... to be born in order to die?' Supremo Tribunal Federal (Brazilian Supreme Court), ADPF 54-8/DF, 20/10/2004 (plenary decision on the admissibility of the case) 89-90.

naturalisation of gender roles implies an absolute duty for women to bear children. In the face of such naturalisation, any suffering is downplayed. This is reflected, for instance, in the opinion of Justice Cezar Peluzo:

> Suffering is not something that degrades human dignity; it is an inherent element of human life ... The judicial system tolerates human suffering, because it would be pointless to aim at eradicating suffering from human experience. I do not want to discuss the ethical aspect of this issue ... but suffering can even make people better in certain circumstances.[40]

In response to the naturalisation of gender roles, other Justices raised two arguments, regarding the possibility of moral choice and the objectification of women. As to the former, Justice Carlos Britto cited Roberto Gambini: 'Scared, we realize that nature creates and destroys our paradises. Nature is not ethical, but we must be! ... We can choose to be'.[41] With respect to the latter, Justice Marco Aurélio Mello (as the case's rapporteur) emphasised that:

> Humanity impedes the objectification of persons; it impedes the use of a person as an object ... The continuation of pregnancy [in cases of anencephaly] damages women's and their family's moral and psychological integrity.[42]

Besides navigating through a private sphere of reproductive rights that is still often alien to Brazilian courts, the preliminary decisions of the Supreme Court in this case involved two innovations: they gave a more complex interpretation to the principle of separation of powers[43] and they opened a participatory discussion about the issue. In an interview Justice Marco Aurélio Mello clarified that: 'We are not legislators. We interpret the normative system in an integrative manner, to make the system efficient. We act upon the positive law enacted by congress'.[44]

This integrative approach to the principle of separation of powers is, therefore, a way to expand rights towards more efficient implementation.

But this preliminary decision was relevant also because it was preceded by a participatory process of constitutional interpretation. The case was brought by the National Confederation of Health Workers before the Supreme Court in 2004 through a relatively new remedy: the Claim regarding the Noncompliance with a Fundamental Provision (Arguição de Descumprimento de Preceito Fundamental - ADPF). Regulating article 102 of

40 Supremo Tribunal Federal (Brazilian Supreme Court), ADPF 54-8/DF, 20/10/2004 (plenary decision on the admissibility of the case) 95.
41 Carlos Britto's opinion: Supremo Tribunal Federal (n 40 above) 128.
42 Marco Aurélio Mello, Supremo Tribunal Federal (n 40 above) 34-35.
43 The separation between the church and the state was also highlighted by Justice Joaquim Barbosa: '"We still have a crucifix in the courtroom, but there was a separation between the church and the state. We should raise in this case technical arguments, constitutional arguments, and not fundamentalist ... religious perspectives', Supremo Tribunal Federal (Brazilian Supreme Court) (n 40 above) 83.
44 Gallucci (n 35 above).

the 1988 Brazilian Constitution, law 9.882/1999 established the possibility of the Court holding public hearings in ADPF cases with the participation not only of the plaintiffs, but also of specialists (article 6). This approach to the constitution as a living text was put into play through a series of public hearings in the case of anencephaly. Twenty five oganisations, secretaries of State, and scientists were heard.[45] Instead of simply avoiding a highly politicised case, the Court refined the lines dividing law and politics, by bringing diverse and specialised testimony to the Court. It put into place a more sophisticated judicial process, which could cope with very complex discussions and still address the rights of women.

3 Challenges ahead: Race and poverty

The Brazilian Supreme Court has, therefore, innovatively approached women's rights cases. However, there is much more to be done not only in traditionally patriarchy-focused cases, but also in cases that recognise the differences of identity amongst women.

As mentioned earlier in this article, in the 1980s and 1990s the feminist movement in Brazil went beyond the binary perspective of discrimination to include issues of inequality amongst women.

This transition is yet to be reflected at the Supreme Court. The Brazilian Supreme Court should have a role not only in strengthening equality between a universal idea of man and a universal idea of woman, but also in strengthening equality between men and women in diverse contexts, as well as equality amongst women. Although contexts vary enormously with regard to race, class, sexual orientation, and origin, amongst others, two issues will be focused here concerning a non-binary perspective of gender discrimination: race and poverty.

3.1 Black women

Sandy Fredman wrote in her article on gender discrimination in South Africa that:

> Gender is intensely racialised: under apartheid, the radical difference in oppression of black and white women is encapsulated in the pervasive symbol of 'maids and madams'. While the white 'madams' experienced patriarchy in many of its suffocating social and legal forms, their dominance over black 'maids'

45 Supremo Tribunal Federal (Brazilian Supreme Court) Notícias STF: 'Chega ao fim audiência pública sobre interrupção de gravidez por anencefalia' (The public hearing on interruption of pregnancy on anencephaly cases reaches its conclusion) 21 June 2006 http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=67233&caixaBusca=N (accessed 15 June 2009).

> meant that the fault-lines of power and identity ran primarily on racial lines … Black women's oppression was both racial and sexist, legal and social.[46]

This is unfortunately also the case in Brazil, in the sense that black women are at the bottom of the Brazilian social pyramid. Let's take, for instance, health and employment indicators. As to health, mortality rates are two times higher for black women (excluding here 'coloured' women) than for white women during pregnancy.[47] In research conducted on 9.633 Brazilian women (51,9 per cent white, 29 per cent coloured and 19 per cent black) who had given birth between July 1999 and March 2000 in maternity hospitals in the city of Rio de Janeiro, 31,8 per cent of black women and 28,8 per cent of coloured women against 18,5 per cent of white women had to go to more than one hospital before being admitted. Besides, more white women had access to anesthesia than black and coloured women: 21,8 per cent of black women and 16,4 per cent of coloured women did not have access to anesthesia.[48] It was also assessed that 43,7 per cent of white women were assisted in private hospitals, while 89,5 per cent of black women and 78,9 per cent of coloured (parda) women were assisted either in public hospitals or in hospitals linked to the Brazilian unified health system (SUS), indicating de facto segregation.[49] In 2000, 8,9 per cent of black Brazilian women who gave birth in the Northern region of Brazil had not had access to prenatal consultations, while only 6,5 per cent% of white women had not had such access. It means that black women had 36 per cent less access to prenatal consultation than white women. In the Northeast region of Brazil, black women had 46 per cent less access. The situation was similar in other regions in Brazil.[50] In 1999, for every 100 000 women, 11.39 black women and 4.92 white women died of AIDS in the State of São Paulo.[51]

46 Fredman (n 6 above).

47 Basic data collected from SIM – Data*SUS*/FSeade and Instituto de Saúde/SAT cited in LE Batista *et al Mortalidade da População Adulta no Brasil e Grandes Regiões Segundo sexo e raça/cor*; FLopes F *Saúde da População Negra no Brasil: contribuições para a promoção da eqüidade* Relatório Final – Convênio UNESCO Projeto 914BRA3002, Brasília: FUNASA/MS (2004); F Lopes 'Experiências desiguais ao nascer, viver, adoecer e morrer: tópicos em saúde da população negra no Brasil'; Ministerio da Saúde - Fundação Nacional da Saúde *Saúde da População Negra no Brasil: Contribuições para a Promoção da Eqüidade*, FUNASA, Brasilia (2005) 28.

48 M Leal *et al* 'Desigualdades raciais, sociodemográficas e na assitência ao pré-natal e ao parto, 1999-2001' (2005) 39 *Revista Saúde Pública* 103; F Lopes 'Experiências desiguais ao nascer, viver, adoecer e morrer: tópicos em saúde da população negra no Brasil' in Ministerio da Saúde - Fundação Nacional da Saúde *Saúde da População Negra no Brasil: Contribuições para a Promoção da Eqüidade* (2005) 28.

49 As above.

50 EMGP Cunha & AAE Jakobo 'Diferenciais raciais nos perfis e estimativas de mortalidade infantil para o Brasil' in F Lopes *Saúde da População Negra no Brasil: Contribuições para a promoção da eqüidade* (2004) 19.

51 F Lopes 'Mulhers negras e não negras vivendo com HIV-AIDS no estado de São Paulo: Um estudo sobre suas vulnerabilidades' Tese de doutorado, Faculdade de Saúde Pública, USAT São Paulo, 2003, cited in R Adorno *et al Quesito cor* no sistema de informação em saúde. *Estudos avançados* (2004) vol 18 119. Available at http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0103-40142004000100011 (accessed 13 December 2013).

With respect to employment, disparities between white and black women can also be found. Between 1995 and 2006 for instance, participation in the labour market increased 7 per cent amongst white women and only 4,4 per cent amongst black women.[52] However, disparities are not restricted to the percentage in participation. They also exist with regard to the quality of women's participation in the labour market.

And with that, we go back to Fredman's comment above. To a certain degree, also in Brazil 'the radical difference in oppression of black and white women is encapsulated in the pervasive symbol of "maids and madams"'.[53]

3.2 Poor women and racialisation of poverty

While white men with regular work mainly held positions in government (45,7 per cent) or as entrepreneurs (23,4 per cent) in 2006, only 37,6 per cent of black men worked in government and 24,7 per cent were entrepreneurs. With regard to women, white women with regular work mainly held positions in government (42,9 per cent). Only 12,9 per cent of white women were domestic employees. As to black women with regular work, they were also mainly employed by the government (29,5 per cent), but at a much lower rate than white women. Another major occupancy amongst black women was domestic employment (21,8 per cent).[54] One in every five black women was therefore a domestic employee in Brazil. Black women were also 75 per cent of women employees not formally protected by legal guarantees in Brazil.[55]

Those disparities are reflected in salaries. In 2006, the average monthly salary of white men was 1.164 reais. This salary was 56,3 per cent higher than that of white women, 98,5 per cent higher than that of black men, and 200 per cent higher than that of black women (388,18 reais).[56] The average monthly salary of black women was approximately half of that of white women.[57]

This difference in oppression will necessarily have an impact on the types of demands to be raised by black and white women before the courts. One example of how diverse those demands can be is found in a 1982 decision of the Supreme Court (issued under the 1967 Constitution). In the case AI 87831

See also D Ikawa & L Mattar 'Racial discrimination in access to health: The Brazilian experience' (2009) 57 *Kansas Law Review* 949 http://www.law.ku.edu/publications/lawreview/pdf/9.0-Ikawa_Final.pdf (accessed 23 July 2009).

52 M Paixão & F Gomes 'Histórias das Diferenças e das Desigualdades Revisitadas: Notas sobre Gênero, Escravidão, Raça e Pós-Emancipação' (2008) 16 *Revista Estudos Feministas* 949 956.

53 Fredman (n 6 above).

54 Paixão & Gomes (n 53 above) 956-959 & 961.See also C Biderman & NA Guimaraes 'Na Ante-Sala da Discriminação' (2004) 12 *Revista Estudos Feministas* 177 183; and Montecinos (n 4 above) 355.

55 Paixão & Gomes (n 52 above) 961.

56 As above.

57 As above.

AgR/SP, the Court ruled on the inadmissibility of an anti-discrimination claim brought by a couple on behalf of their domestic employee. The plaintiffs alleged that the rule established by the owners of the building where they lived, prohibiting access of domestic employees to the swimming pool, was discriminatory and violated article 153, paragraph 1, of the 1967 Constitution. Article 153 provided that 'all persons are equal before the law, without distinction regarding sex, race, work, religion or political convictions'. The First Chamber of the Supreme Court unanimously decided, on the words of Justice Néri da Silveira, that the provisions established by the building owners were protected by the right to property 'to the extent allowed by social harmony'.[58] In a shocking display of self-restraint, the Court also understood that there was no violation of article 153. It added that the Court could not 'replace the criteria used by the building manager more conveniently to implement the rules established by the building owners'.[59]

The case above does not display a clear violation of women's rights unless one notices that women, especially black women, are the great majority of domestic employees. The consideration of cases that transcend a non-binary perspective of gender discrimination involves therefore a much more complex analysis of reality, which encompasses issues of race and poverty, amongst others. It also requires the adoption of an extended conception of women's rights that encompasses the diverse discrimination problems originated in the realities of diversely situated women.

4 Conclusion

The Brazilian Supreme Court had the opportunity to analyse two key cases involving women's rights, and it did so by extending the concept of rights beyond the letter of the law to assure better implementation. It implicitly recognised the institute of indirect discrimination in the maternity leave case, adopted a more complex concept of separation of powers, interfered in issues of distributive justice (taking a needed step to implement a social right), and dared to address a core issue of reproduction by contesting the naturalisation of gender roles.

The Court has, however, an even larger role in promoting gender equality. The challenges for the future rely not only on assuring equality from a binary perspective, but also assuring equality from a multiple perspective, that is, a perspective that recognises women's multiple identities. To face those challenges, the Court will have to balance the need to articulate women's rights as universal with the need to take into account subjective

58 Supremo Tribunal Federal (Brazilian Supreme Court), AI 87831 AgR/SP (First Chamber decision on the inadmissibility of the case), 8/6/1982.

59 As above. The Brazilian Supreme Court has decided other cases involving domestic employees, such as: HC 95426 MC / RJ - RIO DE JANEIRO (13/08/2008); RE 94912 / RS - RIO GRANDE DO SUL (30/03/1982); RHC 46706 / MG - MINAS GERAIS (07/03/1969); HC 41207 (03/12/1964); and RHC 31733 (30/09/1951).

experiences.[60] It will not be an easy task, but it will be one that the Court has the potential to take.

60 Although not addressing the role of the courts, Sarti (n 3 above) 44-45 discusses this balance.

CHAPTER 10

GENDER JUSTICE AND THE INDIAN SUPREME COURT: THE POST-COLONIAL PROJECT

Indira Jaising[1]

1 Introduction

The Constitution of India was adopted in 1950 and is, in a manner of speaking, a child of the post-World War II period and, like most of its sister documents, aware of the demands of a post-Holocaust world. It was, therefore, necessarily influenced by the Universal Declaration of Human Rights and contained the guarantee of fundamental rights. Any law could be struck down if it violated fundamental rights.[2] On the one hand, the Constitution entrenched 'first generation' or 'civil and political' rights, including the right to free speech and expression and the right to work, as justiciable rights. Rights of the post-World War II period, such as the right to a free and fair trial and the right against self-incrimination, were necessarily conferred on the constitutional citizenry. On the other hand, the Directive Principles of State Policies (DPSP) were expressions of the second generation socio-economic and cultural rights, considered fundamental to the governance of the country, yet not enforceable. It was only much later that the courts started interpreting fundamental rights in the context of the DPSP and thereby indirectly enforcing them.

While the Supreme Court of India was a child of the Constitution of a nascent Republic, it was also the heir to colonial British India's federal court system. Hence, it is imperative that before we seek to understand the contours of gender justice and the decisions taken by the Supreme Court, an attempt is made to understand the colonial legacy of our courts in the light of the history of colonialism and imperialism around the globe. The 1950 Constitution of India in article 372[3] ensured that pre-constitutional laws

1 Director, Lawyers Collective, Women's Rights Initiative and Additional Solicitor-General, Government of India. The author thanks Jhuma Sen for her research assistance.

2 Constitution of India, Part III (Fundamental Rights).

3 'Continuance in force of existing laws and their adaptation. (1) Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately

continue in force. This made the Court very comfortable with inherited jurisprudence, uncodified personal laws and common law. Later we will see the devastating consequences of this for women in what has come to be known as 'personal laws'. Elsewhere I have argued that a woman in India has little significance as an individual; her claim upon the state is lost in a labyrinth of mediators like family or religious groups to which she belongs.[4] The Supreme Court too has repeatedly lost the opportunity of articulating a jurisprudential framework within which the demand for equality by the woman as an individual can be constructed.

Being new to the very concept of equality, the Court borrowed from the Constitution of the United States of America and from the American Supreme Court the concept of 'classification' as the heart of the doctrine of equality, treating like alike and unlike unalike. This approach, too, had devastating consequences for women in the early years following the adoption of the Constitution. It was only much later that we saw an emerging jurisprudence of substantive equality for women.

The question of gender justice can be answered by mapping the trajectory of the Supreme Court in three distinct yet overlapping post-independence phases. While the early phase of the Court was influenced by pre-constitutional modes of delivering justice, only responding to formal

3 before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority. (2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law. (3) Nothing in clause (2) shall be deemed (a) to empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution; or (b) to prevent any competent legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause. Explanation I: The expression law in force in this article shall include a law passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas. Explanation II: Any law passed or made by a legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra-territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra-territorial effect. Explanation III: Nothing in this article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force. Explanation IV: An ordinance promulgated by the governor of a province under section 88 of the Government of India Act, 1935, and in force immediately before the commencement of this Constitution shall, unless withdrawn by the governor of the corresponding state earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that state functioning under clause (1) of article 382, and nothing in this article shall be construed as continuing any such Ordinance in force beyond the said period.'

4 I Jaising 'From "colonial" to "constitutional", gender justice and governance' in I Jaising (ed) *Men's laws, women's lives: A constitutional perspective on religion, common law and culture in South Asia* (2005).

equality, the second phase of the Court was marked by the emergence of a decisive break within the British adversarial mode of dispensing justice and a shift in the focus from civil and political rights to socio-economic rights. The second phase merges into the third, as liberalisation and globalisation became the new mantra of the Court, replacing the more socialist-leaning DPSP. When challenged, legislation was often upheld during this era on the ground that it would further the agenda of liberalisation and privatisation. It was also the era when the courts became aware of international law and made reference in their judgments to the treaties signed and ratified by India to support their reasoning. This, as I will demonstrate, has some beneficial effects for women, in that it focused attention on substantive equality. Finally I will revisit the issue of personal laws and argue that when it comes to the issue of marriage, divorce and inheritance, religious identity and not fundamental rights governs the outcome of decisions by the courts to this day. While much has changed in the Indian Supreme Court, the one thing that has not changed is that in the private sphere, women must be kept in their place, and that the law stops at the doorstep of the home.

2 Towards a new Constitution

The Constituent Assembly was given the task of drafting 'the greatest political venture' since the one that originated in Philadelphia in 1787.[5] True to its origin as a post-World War II nation state, the Constitution sought to make citizens out of the subjects of a colony of the Empire. Equality, which was politically and legally unattainable during the colonial period, was incorporated into the written Constitution. The constitutional doctrine of equality encapsulated by articles 14,[6] 15[7] and 16,[8] is the guarantee of non-

5 G Austin *Working a democratic constitution: The Indian experience* (2000).

6 'Equality before law. The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.'

7 'Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. (1) The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and palaces of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of the general public. (3) Nothing in this article shall prevent the state from making any special provision for women and children. (4) Nothing in this article or in clause (2) of article 29 shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.'

8 'Equality of opportunity in matters of public employment. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state. (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the state. (3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the government of, or any local or other authority within, a state or Union territory, any requirement as to residence within that

discrimination against the state. Article 14 of the Constitution guaranteed equality before the law and equal protection under law. The equality doctrine does not require that the law treat all individuals exactly the same, in that it allows the state to make classifications on reasonable grounds. Article 15 of the Constitution prohibited discrimination on the ground of religion, race, caste, sex, and place of birth. Article 15 built the concept of affirmative action for women and children into article 15(3), but not much has come of its potential use in decision making. Yet, the potential exists to move towards substantive equality for women and children through the use of affirmative action. Article 16 guarantees equality in public employment.

3 Mapping the gender justice trajectory of the Court

3.1 First phase: The early years of the Court

True to Nehru's idealism, the Nehruvian period sought to first frame empowerment and equality on the praxis of land reform and affirmative action in reservations for scheduled cases and tribes in educational institutions and positions of employment. Land reform and affirmative action were the two transformative tools of Indian politics to achieve equality and social justice. This paper does not address the issue of the approach of the Court to land reform, but instead addresses the issue of affirmative action enshrined in articles 15 and 16 of the Constitution. In *Champakam Dorairajan*,[9] the province of Madras had issued an order, known as the 'Communal GO', with regard to the admission of students to the engineering and medical colleges of the state, which required that seats should be filled by the selection committee strictly on the following basis, namely, out of every 14 seats, six were to be allotted to non-Brahmin (Hindus), two to Brahmins, two to Harijans, one each to an Anglo-Indian, an Indian Christian and a Muslim. Champakam Dorairajan made an application to the High Court of Judicature at Madras under article 226 of the Constitution, praying for the issuance of the writ of mandamus, seeking protection of her fundamental rights under articles 15(1)[10] and 29(2) of the Constitution.[11] When Champakam Dorairajan questioned the government order that disqualified her from a place in an educational institution in preference to a low-caste

3 state or Union territory prior to such employment or appointment. (4) Nothing in this article shall prevent the state from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the state, is not adequately represented in the services under the state. (5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.'

9 *State of Madras v Champakam Dorairajan* AIR 1951 SC 226.

10 n 7 above.

11 'Protection of interests of minorities ... (2) No citizen shall be denied admission into any educational institution maintained by the state or receiving aid out of state funds on grounds only of religion, race, caste, language or any of them.

candidate, based on a government order making affirmative reservations for scheduled caste (SC)[12] and scheduled tribe (ST)[13] by reserving certain seats for them, she was challenging the order on the ground that she was being discriminated against on the basis of her religion, as she was upper caste. The Court struck down the order and agreed with her that she was discriminated against on the basis of her religion. Here the Court failed to see the affirmative action of the state at play as a facet of the doctrine of equality and instead chose to see religion as a stand-alone category without recognising it as a constituent element of caste. The effect of the judgment was that affirmative action in favour of the scheduled castes was struck down. Years later, while interpreting article 16 of the Constitution, the Supreme Court held in *Indra Sawhney*[14] and *Nagraj*[15] that article 16 was not an exception to article 14, but a facet of the doctrine of equality. With these two judgments, the constitutional right to equality was no longer recognised as a formal guarantee, but was considered as requiring substantive equality. However, these judgments were delivered in the context of affirmative action in favour of castes and not in the domain of gender justice. It remains to be seen if the principle will be extended to women's issues.

The next characteristic judgment of the first phase is *Air India v Nargesh Mirza*.[16] The case was brought by airhostesses of Air India who demanded parity of pay with their male counterparts. The two cadres of female airhostesses and male pursers were kept separate and had different scales of pay. The airhostesses argued that there was no difference in their job content, yet the male pursers were better paid and had better chances of promotion. Airhostesses could never become supervisors on board the aircraft as they retired at the age of 35, while the men continued up to the age of 58. Instead of looking at the argument of equal pay for equal work as a denial of their right to equality, the Court held that the air hostesses could not claim parity of pay, as they constituted a separate class in that they had different educational qualifications at recruitment. In this way, the doctrine of treating unlike unalike (along the lines of 'separate but equal') came into play, reinforcing the concept of formal equality for years to come.

It was also in these early years that the Bombay High Court in 1952, in *Narasu Appa*,[17] held that 'personal laws' were not part of 'laws in force' and hence could not be subjected to the test adherence to 'fundamental rights'. In this case, the defendant was prosecuted under the provisions of the Bombay Prevention of Hindu Bigamous Marriage Act, 1946. The petitioner, a Hindu male, argued that, while polygamy was abolished for Hindu men, it was not abolished for Muslim men and that this constituted discrimination based

12 Abbreviation for Scheduled Caste.
13 Abbreviation for Scheduled Tribe.
14 *Indra Sawhney v Union of India* AIR 1993 SC 477.
15 *M Nagraj v Union of India* AIR 2007 SC 71.
16 AIR 1981 SC 1829.
17 *State of Bombay v Narasu Appa Mali* AIR 1952 Bom 84.

on religion. The Court was called upon to decide whether personal laws of Hindus and Muslims were 'laws in force' within the meaning of article 13 of the Constitution. Article 13 stipulates that all laws in force before the commencement of the Constitution are void if they conflict with fundamental rights guarantees enshrined in the Constitution. The Bombay High Court held that 'personal laws' were immune from constitutional challenges, since 'personal laws' were not 'laws' within the meaning of article 13 of the Constitution. Ironically, therefore, while the decision upheld the validity of the Hindu Bigamous Marriage Act, 1946, benefiting women, the reasoning on which it was based put women governed by personal laws beyond the reach of constitutional law and the guarantee of equality. This judgment upheld discriminatory plural legal systems and deepened the public-private divide. *Narasu Appa*, while reinforcing identity politics, had an impact on the lives of women for years to come.

3.2 Phase two: The move to democratise access to justice

This phase began after the traumatic State of Emergency of 1975 was lifted through a political process and once fundamental rights had been restored. The judges who had endorsed the emergency in the *ADM Jabalpur*[18] judgment now started on a journey of focusing on socio-economic rights. This was achieved by transforming the concept of *locus standi* and permitting social interest groups and non-governmental organisations (NGOs) to bring cases directly to the Supreme Court for violations of the fundament rights of the underprivileged sections of society. Justice Bhagwati theorised this as a departure from the adversarial mode of British justice. He argued that the British system was based on self-identification of injury and self-selection of remedy and therefore not suited to Indian conditions. This jurisdiction of the Court born out of this process has been described as 'public interest litigation' (PIL).

In the famous *Bandhua Mukti Morcha* case,[19] filed by an NGO, the Supreme Court observed that a host of welfare labour legislation, including protective legislation such as the Bonded Labour (Abolition) Act of 1976 and the Minimum Wages Act of 1948, was being breached. The Court gave extensive direction to the state government and noted that the right to live with human dignity derived its breath from the Directive Principles of State Policies. Similarly, in the *Asiad Workers* case,[20] Justice Bhagwati stated that anyone getting less than the minimum wage could approach the Court without going through lower courts and labour commissioners. While interpreting the words 'forced labour' in article 23, it held that all work extracted from less than minimum wages was 'forced labour'. This judgment represents a Magna Carta of rights for working people by ensuring fair

18 *ADM Jabalpur v Shivakant Shukla* (1976) 2 SCC 521.
19 *Bandhua Mukti Morcha v Union of India* 1991 SCR (3) 524.
20 *Peoples' Union for Democratic Rights v Union of India* AIR 1982 SC 1473.

conditions of work. It gave an economic content and a threshold of minimum wages beyond which all labour was forced labour. Hence, a person would not have to prove force in the extraction of labour. The fact of payment of wages below minimum wages established the forceable nature of work. The *Bhagalpur Blinding* case[21] represents an instance in which the Court acted on newspaper reports. It was alleged that the police had taken the law into their hands and blinded prisoners, depriving them of their right to life and liberty. Justice Bhagwati held that if compensation to the survivors were not granted, article 21 would be reduced to a 'mere rope of sand'.

In this phase, the first legal battle for gender justice was played out in the decision of the Supreme Court in the *Mathura*[22] case. Two policemen within the premises of a police station raped Mathura, a 16 year-old tribal girl. The sessions court acquitted the policemen on the ground that, since Mathura had eloped with her boyfriend, she was 'habituated to sexual intercourse' and hence could not be raped. The sessions court went a step further when it held that Mathura was of 'loose morals' and hence the sexual intercourse was with her consent. The High Court reversed the judgment. The Supreme Court, however, set aside the conviction by the High Court and held that, since Mathura had not raised any alarm and since she did not carry any visible marks of injury, the allegations were untrue. This judgment represented the death of gender justice. It led to a massive protest by women's groups, focusing attention on the role of the court in respect of women's issues. These protests left their mark on the Supreme Court for years to come, as I will demonstrate later.

The legislature stepped in and amended the rape laws in a very substantive way. Section 114 A of the Indian Evidence Act sought to undo the presumption that if there were no signs of resistance, the woman must be deemed to have consented to sexual intercourse. Subsequent judgments of the Court take cognisance of this change in the approach to the question of judging a lack of consent to sexual intercourse. For example, the Court demonstrated a remarkable sensitivity to the issue of sexual violence against women in *Bharwada Bhogibhai Hrijibhai v State of Gujarat*,[23] where the Court firmly stated that, in the Indian context, a refusal to act on the testimony of the victim of sexual assault in the absence of corroboration is 'adding insult to injury'. The Court expressed its views as follows:

> Why should the evidence of the girl or a woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society.

21 *Khatri (I) v State of Bihar* (1981) 1 SCC 623.
22 *Tukaram v State of Maharshtra* AIR 1979 SC 185.
23 AIR 1983 SC 753 288.

The expansion of the jurisdiction of the Court in PIL led to women's groups approaching the Court on the issue of 'dowry death'. The *cause célèbre*, the *Kanchanbala* case,[24] more famously known as the *Satya Rani Chadha* case, for the first time united women's organisations and mothers of burnt brides to form an umbrella organisation called Solidarity with Women. These groups joined to demonstrate openly in the court, demanding an answer to the question why the police had recorded the death of their daughters in the matrimonial home as an 'accidental' death and not a murder. Relentless campaigns by groups, the critical mass of which consisted of mothers of burnt brides, led to the passing of sections 498A and 304B of the Indian Penal Code. These sections for the first time recognised cruelty against a married woman as an offence and introduced the offence of 'dowry death', thus recognising the reality of women being killed in the matrimonial home within seven years of marriage (to escape from paying the dowry in full).

In *Rupan Deol Bajaj v KP Singh Gil*,[25] where a Director-General of Police, Punjab, KPS Gill, had 'patted' the 'posterior' of an Indian administrative service officer, Rupan Deol Bajaj, the Supreme Court was called upon to interpret the term 'modesty' in 'outraging the modesty of a woman' under section 354 of the Indian Penal Code,[26] a pre-constitutional statute. It stated that the ultimate test for ascertaining whether modesty has been outraged is whether the action of the offender could be perceived as one that is capable of shocking the 'decency' of a woman. The Court set the standard for evaluating the perception as that of the 'reasonable woman', because the test of ascertaining 'outrages' her 'decency' would be dependent on an understanding of contemporary societal standards by women. The Court also stated that there was no requirement for the presence of 'sexual overtones' to outrage the modesty of a woman, and concluded that attendant circumstances were sufficient indicators of intention.

3.3 Third phase: Liberalisation and the women's question

The second phase merges into the third, which sees a shift in the policy of the state from the focus on socio-economic rights in the DPSP to the needs of the privatised and liberalised economy of the 1990s. A corresponding shift is noticed in the judgments of the Court.

24 *State v Subhash* FIR No 2034 of 1981.
25 (1995) 6 SCC 194.
26 Sec 354 reads as follows: 'Assault or criminal force to woman with intent to outrage her modesty. Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both'.

In *Uma Devi*,[27] a Constitutional Bench of the Supreme Court held that appointments in public employment made without following due process or the rules relating to appointment did not confer any right to security of employment on the appointees, even though they may have worked for several years. This meant that men and women who had worked for years in low-paid jobs with no security of employment would not be given secured jobs simply on the grounds that they had not been employed through national recruitment channels. The Court held that to give them security of employment would be a denial of equality to those who would have otherwise been recruited through regular channels. The Court ignored the legitimate exception to security of employment of those who had laboured for several years continuously in a particular position. The argument used to defeat the right of those present in employment was that those who could have been in employment several years earlier had been denied the opportunity of a job. Apart from the fact that there was no way of putting the clock back and compensate those who could have been in employment, the Court ignored the culpability of the state in making the appointments in the first case. Surely, the doctrine of equality could not be invoked in such a case. This judgment meant that work in the unorganised sector had no protection from the rules of hire and fire. At the same time, within the country, employers were viciously arguing in favour of the rule of hire and fire for all workers, whether organised or unorganised. It seems almost as if the Court was responding to their demands. Considering that the bulk of women work in the unorganised (informal) sector, this meant that women had no protection in the workplace from being exploited due to unfair terms of work.

Workplace issues came to the forefront again in this phase, this time in a different context. The *Vishakha* case squarely dealt with sexual harassment as a denial of the right to work.[28] PIL was filed in the Court with the objective of finding a suitable method for the realisation of gender equality in the work place and in order to make the workplace more accessible to women. In the absence of legislation, the *Vishakha* case sought to outlaw sexual harassment in the workplace. The Court recognised that every incident of sexual harassment at the workplace resulted in the violation of the fundamental rights of gender equality and the right to life and liberty. The Court also observed that the effect of such a violation was a denial of the woman's right to freedom to practise any profession, occupation, trade or business under article 19(1)(g) of the Constitution. Hence, the Court considered international documents and treaties relevant to sexual harassment, particularly the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and framed guidelines to be put in place at the workplace. Although there was a clear link to international law in *Vishakha*, there was no clear articulation of the horizontal application of fundamental rights. This

27 (2006) 4 SCC 1.
28 *Vishaka v State* of *Rajasthan* (1997) 6 SCC 241.

meant that the judgment would be a guarantee against the state but not necessarily against employees in the private sector.

In *Anuj Garg v Hotel Owners Association*,[29] the Supreme Court once again addressed the issue of women in the workplace. It examined and struck down a protective discrimination provision in the Punjab Excise Duty Act of 1914 that restricted women's rights to employment and equal treatment. In this case, section 30 of the Punjab Excise Duty Act of 1914, which prohibited the employment of women in premises where liquor or intoxicating drugs were consumed by the public, was struck down as unconstitutional for not satisfying the strict scrutiny test. This decision represented an instance of substantive due process, making it possible for women to work in bars as bartenders. Ironically, the case was brought by bar owners and not by women themselves.

While the Court in this phase remains an activist with respect to the right to work, it remains conservative on issues of family law and the economic rights of women within marriage, as the next section will show.

3.4 Coming full circle: Identity politics

We return now to the early years to indicate that the Court keeps intact impunity in the private sphere while addressing the symptoms of impunity manifested as violence against women. It is now time to return to the private domain of home and family. We begin at the beginning, that is, *Narasu Appa*. To this day, the judgment of *Narasu Appa* haunts the courts. No legislation concerning personal laws has ever been struck down by the Supreme Court. What the Court does instead is to dodge the constitutional question of discrimination inside the four walls of the family. Articulating this, the Delhi High Court in *Kaur v Kaur*[30] had emphatically noted as follows:

> Introduction of constitutional law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life, neither article 21 nor article 14 has any place. In a sensitive sphere which is at once intimate and delicate, the introduction of the cold principles of constitutional law will have the effect of weakening the marriage bond.

It is therefore hardly surprising that the Court has always tended to move around the question of discrimination based on sex. Whenever the need to balance the right to equality and the right to freedom of religion had surfaced, the balance has tilted in favour of religion. The circumvention of the constitutional question is omnipresent in the realm of all laws and faiths. In the *Shah Bano* case,[31] the Court was called upon to grant maintenance to a

29 AIR 2008 SC 663.
30 AIR 1984 Del 66.
31 *Mohd Ahmed Khan v Shah Bano Begum* (1985) 2 SCC 556.

divorced Muslim woman from her former husband under section 125 of the Criminal Procedure Code (CrPC). The husband refused to do so, stating that providing maintenance under section 125 of the CrPC would evenly conflict with his personal laws. The Court entered into a debate on the content of the Koran and sought to explain why the Code was not in conflict with it. Although presented with an opportunity to discuss this issue as an equality issue and to answer the question whether a personal law, which discriminated against women, should be recognised after the Constitution had come into force, the Court on these questions evaded its responsibility to categorically frame a question of discrimination based on religion. When the conservative sections of the Muslim community launched a protest against the judgment, Parliament deepened the crisis by enacting the Muslim Women's (Protection of Rights on Divorce) Act, 1986, which sealed all routes for Muslim women to avail maintenance after divorce under section 125 of the CrPC.

When Mary Roy challenged the Travancore Christian Succession Act (TCSA) on the ground that it put an upper limit of Rs 5000 for the inheritance of daughters belonging to the Christian community, thus causing the bulk of the estate to be left to the son, the Supreme Court observed that with the enactment of the Indian Succession Act, 1925, the TCSA stood repealed.[32] Since the Indian Succession Act, 1925, granted equal rights of inheritance to women, the judgment resulted in favour of equality in the matter of inheritance for women of the Syrian Christian community. However, the Court failed to address the question of discrimination between the daughters and sons simply by saying that the statute itself was repealed by implication upon the coming into force of the Indian Succession Act, 1925. Hence, the judgment does not contain an articulation of the principles of non-discrimination between sons and daughters.

When Geetha Hariharan challenged the discriminatory provisions of the Hindu Minority and Guardianship Act, 1955, which made the father a 'natural guardian' of the child, the Supreme Court cleverly read the words 'and in the absence of the father' to mean absence of the father for any reason, including neglect of the child, and held that, in such a case, the mother would be the natural guardian.[33] The Court desisted from striking down the law as discrimination based on sex. This judgment too has resulted in positive benefits for women, in that it allowed schools to admit children at the mother's request without insisting on the father's signature. It also enabled women to get passports in the name of the child.

Often, the Court used the doctrine of separation of powers to evade the question of evolving a rights-based jurisprudence by delegating the duty to the legislature. In the *Madhu Kishwar* case,[34] discriminatory tribal laws which prevented daughters from inheriting tribal land on the grounds that such land

32 *Mary Roy v State of Kerala* AIR 1986 SC 1011.
33 *Githa Hariharan v Reserve Bank of India* (1999) 2 SCC 228.
34 *Madhu Kishwar v State of Bihar* (1996) 5 SCC 125.

would leave tribal hands when daughters marry non-tribals, were challenged. The Court refused to enter this domain, observing instead that this was a matter for the legislature to decide.

In *Danial Latifi v Union of India*,[35] the petitioner challenged the constitutional validity of the Muslim Women's (Rights on Divorce) Act, 1986. The petitioner, who was a lawyer and Islamic law scholar, contested the validity of the Act on the ground that it made an unreasonable distinction between women of two groups, based on religion, and deprived Muslim women from claiming maintenance under secular law.

The Act excluded the application of the Criminal Procedure Code, which guaranteed to all women the right to claim maintenance from a divorced husband, in respect of Muslim women. Section 3(1)(a) of the Act provided that a Muslim woman could claim reasonable and fair provision to be made and paid during the Iddat period from her divorced husband. On a plain reading of the Act, it would seem that a Muslim woman was not entitled to claim maintenance from her divorced husband for any period beyond the Iddat period (that is for three months). This was stated to be the position in Muslim law. The Court interpreted the expression 'a reasonable and fair provision and maintenance to be made and paid to her within the Iddat period' to mean that the payment was to be made within the Iddat period, and not that the payment was for the Iddat period alone. On this interpretation, the constitutional validity of the statute was upheld on the ground that it provided an equally efficacious remedy to Muslim women as compared to the remedy under section 125 of the Criminal Procedure Code. Hence, it did not violate rights and articles 14, 15 and 21 of the Constitution. As can be seen, the Court once again fell short of declaring the law unconstitutional on the grounds that it took away the protection of a secular law of maintenance from Muslim women. Yet, in its outcome, it benefited Muslim women immensely by extending the right to post-divorce maintenance for them to their entire life span.

An unintended benefit of the judgment was the articulation of the reasons why it was necessary to make provision for maintenance of divorced women. In this respect, the Court held as follows:

> In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated, both economically and socially, and women are assigned, invariably, a dependent role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, given up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her

35 (2001) 7 SCC 740.

> husband her emotions, sentiments, mind and body, and her investment in the marriage is her entire life – a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the Wakf Boards.

This reasoning can be extended to demand a law of community of property for all women.

The Gujarat High Court by a majority judgment recently decided that a Parsi woman, by contracting a civil marriage with a non-Parsi, ceased to be a Parsi by religion.[36] This case represents a low water mark for gender justice in India. Although at the time of writing the judgment is under challenge in the Supreme Court, it is necessary to comment on it as it typifies a certain mindset. It assumes that upon marriage a woman loses her identity as an individual. She also loses her religion and acquires the religion of her husband through the sheer operation of law. The Court did not pause to consider that the acquisition of a religion or the giving up of a religion requires a conscious decision-making process by the persons concerned and is often accompanied by rituals. The logical culmination of such a tragic ideology, which is unable to see women as individual citizens and bearers of fundamental rights, is that all women are viewed as extensions of their husband or family. It is also the logical outcome of the collapse between the religion and personal laws, leaving women as prisoners within the framework of personal laws.

4 Conclusion

An overview of the three phases of the Supreme Court indicates that, while the Court is willing to address issues faced by women in the public domain, the Court is reluctant to address the issues of the rights of women in what is perceived to be the private domain, namely, family, marriage, divorce, inheritance and guardianship. Considering that laws relating to the private domain have a disparate impact on women, women continue to be subjected to unequal laws in these matters. The Court has circumvented the issues of discrimination either by paying homage to the legislature or by interpreting statutes to mitigate the discriminatory aspects of personal laws. While affirmative action in the matter of employment and education in favour of women has come to stay and has been recognised as a dimension of the right

36 Final judgment and order dated 23 March 2012 in SCA No 449/2010.

to equality, there is still no understanding of the impact of discriminatory laws in the private sphere. While violence against women, sometimes resulting in death, has been addressed by the Court, rape within the marriage is not considered an offence. Perhaps the reason for the continuation of impunity in the private sphere of marriage is the belief that fundamental rights have no horizontal application to non-state actors. That apart, the history of much of family law and matrimonial law seems to be the history of property law. Nothing illustrates this proposition better than the decision of the Court in *Batra v Batra.*[37] The law in question, the Protection of Women from Domestic Violence Act, 2005, provided to a woman in a shared household the right to reside in it regardless of who owned the property. The Court in *Batra* held that such a right existed only if the shared household was owned by the husband. Ignoring the patterns of living in the joint families, where the parents-in-law and the daughter-in-law live in the same shared household, the Court strongly gave preference to the right to property over the right to reside. Quite clearly, it is evident that the Indian state, including the courts, have an unfinished agenda on the right to equality and non-discrimination against women.

37 (2007) 3 SCC 169.

CHAPTER 11

GENDER AND TRANSFORMATION IN THE SOUTH AFRICAN CONSTITUTIONAL COURT

Sandra Fredman[1]

1 Introduction

Gender equality lies at the confluence of many different currents in South Africa and is therefore perhaps the most challenging of the issues confronted by a potentially transformative court. Gender is intensely racialised: Under apartheid, the radical difference in oppression of black and white women is encapsulated in the pervasive symbol of 'maids and madams'. While the white 'madams' experienced patriarchy in many of its suffocating social and legal forms, their dominance over black 'maids' meant that the fault lines of power and identity ran primarily on racial lines.[2] Black women's oppression was racial and sexist, legal and social. They experienced patriarchy through customary law as filtered through the lens of common law patriarchy, multiplying its effect. They experienced racial oppression in the full force that apartheid could apply, with rural women left to fend for the family by the migrant labour system, and urban women relegated to domestic work and separation from their children. While the aspirations of white women might have been to escape the claustrophobia of domestic life and child care and to enter the world of paid work, many black women aspired to be freed of exploitative work and to be permitted to care for their children.

At the same time, patriarchy stretched its cold fingers over black and white women alike. Until well into the 1980s, women married in community of property remained in a position of legal subordination to their husbands, who had control over the joint property, the children, and their wives. Patriarchy in the law of marriage and the family affects all women, black and white, rich or poor. But black women were still worse off as a result of a noxious combination of customary law, common law and statute. The result

1 I am very grateful to Chris McConnachie for his research assistance in preparing the final draft of this paper.

2 See J Cock *Maids and madams: Domestic workers under apartheid* (1989).

was that women remained perpetual minors, and the rules of intestate succession were governed by a rigid form of male primogeniture.

The removal of apartheid has only partly altered this picture. In some respects, the racialisation of gender has been overlaid by class divisions, with increasing solidarity amongst middle class black and white women, but a concentration of poverty amongst black women.[3] The incidence of violence against women is pervasive across class and race, both within the family and outside it. All of this makes gender a highly complex issue for a transformative court to address. As Sachs J put it:

> For all the subtle masks that racism may don, it can usually be exposed more easily than sexism and patriarchy, which are so ancient, all-pervasive and incorporated into the practices of daily life as to appear socially and culturally normal and legally invisible. The constitutional quest for the achievement of substantive equality therefore requires that patterns of gender inequality reinforced by the law be not viewed simply as part of an unfortunate yet legally neutral background. They are intrinsic, not extraneous, to the interpretive enquiry.[4]

In the face of such complex conflicting currents, in what ways can a court be transformative? Transformative adjudication requires a court not only to provide remedies in individual cases of discrimination, but to seek to transform the underlying social and legal structures that produce this discrimination.[5] However, a court is inevitably limited in its ability to bring about social change. It is dependent on the type of claimants and the nature of the claims brought before it. It is conscious of the need to maintain comity with legislative institutions and to respect separation of powers. It is limited in the evidence it can consider and the remedies it can provide, particularly in the case of polycentric issues, with wide ramifications. Within this institutional context, a transformational approach might require a court to be deferent. The history of human rights adjudication is full of instances in which individuals have attempted to use the judicial process to prevent progressive social change. Thus, a transformative court is not necessarily an interventionist court. Alternatively, faced with a transformational opportunity, it might have sufficient confidence in the principle before it and its position in relation to other institutions to reach beyond existing boundaries. In the context of a new democratic order and an expressly activist political sphere, the South African Constitutional Court has been acutely aware of the delicate balance between appropriate deference and interventionism in achieving the transformational ideal of the South African

3 The gendered and racialised nature of poverty in South Africa finds parallels in Brazil. See D Ikawa 'The role of the Brazilian Supreme Court in the implementation of women's rights: Bridging constitutional norms and reality' (Chapter 9 above).

4 *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).

5 N Fraser *Justice interruptus* (1997) 23; see further C Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 253; KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

Constitution. In the context of gender, however, the fault-lines of transformation lie in a different and particularly challenging direction.

This paper analyses the major cases on gender before the South African Constitutional Court by focusing on the ways in which the Court addresses the inevitable limitations confronting all potentially transformational courts. These can be broadly divided into five types of restraints. The first is the nature of the constitutional text itself. To what extent does a court prefer a substantive as opposed to a formal reading of the text? The South African Constitution is rich in its transformative potential. However, particularly in relation to gender equality, there is a significant divergence between formal and substantive conceptions of equality as between the cases. It will be seen that, while in some cases courts take a substantive approach with potentially transformative effect, in others, a formal and restrictive definition is used. The second is the nature of the Court. Do different judges take consistently different positions, and is this affected by gender or race? It is notable that several key cases divide on gender lines. The third constitutes the nature of the claim. To what extent does a court limit itself to the narrow question before it, as against being prepared to move beyond it and create general principles? The oft-quoted case of *Prinsloo*,[6] which sets out the major principles for deciding an equality case, was based on the most unlikely of fact situations – a claim that a law creating a presumption of negligence in certain circumstances on the part of a property owner on whose land a fire arises discriminates against such property owners because such a presumption does not arise in civil negligence cases not concerning veld fires or in 'controlled' zones. Yet, the Court was prepared to reach beyond the situation and to establish principles of equality which have continued to guide future cases.

The fourth restraint on a transformational court concerns the nature of the claimant. This involves two sorts of questions: Firstly, whether a court is prepared to transform its own gate-keeping rules to permit wide standing and direct access, and secondly, the ways in which the nature of the claimant and her claim affects the transformational potential of the court. Given that the former question is not specific to gender, this paper will focus on the latter. Finally, and particularly important, is the question of separation of powers, or comity as between judiciary and legislature. As we have seen, courts can be appropriately deferent, for example, where a legislature is pursuing a transformational agenda which could be obstructed by a litigant relying on a formal conception of equality. However, deference might signify a judicial reluctance to engage with issues before it in a transformational manner. This issue is particularly complex in South Africa, where significant patriarchal legislation dates from the apartheid period. The failure of the democratic government to remove such legislation could be interpreted as endorsement, and a court might re-interpret it as a moral issue which can be

6 *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC).

sustained in light of current values. This is seen in *Jordan*,[7] discussed below. Remedies also raise taxing concerns in relation to separation of powers, an issue which has been significant in the gender cases.

The subject matter of the case law on gender before the Court is itself indicative: No case directly concerns the poverty of black South African women, and indeed, several of the cases are brought by relatively affluent women. This can be contrasted with the cases on socio-economic rights. Irene Grootboom, the applicant in the major housing case,[8] framed her claim in terms of her homelessness and poverty rather than her gender, as did Saleta Mahlaule.[9] Similarly, the *TAC* case, which concerned pregnant women, was formulated as a right to health case.[10] Instead, the gender cases focus on four main issues: Firstly, women's role in the family, marriage and cohabitation; secondly, women in customary law; thirdly, violence against women; and fourthly, the commercial use of sex and women's bodies. Nevertheless, none of these cases can be regarded as solely about what Fraser refers to as 'recognition' (cultural value patterns which cast groups as being inferior, excluded or invisible), as against redistribution.[11] Instead, women's access to socio-economic goods is closely bound up with all of these issues. Access to work and economic independence as well as personal autonomy depends on the legal and social characterisation of their relationship to partners, spouses and children, whether at customary or civil law, and all of these relationships are implicated in the four subject areas set out above.

2 Taking the lead: Courts in patriarchy

There are eight main cases in which the court was confronted with the possibility of transforming patriarchy within the family. In five of them, *Brink v Kitshoff*,[12] *Van der Merwe,*[13] *Bhe,*[14] *Shilubana*[15] and *Gumede*,[16] the Court rose to the challenge. This section deals with these five cases. The next

7 *S v Jordan (Sex Workers Education and Advocacy Task Force as Amici Curiae)* 2002 (6) SA 642 (CC).
8 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).
9 *Khosa v Minister of Social Development; Mahlaule v Minster of Social Development* 2004 (6) SA 505 (CC).
10 *Minister of Health and Others v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC).
11 See S Fredman 'Redistribution and recognition: Reconciling inequalities' (2007) 23 *South African Journal on Human Rights* 214 215; N Fraser 'Social justice in the age of identity politics: Redistribution, recognition, and participation' in N Fraser & A Honneth (eds) *Redistribution or recognition? A political-philosophical exchange* (2003) 1 13.
12 *Brink v Kitshoff NO* 1996 (4) SA 197 (CC).
13 *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC).
14 *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 580 (CC).
15 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC).
16 *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC).

section deals with the remaining three, *Volks,*[17] *Hugo*[18] and *Jordan*, in which the Court declined to intervene.

On the face of it, the Court's first unfair discrimination judgment, *Brink v Kitshoff*, seems an inauspicious place for the gender equality jurisprudence of the Court to begin. It concerned what appears to be an arcane corner of the law, namely, whether section 44 of the Insurance Act 27 of 1943 discriminated against married women by depriving them, in certain circumstances, of all or some of the benefits of life insurance policies ceded to them or made in their favour by their husbands. Moreover, this was scarcely a representative of the vast under-swell of poverty and persecution of women in South Africa. Instead, the claimant was attempting to regain an insurance policy of some R2 million which the executors claimed belonged to the insolvent estate. The facts of *Van der Merwe* were much closer to the issues that need to be addressed, but the legal question seemed similarly confined. Here a woman had been subjected to a vicious attack by her husband, who deliberately ran over her with his car. She was unable to claim against his insurance because a spouse married in community of property was prohibited by statute from claiming 'patrimonial' damages in respect of bodily injuries suffered due to the fault of his or her spouse.[19] This meant that she could not claim damages to compensate for past and future medical expenses, past and future loss of income, loss of earning capacity, and loss of support, although she could claim for non-pecuniary losses such as pain and suffering. This was in principle due to the fact that community of property meant neither spouse had a separate estate. Any recovery of damages would therefore simply be circular: It would come from the joint estate and fall back into the joint estate.

These rules, however, are far from arcane. Rules such as these, as O'Regan J put it in *Van der Merwe*, owe their origin to

> boundless patriarchy in a setting where the husband wielded marital power over the wife and children born of the marriage, and was the exclusive administrator of the joint estate. As long as the marriage endured, the estate was deemed to be one, indivisible and subject to one command. [20]

The semblance of community masked the serious power imbalance between husband and wife within the marriage. Under the marriage regime prevailing until as recently as 1984, the husband wielded sole power over the person and property of his wife where the spouses were married in community of property. It was only then that legislation was passed making significant inroads into the gender differentiation found in the common law of marriage in community of property. The Matrimonial Property Act of 1984 abolished

17 *Volks* (n 4 above).
18 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).
19 Matrimonial Property Act 88 of 1984, sec 18(a).
20 *Van der Merwe* (n 13 above) para 29, per O'Regan J.

the marital power of the husband over the person and property of his wife, gave women equal power to manage the joint estate, subjected juristic acts affecting the joint estate to the consent of the other spouse, and immunised and protected monetary and other financial receipts by a spouse from interference by the other.[21] It took nearly another decade for the General Law Fourth Amendment Act 132 of 1993 to abolish the marital power in all existing marriages in which it was operating.[22] The effect of this was the deletion of the reference to the husband's position as head of the family.

However, aspects of the older system survived, and it was these which were challenged in *Brink v Kitshoff* and *Van der Merwe*. In both cases, the Court had no difficulty striking down the legislation. In *Brink*, the fact that the provision disadvantaged married women and not married men was clearly held to be discrimination on grounds of sex. Nor could the proposed justification, namely to prevent collusion between spouses, explain why the rule applied to married women and not married men.[23] In *Van der Merwe*, the issue was more complex, since the rule did not distinguish, on its face at least, on grounds of either gender or as between married and unmarried couples. It distinguished between the different proprietary consequences of marriages in and out of community of property. Moseneke J therefore declined to interpret 'marital status' in an expansive way to deal with this situation. Instead, he dealt with it on the basis of the rationality test applied to non-enumerated grounds. Nevertheless, he had no difficulty in holding that the provision was irrational and could not be justified. Particularly important is the rejection of the argument, raised by the Fund, that parties' autonomous choice of marital regime should be respected. Such an argument, in his view, would amount to a species of constitutional waiver, which was not acceptable by the Constitution.[24]

So are these judgments transformational? In both cases, only token justifications were offered, and there was little political will to sustain the provisions. Indeed, in *Van der Merwe*, the Minister expressly supported the challenge, rather than the provision, a fact which Moseneke J regarded as of particular importance:

> Ordinarily the starting point of a justification enquiry would be to examine the purpose the government articulates in support of the legislation under challenge. In this case the government did not proffer a purpose to validate the impugned provision. If anything, the government contends that the provision is inconsistent with the Constitution because it is irrational or unfairly discriminatory. It correctly, in my view, disavowed the existence of a legitimate purpose for withholding a right of recourse for patrimonial loss from physically brutalised spouses in marriages in community of property whilst granting the

21 Matrimonial Property Act 88 of 1984, cc II and III and Marriage and Matrimonial Property Law Amendment Act 3 of 1988. See *Van der Merwe* (n 13 above) para 30.
22 The same Act substituted sec 13 of the Matrimonial Property Act which section was later repealed by sec 4 of the Guardianship Act 192 of 1993.
23 *Brink* (n 12 above) paras 48 and 49.
24 *Van der Merwe* (n 13 above) para 59.

> protection to spouses in other forms of marriages or indeed to parties in other domestic partnerships.[25]

It is not easy to tell why the legislation had remained on the statute books. Thus, the court was certainly following a transformational agenda, disavowing the patriarchal system of marriage, filling in the gaps which the legislature had not done.

In addition, in both cases, the Court was keen to take a substantive rather than formal view of the Constitution, using the opportunity not just to decide the case before it, but to expand on the context. Thus, in *Brink v Kitshoff*, the Court established some of the major principles which should be used in subsequent equality cases. In *Van der Merwe*, the Court went out of its way to stress the reality of gender subordination and violence which underlay the claim. Thus it affirmed the arguments of the *amicus* that the continuing operation of the impugned position must be seen within the social context of the prevalence of domestic violence in South Africa and its gendered nature; the effect of physical abuse on women in particular and their economic vulnerability within marriage. As Moseneke J stated:

> There is no doubt that in our society domestic violence and economic vulnerability are gendered in nature. Both are a sad sequel to patriarchy. Women are more likely to fall victim to the battery, abuse or negligent driving of their domestic partner than otherwise and are therefore more likely to be non-suited for patrimonial damages than their husbands. Even more demeaning is that victims of domestic and other violence within marriages in community of property would have to solicit their abuser's consent to meet medical and other bills or to make up loss of earnings out of the joint estate. Moreover, in these circumstances third party insurers, if any, are not liable to reimburse the injured spouse or the joint estate. In this way, the burden of abuse and economic dependency becomes mutually reinforcing and most intolerable … Not even a divorce from her abuser entitles her to escape the adverse consequences of being rendered claimless under section 18(b) in time if needed. Although on its face the provision appears gender-neutral, there is much to be said for the inference that it is bound to work a more severe hardship on women married in community of property than men similarly situated.[26]

More dramatically transformative is the decision in the *Bhe* case, which challenged the rule of male primogeniture in customary law. As described by Langa DCJ:

> Central to the customary law of succession is the rule of primogeniture, according to which only a male who is related to the deceased qualifies as intestate heir. Women do not participate in the intestate succession of deceased estates. In a monogamous family, the eldest son of the family head is his heir. If the deceased is not survived by any male descendants, his father succeeds him. If his father also does not survive him, an heir is sought among the father's male

25 *Van der Merwe* (n 13 above) para 62.
26 *Van der Merwe* (n 13 above) para 69.

> descendants related to him through the male line … The exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply-embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family.[27]

This principle was given statutory force in the Black Administration Act 38 of 1927,[28] which set up a parallel system of intestate succession purporting to give effect to the customary law of succession. This provision prescribes which estates must devolve in terms of what the Act describes as 'Black law and custom' and details the steps that must be taken in the administration of those estates.

Unlike the claimant in *Brink v Kitshoff*, the claimant in *Bhe* was amongst the poorest of South African women. Her partner was a carpenter and she a domestic worker. They lived in a temporary informal shelter in Khayelitsha, Cape Town. He obtained a state housing subsidy to purchase the land on which they lived as well as building materials to build a house. But he died before the house could be built. The estate was scanty: A temporary informal shelter and the property on which it stood, and miscellaneous items of movable property that Ms Bhe and the deceased had acquired jointly over the years, including building materials for the house they intended to build. On the death of the deceased, his estate fell to be distributed according to 'black law and custom', according to which his father was appointed the representative and sole heir of the estate. The latter made it clear that he intended to sell the property to defray his son's funeral expenses, thereby rendering Ms Bhe and her two minor children homeless.

The Court had no hesitation in holding that the exclusion of women from inheritance on the grounds of gender 'was a clear violation of section 9(3) of the Constitution' that 'entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality'.[29] The principle of primogeniture was also held to violate the right of women to human dignity as it

> implies that women are not fit or competent to own and administer property. Its effect is also to subject these women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of their sex and gender. Their dignity is further affronted by the fact that as women, they are also excluded from intestate succession and denied the right, which other members of the population have, to be holders of, and to control property.[30]

27 *Bhe* (n 14 above) paras 77 and 78.
28 Sec 23.
29 *Bhe* (n 14 above) para 91.
30 As above.

Bhe comes closest to a truly transformational case, in that the impact of the judgment reaches out to innumerable poor women, whose poverty had until then been compounded by their subjection to laws making them dependent on male members of their families. It is also a case which, unlike *Brink v Kitshoff* and *Van der Merwe*, swims against the legislative current, which had brought no changes to patriarchal laws of succession in African customary law in South Africa. In fact, the first proposal by the South African Law Commission for legislation in this field was made as many as six years before the *Bhe* judgment. The Minister told the Court in *Bhe* that the delay had been due to the need for wide consultation, and he could not give any guarantee as to when the Bill would become law.[31] Although the Court was keen to defer to the legislature to produce what detailed legislation, it regarded the situation as urgent, requiring immediate judicial action. It therefore made a detailed order, pending further legislation, requiring that the existing Intestate Succession Act, which previously did not apply to situations covered by customary law, should apply to all intestate estates.

However, its finding is far from straightforward, because the preservation of customary law is itself a fundamental value in the South African Constitution. To reconcile the value of equality with the value accorded to customary law, the judgments had to recognise the extent to which customary law has been ossified by the common law, which prevented it from developing with changing times. As Ngcobo J showed in his judgment, indigenous law did not simply give the deceased's property to the next male in line. There was a crucial difference between succession and inheritance. In a rural society in which land and livestock were the most important property:

> The main purpose of succession was to keep the family property in the family. This was essential to the preservation of the family unit. Land and livestock were the most important property. They provided the whole family with a source of livelihood and a place to live. They constituted family property and as such belonged to the family. The father was the head of the family and he held the property on behalf of and for the benefit of the family. He was responsible for the maintenance of the family from the property. Upon his death, two objectives had to be achieved: the perpetuation of the family; and getting someone to take over the powers and duties of the deceased family head. This was achieved by providing rules for the transmission of the deceased's rights and obligations to the eldest son … This descendant is referred to as *indlalifa* or successor. It is this male descendant who is equated with the heir under common law. But there are important differences between the two. *Indlalifa* takes over the powers and responsibilities of the deceased family head … Once it is accepted that *indlalifa* holds the family property on behalf of and for the benefit of all family members, it cannot be said that he is the owner of the family property or that he inherits it in the sense understood in common law.[32]

31 *Bhe* (n 14 above) para 114.
32 *Bhe* (n 14 above) paras 167, 169 and 171.

The difficulty in this area is compounded by the fact that 'customary law', as applied by the magistrates in these cases, does not necessarily reflect the indigenous law of succession actually lived by the people.[33] According to Nhlapo, quoted by Langa DCJ, '[a]lthough African law and custom has always had [a] patriarchal bias, the colonial period saw it exaggerated and entrenched'.[34] Indeed, many of the patriarchal aspects of Roman-Dutch law, and the English common law, were projected onto customary law, often by ignoring the checks and balances in favour of women and children. For example:

> Enacting the so-called perpetual minority of women as positive law when, in the pre-colonial context, everybody under the household head was a minor (including unmarried sons and even married sons who had not yet established a separate residence), had a profound and deleterious effect on the lives of African women.[35]

Equally problematic, when the patriarchal features of Roman-Dutch law were belatedly being removed by legislation,

> customary law was robbed of its inherent capacity to evolve in keeping with the changing life of the people it served, particularly of women. Thus customary law as administered failed to respond creatively to new kinds of economic activity by women, different forms of property and household arrangements for women and men, and changing values concerning gender roles in society.

As Langa DCJ concluded, 'the outcome has been formalisation and fossilisation of a system which by its nature should function in an active and dynamic manner'.[36]

Thus, *Bhe* is a case in which the judges have no doubt about the need for immediate transformation, but the means to achieve it are contested. Should indigenous law be freed from its common law shackles and be allowed to develop an indigenous concept of equality, consistent both with the Constitution and its own dynamic traditions? Or should legislation be put in place to pre-empt this development? It was argued before the Court that applying the Intestate Succession Act, which was premised on a nuclear family, would be inappropriate for the many kinds of family structures amongst South Africans, and would amount to an obliteration of the customary law of succession. Langa DCJ, for the majority, dealt with the first point by making specific provision for polygynous families in the order. As to the second, the difficulty in ascertaining the true content of living customary law as to succession, together with the slowness and unpredictability of judicial development, led him to reject the option of leaving it to customary

33 *Bhe* (n 14 above) para 177.
34 T Nhlapo 'African customary law in the Interim Constitution' in S Liebenberg (ed) *The Constitution of South Africa from a gender perspective* (1995) 162.
35 As above.
36 *Bhe* (n 14 above) para 90.

law to develop its own rules. This led to a detailed and emphatic dissent by Ngcobo J who, referring to the experience of other African countries, argued that, while the rule of male primogeniture clearly infringed the Constitution, indigenous law could nevertheless be the law of choice in particular circumstances.[37]

Customary law and gender equality interacted in a different way in *Shilubana*,[38] which was a dispute about the right to succeed as *hosi* (chief) of the Valoyi traditional community in Limpopo. At that time, succession to *hosi* was governed by the principle of male primogeniture. Thus, when Ms Shilubana's father, Hosi Fofoza, died without a male heir, he was succeeded by his younger brother, Richard, rather than his daughter. On the death of Richard, the royal family of the Valoyi met and unanimously resolved to confer chieftainship on Ms Shilubana. The son of Richard contested this. The Court was faced with the question of whether to support the traditional position at customary law, or to support its development in the direction of equality. It chose the latter.

The Court's decision in *Gumede*,[39] which concerned the effect of customary marriage on women, was equally robust. In KwaZulu-Natal, where the Gumedes were domiciled, customary law was codified in the KwaZulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law. These provincial statutes provided that in a customary marriage, the husband is the family head and owner of all family property, which he may use in his exclusive discretion. Thus, in terms of codified customary law in this province, a wife to a customary marriage would have no claim to any family property during the marriage or on its dissolution. A national statute, the Recognition of Customary Marriages Act 120 of 1998, had sought to end the marital power of the husband in customary marriages by providing for the equal status and capacity of spouses.[40] However, as Moseneke J put it:

> [S]ection 7(1) of the Recognition Act swiftly qualifies the equal dignity, status and capacity of the spouses by providing that the proprietary consequences of a customary marriage entered into before its commencement continue to be governed by customary law. This means that 'old' marriages are subject to the matrimonial system dictated by customary law.

The result was that Mrs Gumede, and other women in her position, were considered incapable and unfit to hold or manage property, excluding them from meaningful economic activity. The unanimous Court had no hesitation in holding this to constitute unfair and unjustified discrimination. As Moseneke J put it:

37 *Bhe* (n 14 above) paras 235 ff.
38 *Shilubana* (n 15 above).
39 *Gumede* (n 16 above).
40 Sec 6.

> Whilst patriarchy has always been a feature of indigenous society, the written or codified rules of customary unions fostered a particularly crude and gendered form of inequality, which left women and children singularly marginalised and vulnerable ... The matrimonial proprietary system of customary law during the subsistence of a marriage, as codified in the Natal Code and the KwaZulu Act, patently limits the equality dictates of our Constitution and of the Recognition Act. The former statutes provide that the family head is owner of all the family property over which he has 'charge, custody and control' and may 'in his discretion use the same for his personal wants and necessities, or for general family purposes or for the entertainment of visitors'. This patriarchal domination over, and the complete exclusion of, the wife in the owning or dealing with family property unashamedly demeans and makes vulnerable the wife concerned and is thus discriminatory and unfair. It has not been shown to be otherwise, nor is there any justification for it.[41]

Taken together, these cases represent a court taking up the possibilities for transformation, and making a real impact on dislodging tenacious patriarchal assumptions within the law of marriage. The result in all five cases is to open the way for women to free themselves of enforced economic dependency on men, and therefore have real redistributive consequences. At the same time, it should be stressed that these cases involve the redistribution of private property as between private individuals, rather than requiring the state to make resources available. In many cases, the consequences will be to redistribute poverty, rather than to alleviate it. As we have seen in *Bhe*, the dispute concerned a shack and the land it stood on, together with some building materials. Many will not even have access to this tiny parcel of resources. This reinforces the general pattern which shows courts as clearly more comfortable pre-empting legislative action when it does not require any direct provision of resources.

3 Reviving choice: Judicial retrenchment

The Court's approach to gender has not, however, been uniformly transformational, and it is when the Court pulls back from the transformational route that differences as between individual judges become more apparent. These divergences concern three main issues. The first is substantive and ideological, and focuses on the extent to which individual choice is regarded as an expression of autonomy as against a response to social constraints. The second, often used to justify the first, concerns the line of demarcation between judicial activism and deference to the legislature. The third, and perhaps subliminal, is the effect of the individual plaintiff and the nature of the specific claim on the ultimate conclusion.

It is the ideological approach to choice which divides the narrow majority from the dissent in *Volks*, although the individual circumstances of the complainant might well have obstructed their ability to see the underlying

41 *Gumede* (n 16 above) para 46.

power relations which the *amici* sought to bring before the Court. The issue here was again the imbalance in power and economic dependence of women, but this time outside the regulated and, in this case, protected sphere of marriage. The complainant argued that life partners should be afforded the same protection as the survivor of a marriage, including the statutory right to claim maintenance from the estates of their deceased spouses if they are not able to support themselves.[42] The plaintiff, Mrs Robinson, had lived as a permanent life partner with the late Mr Shandling, an attorney and senior partner at a law firm in Cape Town, from 1985 until the latter's death in 2001. She claimed that the legislation in question breached the right to equality in section 9 of the Constitution.

In rejecting her claim, the majority placed the concept of free choice centre-stage. There were two such choices at issue: the choice of the parties not to marry, and the choice of the testator as to how to dispose of his estate. As far as the first was concerned, Ngcobo J's concurring judgment was particularly emphatic:

> The Act does not say who may enter into a marriage relationship. The Act simply attaches certain legal consequences to people who choose marriage as their contract. There is a choice at the entry level. The law expects those heterosexual couples who desire the consequences ascribed to this type of relationship to signify their acceptance of those consequences by entering into a marriage relationship. Those who do not wish such consequences to flow from their relationship remain free to enter into some other form of relationship and decide what consequences should flow from their relationships … Marriage is a matter of choice.[43]

Although he recognised that both partners may not share the same choice, he was unwilling to acknowledge the underlying power imbalance which might permit one party to impose its choice on the other. Instead, his primary concern was to protect the partner who chose not to marry:

> People involved in a relationship may choose not to marry for a whole variety of reasons, including the fact that they do not wish the legal consequences of a marriage to follow from their relationship. It is also true that they may not marry because one of the parties does not want to get married. Should the law then step in and impose the legal consequences of marriage in these circumstances? To do so in my view would undermine the right freely to marry and the nature of the agreement inherent in a marriage. Indeed it would amount to the imposition of the will of one party upon the other. This is equally unacceptable.[44]

For Skweyiya J, writing for the majority, the choice of the testator was also important:

42 Sec 1 of the Maintenance of Surviving Spouses Act 27 of 1990.
43 *Volks* (n 4 above) para 92.
44 *Volks* (n 4 above) paras 92-94.

> It must be borne in mind that the legislature, by enacting the law, in fact qualified the right to freedom of testation. It said that freedom of testation would be limited to the extent that where marriage obliged the parties to it to maintain each other, freedom of testation ought not to result in the termination of the obligation upon death. The question we have to answer is whether it was unfair for the legislature not to qualify freedom of testation further, by creating a posthumous duty to maintain on cohabitants.[45]

This quintessentially liberal vision of choice, as untrammelled by social, economic or gender-based constraints, is in stark contrast with the substantive and transformational nature of the South African Constitution. As L'Heureux-Dubé J put it in the Canadian Supreme Court decision in *Miron*: 'It is small consolation, indeed, to be told that one has been denied equal protection under the Charter by virtue of the fact that one's partner had a choice'.[46]

Indeed, as we have seen, the Court in *Van der Merwe* rejected the argument that the choice of community of property as the marital regime was relevant to the question. Moreover, although the claimant was not herself amongst the poorest of South African women, figures show that women's vulnerability in co-habiting relationships is widespread in South Africa. Partly as a consequence of the migrant labour system, which wreaked havoc on the traditional family structure, more and more people in South Africa live together without being married. In the 2001 census, 2.3 million people described themselves as 'living together like married partners' although they were not married. This constitutes approximately 8 per cent of the adult population.[47]

O'Regan and Mokgoro JJ, both female members of the Court, took a radically different view from the majority. Their focus was on the social and functional similarity of life partnerships to that of marriage rather than on fictional notions of choice: 'Where relationships which are socially and functionally similar to marriage are not regulated in the same way as marriage, discrimination on the grounds of marital status will arise'.[48] To decide whether this was unfair, it was necessary to revisit the basic principles of substantive equality, which pays attention to: (a) the position of complainants in society and whether they have previously suffered from patterns of disadvantage; (b) the nature of the provision and the purpose sought to be achieved by it; and (c) the extent to which the discrimination has affected the rights or interests of the complainants and whether it has led to an impairment of their fundamental human dignity or has caused them some

45 *Volks* (n 4 above) para 57.
46 *Miron v Trudel* [1995] 2 SCR 418 (Canadian Supreme Court) 471-472.
47 *Volks* (n 4 above) para 119.
48 *Volks* (n 4 above) para 108.

other harm of a comparably serious nature.[49] On all these criteria, they held that the discrimination was unfair and unjustifiable.

As well as taking a very liberal view of choice, the majority relied on the traditional technique of separation of powers to justify its refusal to intervene. Thus, Skweyiya J held that it was for parliament, not the judiciary, to make whatever provision it considered appropriate for co-habiting couples. Skweyiya J was prepared to concede that women remain generally less powerful in co-habiting relationships, and that their desire to be married may be difficult to achieve because the more powerful partner would not agree to be bound by marriage. He also acknowledged that the very poor and illiterate were most vulnerable.[50] However, this was a problem which was unlikely to be corrected by maintenance claims in a situation of poverty, and instead needed the legislature to take wide-ranging steps. There were many ways in which this could be done, and it was not for the courts to decide how to do it.[51]

This explanation for judicial reticence is, however, difficult to sustain in the circumstances. A court faced with a specific claim in respect of a specific measure is not in fact called on to make widespread changes. Judicial activism is inevitably only piecemeal and incremental. But that does not mean that when an opportunity to make a change comes before it, it should reject the claim because it deals only with an aspect of the problem. Judicial activism need not preclude legislative change, nor have the effect of dictating the precise manner of change. But it does require the court to demand that the legislature acts consistently with constitutional values, and if that can only be done in respect of the case before it, there is no good reason to desist. In fact, O'Regan and Mokgoro JJ in their dissenting judgment upheld the claim on principle, but declined to give relief to the plaintiff herself on the grounds that provision had indeed been made for her in the will of the deceased.

4 Redressing disadvantage or reinforcing stereotypes: Women as child-carers

A particularly challenging case for a transformation analysis is the early case of *Hugo*, which concerned the pardon issued by President Mandela to all women prisoners who were mothers of young children. The pardon was challenged by a male prisoner, the sole carer of his young son, on the basis that it discriminated on grounds of gender. Notably, it was open to the Court to escape the difficulty by holding that the power of pardon was not justiciable. It commendably did not take this route, holding that, like other prerogative powers, the power of pardon should be open to scrutiny by the

49 *Volks* (n 4 above) para 123, drawing on the test formulated in *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 52.
50 *Volks* (n 4 above) paras 65 and 66.
51 *Volks* (n 4 above) para 67.

Court, particularly in order to ensure it was consistent with the Constitution. However, the Court rejected the case in substance. The Presidential Act might have denied fathers an opportunity it afforded mothers, but it could not be said to have fundamentally impaired their rights of dignity or sense of equal worth. Their freedom was curtailed as a result of their criminal conviction, not as a result of the Presidential Act; the latter merely deprived them of an early release to which they had no legal entitlement. Furthermore, the Presidential Act did not preclude fathers from applying directly to the President for remission of sentence on an individual basis in the light of their own special circumstances. The Court concluded that the impact upon the relevant fathers was, therefore, in all the circumstances of the exercise of the Presidential power, not unfair.

What is notable about the Court's method of rejecting the claim was its reliance on its own assumptions about the effects of a finding of unfair discrimination. Although the President had relied exclusively on his desire to protect the interests of young children, the Court was particularly influenced by what it regarded as the impossibility of extending the remission to fathers of young children:

> Male prisoners outnumber female prisoners almost fifty-fold. A release of all fathers would have meant that a very large number of men prisoners would have gained their release. As many fathers play only a secondary role in child rearing, the release of male prisoners would not have contributed as significantly to the achievement of the President's purpose as the release of mothers. In addition, the release of a large number of male prisoners in the current circumstances where crime has reached alarming levels would almost certainly have led to a considerable public outcry. In the circumstances it must be accepted that it would have been very difficult, if not impossible, for the President to have released fathers on the same basis as mothers. Were he obliged to release fathers on the same terms as mothers, the result may have been that no parents would have been released at all.[52]

It was with this that the lone dissenter, Kriegler J (the white Afrikaner male on the bench), took issue. The President had not sought to justify his decision by reference to the numbers of male prisoners who would have gained their release and no evidence was led to that effect. Nor was there evidence that such numbers would have produced public disquiet, nor did the Court know anything about the administrative burden of weighing the family circumstances of individual prisoners. The Court simply assumed these issues by way of justification for the differential treatment. Equally problematic for Kriegler J was the fact that the Court relied on a stereotypical notion of women to vindicate the discrimination:

> One of the ways in which one accords equal dignity and respect to persons is by seeking to protect the basic choices they make about their own identities. Reliance on the generalisation that women are the primary care givers is harmful

52 *Hugo* (n 18 above) para 46.

> in its tendency to cramp and stunt the efforts of both men and women to form their identities freely.[53]

Nor was the objectionable nature of the generalisation saved by the suggestion that it had been used for the benefit of a particular group of women prisoners. As a start, the President did not state that his purpose was to benefit women generally or the released mothers in particular. Instead, his stated rationale was the 'interest of children'. More seriously, Kriegler J noted:

> The benefits in this case are to a small group of women the 440 released from prison and the detriment is to all South African women who must continue to labour under the social view that their place is in the home. In addition, men must continue to accept that they can have only a secondary/surrogate role in the care of their children. The limited benefit in this case cannot justify the reinforcement of a view that is a root cause of women's inequality in our society. In truth there is no advantage to women *qua* women in the President's conduct, merely a favour to perceived child minders. On the other hand, there are decided disadvantages to womankind in general in perpetuating perceptions foundational to paternalistic attitudes that limit the access of women to the workplace and other sources of opportunity. There is also more diffuse disadvantage when society imposes roles on men and women, not by virtue of their individual characteristics, qualities or choices, but on the basis of predetermined, albeit time-honoured, gender scripts. I cannot agree that because a few hundred women had the advantage of being released from prison early, the Constitution permits continuation of these major societal disadvantages.[54]

This technique, namely a reliance on judicial notice or assumptions of unproved facts, is a familiar one for a court to resort to when it is unwilling to deflect what it regards as a legitimate government policy to further substantive equality. In the *Gosselin*[55] case in Canada, for example, the Supreme Court accepted the state's assertion, presented without substantiating evidence, that it was easier for young people to find jobs than older people. Judicial deference in this context operates as an obstacle to transformation because it protects the state from having to explain its decision to exclude a particular group from a particular benefit. This is done by deferring to the state in defining the ingredients of substantive equality, taking judicial notice of broad generalisations offered by the state, and erecting extra barriers for the applicant to cross before the burden shifts to the state to justify. It is argued here that this misplaces the role of judicial deference. Respect for the democratic process requires greater, not less, attention to the duty to account and explain. Providing an explanation for a decision enhances the accountability of decision makers, exposing them to public scrutiny and debate. This accepts, as Sunstein puts it, that 'judges have

53 *Hugo* (n 18 above) para 80.
54 *Hugo* (n 18 above) para 83.
55 *Gosselin v Quebec (Attorney-General)* [2002] 4 SCR 429 (Canadian Supreme Court).

limited wisdom and limited tools. Their role is therefore catalytic rather than preclusive'.[56] Requiring the state to provide a reasoned explanation does not require the judges to substitute their own opinions for those of policy makers on resource allocation questions. The judicial role in applying substantive equality remains a supervisory one, to guard against stereotypical assumptions and unwarranted generalisations which can cause or perpetuate disadvantage. This role is not easy to define. However, by protecting the state from having to explain an allocation in the first place, courts circumvent the need to develop an appropriate judicial standard of scrutiny.[57]

5 A retreat into formalism

Possibly the greatest test of a transformational court occurs in the most contested of arenas. Where opinions differ widely and fiercely, should a court ultimately defer to the legislature? Or is this the very place that a court should enter to consider the choice of alternatives to be subjected to constitutional values? Sex work is such an arena, where the disagreement is not just between moral conservatives and feminists, but amongst feminists themselves. Central to the question is the role of choice. For some, sex work is the paradigmatic manifestation of gender subordination, requiring women to commodify their bodies for the sake of men's sexual gratification. This approach is rejected by others on the grounds that it negates the choice and agency of sex workers. Both perspectives have important currency: The difficulty is in finding a way of recognising the real and problematic constraints on choice which lead sex workers into the position they are in, while at the same time affirming their dignity and human rights even in that position. In *Jordan*, the Court was given an opportunity of achieving such a synthesis, because the challenge was not only to the criminalisation of prostitution per se, but to the inequality of the law which criminalised the prostitute but not the client. An insistence that the law dealt equally with both would expose the inherent power imbalance between men and women in relation to sex work, without pre-empting the legislative response as to how to redress this balance. The Court, however, by a narrow majority, declined this opportunity. It did this by a retreat into formalism of the most severe kind.

The *Jordan* case more than any other exposes the ways in which a court faced with difficult choices might regard a retreat into formalism as the most comfortable place to be. Ngcobo J, writing for the majority, refused to regard the question before him as one which implicated an imbalance of gender power relations. The section penalised 'any person' who engages in sex for reward. This meant that it applied to male as well as female prostitutes and

56 C Sunstein *Designing democracy: What constitutions do* (2001) 11.
57 See further S Fredman 'Providing equality: Substantive equality and the positive duty to provide' (2005) 21 *South African Journal on Human Rights* 163.

was therefore simply not discriminatory. Nor was it indirectly discriminatory. Far from an imbalance of power, the relationship between the sex worker and the client was characterised as one of dealer and customer in an arms-length commercial relationship:

> There is a qualitative difference between the prostitute who conducts the business of prostitution and is therefore likely to be a repeat offender, on the one hand, and the customer who seeks the service of a prostitute only on occasion and thus may or may not be a repeat offender ... criminal sanctions. The differentiation between the dealer and customer is a common distinction that is made in a number of statutes.[58]

Ngcobo J also placed great weight on the fact that the customer would also face a criminal penalty, in that the latter was aiding and abetting a crime. In practice, however, no cases of a prosecution of a customer since the provision was introduced in 1988 was brought to the Court's attention, and the state did not seek to challenge the assertion that in practice only the prostitutes were charged in terms of the section. In Ngcobo J's view, however, this was irrelevant: 'What happens in practice may therefore point to a flaw in the application of the law but it does not establish a constitutional defect in it'.[59]

In a trenchant critique of this approach, the dissenting judgment of O'Regan and Sachs JJ exposed the reality of the power imbalance beneath the formal equality of the measure:

> The section brands the prostitute as the primary offender of the actual offence. The offence of the customer becomes an offence of conspiracy or complicity … This distinction is, indeed, one which for years has been espoused both as a matter of law and social practice. The female prostitute has been the social outcast; the male patron has been accepted or ignored. She is visible and denounced, her existence tainted by her activity. He is faceless, a mere ingredient in her offence rather than a criminal in his own right, who returns to respectability after the encounter. In terms of the sexual double standards prevalent in our society, he has often been regarded either as having given in to temptation, or as having done the sort of thing that men do. Thus, a man visiting a prostitute is not considered by many to have acted in a morally reprehensible fashion. A woman who is a prostitute is considered by most to be beyond the pale. The difference in social stigma tracks a pattern of applying different standards to the sexuality of men and women … The inference is that the primary cause of the problem is not the man who creates the demand but the woman who responds to it: She is fallen, he is at best virile, at worst weak. Such discrimination, therefore, has the potential to impair the fundamental human dignity and personhood of women.[60]

58 *Jordan* (n 7 above) para 10.
59 *Jordan* (n 7 above) para 19.
60 *Jordan* (n 7 above) para 64.

Notably too, the dissent distinguished this conclusion from that in *Hugo*, holding that in this case the reliance on a stereotyped view of women was used to impose further burdens and disadvantages on women whereas, in *Hugo*, the reliance on the stereotype of women as primary child carers was used to reduce a burden borne by mothers.[61]

However, the dissent would not go so far as to find that the criminalisation of prostitution was itself a breach of the Constitution. For this, they resorted again to the familiar separation of powers argument:

> Open and democratic societies vary enormously in the manner in which they characterise and respond to prostitution … The issue is an inherently tangled one where autonomy, gender, commerce, social culture and law enforcement capacity intersect. A multitude of differing responses and accommodations exist, and public opinion is fragmented and the women's movement divided. In short, it is precisely the kind of issue that is invariably left to be resolved by the democratically accountable law-making bodies.[62]

The *amici* before the Court, such as the Gender Commission, SWEAT and RHRU, were urged instead to use the political process to achieve change in this respect. This refusal to challenge the underlying provision while being prepared to take issue with its discriminatory application reflects the kind of judicial deference found in other jurisdictions, such as that of the European Convention of Human Rights. There the guarantee of equality will apply only if a state has provided a benefit in a discriminatory manner, but it does not require the state to provide the benefit in the first place.

This casts an important light on the role of equality even in a potentially transformative court. The dissent, while relatively at ease with a substantive equality analysis in principle, can in practice be seen to be applying this concept in only a limited sense:

> Parliament may decide to render criminal sexual intercourse where a reward is paid, but their decision to make only purveyors of sexual intercourse and not purchasers primarily liable, entrenches the deep patterns of gender inequality which exist in our society and which our Constitution is committed to eradicating.[63]

There is a strong element of formal equality here: Extending criminalisation to men would have fulfilled the judicial standards as well as removing criminalisation from both women. Moreover, although they implicitly recognised that criminalisation itself was a reflection of the deep-seated inequality of gender in society, they did not see this as a constitutional issue, but one for the political process. This is problematic, in that sex workers

61 *Jordan* (n 7 above) para 69.
62 *Jordan* (n 7 above) para 90.
63 *Jordan* (n 7 above) para 69.

scarcely have a voice in the deliberative process, however much they might be assisted by NGOs such as SWEAT and RHRU.

6 Conclusion

This paper has analysed some of the major cases on gender before the South African Constitutional Court. The potential for transformation clearly depends on a range of factors, such as the wording of the constitutional text, the claimants who happen to appear before the Court, the type of claim that happens to be brought, and the relationship between the Court and the legislature. These factors are partly out of the control of the Court, but only partly so. The wording of the Constitution can be construed in a substantive or formal sense, and the focus of the case could be on the narrow dispute before it or on the possibility of developing wider principles. Wider standing rules and direct access can encourage a wider range of claimants to apply, and *amici* interventions and other changes in procedure can open up wider vistas to a court. In addition, the Brazilian approach of inviting experts to present additional evidence in fundamental rights challenges is but one of many options available to the Court to improve the quality of the empirical evidence before it.[64] The above analysis has shown that in the complex area of gender, the Court is quite capable of directly challenging patriarchy within marriage and property ownership. However, it also relies on traditional self-limiting devices to avoid transformational decisions in more complex situations. Particularly disturbing is the easy resort to formal, liberal notions of choice, autonomy and equality in its response to gender-based cases in the most complex of fields. It is argued here that the Court has unnecessarily abdicated its proper role in these cases. This is not to say that the Court should substitute its decision for that of the legislature. Instead, it should fearlessly insist on accountability and justification from the state, which should be required to produce a thorough, evidence-based set of reasons for any *prima facie* discrimination. In this way, the Court can facilitate and strengthen deliberative democracy, without usurping the functions of the legislature.

64 See Ikawa (Chapter 9 above).

PART C: SPECIFIC RIGHTS AND THEMES

Sexual minorities

CHAPTER 12 ON PLURALISM AND ITS LIMITS: THE CONSTITUTIONAL APPROACH TO SEXUAL FREEDOM IN BRAZIL AND THE WAY AHEAD

Samuel Friedman and Thiago Amparo

> Accepted in the intimate sphere of private life, homosexuality becomes unbearable when it publicly claims its equivalence to heterosexuality. Homophobia is the fear that such equivalence will be recognised.
>
> Daniel Borrillo[1]

1 Introduction

On 5 May 2011, the Brazilian Supreme Court (STF), the apex court within the Brazilian judicial system, decided unanimously that article 1723 of the Civil Statute, which establishes civil unions between men and women, should be interpreted to also include same-sex unions.

The Court went further than just granting the same legal status. The justices recognised and emphasised that both opposite-sex and same-sex unions are family entities, subjected to the same criteria of 'public, continuing, and long-lasting relationships with the aim of establishing a family'.[2]

In other words, the STF decision is two-fold. On the one hand, it recognises the fundamental right of same-sex couples to establish families via the legal entity of a civil union, based on the right to non-discrimination, which is considered per se a right derived directly from the Constitution. On the other hand, the Court recognises the existence of a legal gap, to be filled

1 D Borrillo 'A homofobia' in T Lionço & D Diniz (eds) *Homofobia & educação: Um desafio ao silêncio* (2009).

2 Art 1723, Civil Statute, available at http://www.planalto.gov.br/ccivil/leis/2002/L10406.htm (accessed 11 June 2011). In this article, the terms 'civil union', 'stable unions' and 'same-sex unions' are used interchangeably in order to refer to the family entity established and so defined by art 1723 of Brazil's 2002 Civil Statute and art 226, para 3, of Brazil's 1988 Federal Constitution. A literal translation would be 'stable unions'. The rationale of this kind of family is to legally define those families that are not established by public celebration of marriage, as a civil act, but rather constituted by the continuing relationship between two people with the intent of establishing a family.

in by the legislature in the future, due to the need for amending family law to regulate the legal consequences derived from the recognition of same-sex unions.

The combination of these two elements raises concerns, from a practical perspective, about the legal effects of this decision and, from a legitimacy perspective, about the role of the Constitutional Court in relation to the legislature. Put simply, despite clearly being a progressive decision from a legal and moral perspective, the aftermath of the decision by the STF is still unclear. Several questions arise from the decision. For instance, is the recognition of same-sex unions a step towards the recognition of same-sex marriage or does it already constitute its recognition? Furthermore, what exactly is the legal gap to which the Court referred to in its decision?

The objective of this paper is to clarify the Brazilian approach to sexual minority freedom in light of the STF decision, oddly composed of partial deference to the legislative branch and a strong recognition of the right of lesbian, gay, bisexual, transgender, transsexual or intersex (LGBTTI) people and same-sex couples to equality before the law.

We argue that the STF approach to sexual minority freedom and recognition is based on a delicate equilibrium between rights protection and democratic legitimacy. On the one hand, the Court did not specify clearly all rights derived from its decision; in fact, it relied on a reluctant legislature to fill the gap, which may delay or even undermine the effects of the decision. On the other hand, the Court's strong affirmation of the rights of same-sex couples could spark a constitutional dialogue not only with the legislature, but also with lower courts, civil society organisations and public officials, such as public registry servants, with the goal of implementing the decision.

The first part of the article presents the Brazilian constitutional framework as well as the description of the decision. The second part of the article focuses on the strong rights protection established by the STF decision and its constitutional basis, the first element of the delicate equilibrium mentioned above. In this paper, the concept of invidious discrimination will be used in order to link the Brazilian and the South African decisions on this matter. Finally, the third part of the paper will reflect on the possible future of sexual minority freedom in Brazil, in the aftermath of the STF decision, focusing on the legislative gap, the second element of the delicate equilibrium.

2 Brazilian constitutional framework and the STF decision on same-sex unions

2.1 Constitutionality control in the Brazilian 1988 Federal Constitution

In 1985 Brazil emerged from a military dictatorship and underwent a slow transition to democracy. This process resulted in a new Constitution, the eighth after its independence. This new 'Generous Constitution' is a reaction to the arbitrary experience and long history of social injustice and inequality,[3] recognising and protecting individual and social rights, with a clear influence from international norms and standards.

The Brazilian Constitution allows the Supreme Court to analyse and decide on 'abstract constitutionality demands' that can be presented by a few actors.[4] Unconstitutional laws can impact on innumerable people and therefore several individuals or organisations may also seek judicial protection individually. However, a small number of actors have standing to challenge laws *in abstracto*. This particular case does not derive from an individualised dispute between parties personally injured, hence its 'abstract' nature.

A fair number of similar suits that had been brought to the STF relate to human rights, both directly and indirectly. The examples include affirmative actions, stem cell research, indigenous and traditional populations, religious freedom, access to healthcare and medicines, persons with disabilities, torture, environment and sexual minorities, to name just a few.

After the 1988 Constitution, new laws opened the possibility for organised civil society to participate in those cases, presenting *amicus curiae* briefs and oral statements before the Court.

Conectas Human Rights, a non-governmental organisation (NGO) based in São Paulo[5], has presented more than 35 such briefs, has participated in several judgment sessions and is today the most active organisation advocating for human rights in the Brazilian Supreme Court. This paper is based on the work developed by Conectas regarding constitutional litigation on gay rights, to which the authors of the present article contributed.

3 O Vieira Vilhena 'Public interest law: A Brazilian perspective' (2008) 13 *UCLA Journal of International Law & Foreign Affairs* 219.

4 Brazilian Constitution of 1988, art 103: The President of the Republic, Directing Board of the Federal Senate, Directing Board of the Chamber of Deputies, Directing Board of a State Legislative Assembly or of the Legislative Chamber of the Federal District, a State Governor or the Governor of the Federal District, the Federal General-Prosecutor, the Federal Council of the Brazilian Bar Association, a political party represented in the National Congress and a confederation of labour unions or a nationwide professional association.

5 For more information on Conectas, see www.conectas.org.

2. 2 Same-sex couples and the Brazilian Supreme Court

On 5 May 2011, the Brazilian Supreme Court decided favourably on two suits regarding the legal status of same-sex couples.

The first one is the ADPF[6] 132, filed by the Governor of the Rio de Janeiro state in February 2008, challenging the constitutionality of the State's Public Employees Act, which protected the partners of heterosexual public employees but, albeit indirectly, excluded same-sex partners from the same benefits.

The Governor argued that the distinction between opposite and same-sex partners violated the rights to equality, freedom, self-determination, human dignity and judicial security. The petition requested the Supreme Court to issue an interpretative decision of the local law in accordance with the Federal Constitution and, therefore, extend the same benefits given to opposite-sex partners to same-sex partners.

The state government sought the Supreme Court decision to avoid administrative liability for granting benefits to partners that were not expressly included in the law, and also to avoid judicial liability for discriminating against a vulnerable group. The fact that the state judiciary system was giving contradictory decisions – sometimes granting the benefits and sometimes denying them – was also taken into account.

Fundamental rights and principles are the legal bases of the suit. The Governor indicated that the lack of recognition of same-sex couples was a hideous discrimination prohibited by the Constitution and a breach of the rights to equality, non-discrimination, the right to full and free personal development, self-determination, human dignity and judicial security. His premise was the fact that homosexuality was not forbidden in any way; in fact, a democratic state should guarantee everyone the possibility to fully and freely develop their personality, whatever their inclination. The government – and its laws – can neither discriminate nor tolerate any discrimination against vulnerable groups. He argued that there is a set of fundamental rights and principles in the Constitution that include same-sex couples in the same protective status as opposite-sex couples. If the legal system is complete, even if the laws do not regulate a situation, the argument continued, an analogical interpretation should apply and, in this case, the essential characteristics of a 'stable union' are present in same-sex partnerships and thus its rules should also apply to them.

According to the Governor, same-sex partners are bound together by affection and not by simple material relations, therefore they should receive

6 Acronym for Allegation of Disobedience of Fundamental Precept.

the same legal treatment and status as the heterosexual 'stable unions' and not be regarded as mere civil *de facto* societies.

The second suit is the ADI[7] 4277, filed by the Federal General-Prosecutor[8] in July 2009. The first petition requested the Court to declare 'the recognition of same-sex couples as family entities' mandatory to all public and governmental services, and hence 'stable unions', if the same requirements applicable to such unions for opposite-sex couples were present. The Court's President asked for an indication of which laws were being challenged by the Federal General-Prosecutor's Office, and article 1723 of the Brazilian Civil Statute[9] was nominated.

That article states that a 'stable union'[10] *between a man and a woman* should be recognised when they have a public, continuous and long-lasting relationship established with the goal of establishing a family. The suit was based on the conclusions of the Working Group on Sexual and Reproductive Rights of the Federal Human Rights Prosecutor's Office (PFDC), and presents the same fundamental rights and principles indicated in ADPF 132 as its foundation.

However, this second suit challenges the limited concept of 'stable union', defined as a *couple formed by a man and a woman*, in the context of a Federal Constitution that prohibits all forms of discrimination and is focused on establishing and maintaining a plural and diverse society. The claim is that the requirements of a 'stable union' can be met by either same-sex and opposite-sex couples and they should receive the same treatment. The President of the Republic and the Federal Attorney-General[11] provided

7 Acronym for Direct Unconstitutionality Action.

8 According to arts 127-130 of the Federal Constitution and Federal Law 8.625/93, the Federal General-Prosecutor (*Procurador-Geral da República*) is the head of the Federal Prosecution Service (*Ministério Público Federal* or MPF). The MPF is not part of the executive, legislative or judicial branches, being totally independent. It cannot be terminated and its duties cannot be transferred to other government agencies. Prosecutors have their independence guaranteed by the Brazilian Constitution. Therefore, its internal hierarchy is for administrative purposes only, hence each member of the Prosecution Service is free to act according to their conscience and convictions under the law. The MPF acts on those federal matters regulated by the Constitution and federal laws whenever public interest is involved, by virtue of the parties or of the matter itself. It is also the MPF's responsibility to ensure compliance with the laws in force in Brazil, including international agreements. Furthermore, the MPF acts as a guardian of democracy, ensuring respect for principles and rules that guarantee popular participation.

9 Federal Law 10.406/2002.

10 Brazil is one of the biggest Catholic countries in the world and its history show a long relationship with the church. It was only in 1890 that state and religion were separated. Until 1977, there were no divorce laws in Brazil and once married, a person could not have a second wedding and enjoy its legal protection. The 'stable union' provision was created to regulate the relationships of those who could not be legally married. It does not require the formalities of a civil marriage and, although it creates a legal status that is close to marriage, there are still differences regarding the relations between the partners.

11 At the time Dias Toffoli was the Federal Attorney-General. He was later appointed justice of the Supreme Court. Since he had already functioned in those matters in a different capacity, he could not participate in its judgment.

information to the Court supporting the extension of 'stable union' protection to same-sex couples.

2.3 Conectas's briefs

Conectas Human Rights, through its Justice Programme, presented *amicus curiae* briefs in both those suits, along with gay organisations, including the Brazilian National LGBT Association.

In both *amici curiae* briefs,[12] Conectas and the partner organisations emphasised that the Federal Constitution does not allow any kind of discrimination based on gender, sex or sexual orientation. Therefore any laws or judicial decisions that consider – even indirectly – that homosexuals or same-sex couples are less worthy of rights than heterosexuals and opposite-sex couples are unconstitutional. Even though there is no direct reference to same-sex relationships (or its prohibition) in the Federal Constitution, a systematic and teleological interpretation, in light of the principles set forth in 1988, leads to the conclusion that such relationships are as protected as those of heterosexual couples. If Brazil intends to be a plural, diverse and democratic republic, in which discrimination based on sexual orientation is unlawful,[13] all individuals are free to self-determination and to live their lives as they see fit, and none should be persecuted or discriminated against because they are different: respect is the other facet of pluralism.

Considering the Supreme Court's jurisprudence, it was demonstrated that discrimination is only permissible when based on a reasonable and not prohibited ground,[14] and that laws that exclude same-sex couples do not fall in this exemption. Hence the denial of equal rights for same-sex couples was simple prejudice.

Although there is no international convention on the rights of sexual minorities, it was pointed out that the Yogyakarta Principles[15] outline the protection that is already dispensed to homosexuals and same-sex couples by international human rights law to date. Articles from the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the American Convention on Human Rights were also quoted.

The *amici curiae* briefs also referred to decisions and recommendations from several United Nations (UN) committees and Special Rapporteurs that

12 Available at http://www.stfemfoco.org.br in Portuguese (accessed 20 November 2013).
13 JRL Lopes 'The right to recognition for gays and lesbians' (2005) 2 *SUR Revista Internacional de Direitos Humanos* 64.
14 Such as the privileges of the elderly because of their advanced age or the affirmative distinctions between men and women in the Federal Constitution, *verbi gratia.*
15 For more information, see http://www.yogyakartaprinciples.org/ (accessed 20 November 2013).

have visited Brazil, in order to demonstrate that international jurisprudence protected homosexuals and homosexual couples from discrimination and that they are vulnerable and often subjected to serious violence, in Brazil and all over the world.

In fact, homophobia can be analysed from a state perspective: Prejudice that is institutionalised, tolerated or overlooked allows and reinforces the continuity of discrimination against homosexuals as a vulnerable group, hence they are not recognised as entitled to equal rights or are even seen as 'second class' citizens.

Recent research showed that although 92 per cent of the population says that there is prejudice against homosexuals, only 26 per cent of the same population said that they were, themselves, prejudicial.[16] As part of the research, interviews were conducted and revealed 99 per cent of the interviewees have somehow shown prejudicial attitudes against homosexuals (45 per cent either strong or medium prejudice). According to some other research, in the school environment, 87,3 per cent of the interviews revealed that students, teachers and parents had prejudice regarding sexual orientation.[17]

Discrimination leads to violence and, in Brazil, homosexuals are a targeted vulnerable group and are exposed to hate crimes. According to the Justice Ministry, from 2002 to 2005 at least 458 homosexuals were murdered as victims of hate crimes.[18] The same reality was noted in the report offered by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance following his visit to Brazil in 2005.[19]

Finally, the *amici curiae* offered a comparative law perspective to the Supreme Court. According to the International Lesbian and Gay Association (ILGA), several countries and states recognise either marriage or civil unions for same-sex couples.[20]

16 Gustavo Venturi 'Diversidade sexual e homofobia no Brasil' [Sexual diversity and homophobia in Brazil] Fundação Perseu Abramo, 2008, more information available at: http://novo.fpabramo.org.br/content/diversidade-sexual-e-homofobia-no-brasil-intolerancia-e-respeito-diferencas-sexuais (accessed 20 November 2013).

17 'Pesquisa sobre Preconceito e Discriminação no Ambiente Escolar' [*Prejudice and discrimination in the school environment*], Fundação Instituto de Pesquisas Econômicas (FIPE), June 2009, available at http://portal.mec.gov.br/dmdocuments/diversidade_apresentacao.pdf (accessed 20 November 2013).

18 Third Human Rights National Report.

19 E/CN.4/2006/16/Add.3 para 40.

20 ILGA 'State homophobia: World legal map on LGBT legislations' 2013, available at: http://ilga.org/ilga/en/article/1161 (accessed 20 November 2013).

The *Fourie* and *Equality Project* cases in South Africa[21] and the D-6947 and D-7290 cases in Colombia were highlighted in the *amicus curiae* briefs as paradigmatic cases in which Supreme Courts of other countries from the global south had recognised equality for same-sex couples regardless of previous legislative change, and even demanding such a change.

All those arguments intended to argue before the Brazilian Supreme Court that the Federal Constitution protects the human rights, dignity and equality of homosexuals and same-sex couples, and the Court should uphold those values to improve their lives and stop the vastly documented discrimination context in which sexual minorities live in Brazil.

2.4 The Supreme Court decision of May 2011

ADPF 132 was filed before the Supreme Court in February 2008 and distributed to Justice Carlos Ayres Britto. ADI 4277 was filed in July 2009 and first distributed to Justice Ellen Gracie. In March 2011, the President of the Supreme Court consented with Justice Gracie's request to redistribute the suit to Justice Britto, who was already considering the same matter through ADPF 132. The Court decided to hear both claims jointly in May 2011. In two days of proceedings, all plaintiffs and *amici curiae* were heard and all justices presented their votes.

The Court decided unanimously[22] that, according to the Federal Constitution, same-sex unions are equal to opposite-sex unions and should be extended the same rights and duties. The Court recognised that same-sex public and lasting unions, like opposite-sex unions, were also a family nucleus and should be protected as such.

The rapporteur for both claims was Justice Carlos Ayres Britto. His decision was accompanied by the other justices, who have also added arguments and insights in their own votes. It is important to note that the Court stressed that the decision had *erga omnes*, immediate and compulsory[23] effect.

In his leading vote, Justice Britto started analysing the constitutional protection for *homoaffective*[24] people and then moved on to analyse its protection towards same-sex unions. The rapporteur stated that the Brazilian

21 J Barnard-Naudé 'Sexual minority freedom and the heteronormative hegemony in South Africa' (Chapter 14 below), provides a comprehensive and critical analysis of the South African cases.

22 The Brazilian Supreme Court has 11 justices. Justice Dias Toffoli did not participate in the judgment because he had acted as Federal Attorney-General in those claims before he was appointed as justice.

23 Similar to the *stare decisis* doctrine, the Supreme Court may confer authority on the decision to bind all other pending cases in the same manner.

24 Maria Berenice Dias, jurist and former Rio Grande de Sul's High Court judge, is known for her academic research and litigation for gay rights in Brazil. She started using the term

Constitution prohibited discrimination based on several grounds, such as race, geographical or social origin and sex.[25] Regarding 'sex' specifically, the justice emphasised that the expression went beyond the anatomical differences between males and females and included free living and the expression of one's own sexuality. Therefore, people's sex and sexuality are not valid grounds for discrimination. If used for that purpose, those grounds would conflict with Brazil's constitutional objective of 'promoting the well-being of all',[26] eroding the principles of socio-political-cultural pluralism and material democracy with the respectful co-existence of differences.

Justice Britto said that the right to sexual freedom is an elementary part of one's human dignity and autonomy, in their personal pursuit of a meaningful life. It is also based on the rights to freedom, privacy and intimacy, resulting, in fact, in an individual right to personality, which is both immediately applicable[27] and irrevocable.[28] That considered, there are no permissible grounds for unequal treatment of homoaffective and heteroaffective people. In fact, according to the vote, heteroaffective people were not entitled to object to equal treatment.

The rapporteur moved on to the logical question: If sexuality is not a permissible ground for discrimination between people, could it be to differentiate their unions? His answer was in the negative.

The leading opinion states that in the twenty-first century family notion, affection prevails over biology. According to the Constitution, the family, which is the basis of society, has special protection from the state. Justice Britto continues to explain that the only non-homophobic interpretation, aligned with the constitutional principles, was the one that recognises the equality of the families composed both by *heteroaffective* and *homoaffective* couples. In fact, when the Constitution mentions the 'the union of a man and a woman',[29] it does not intend to only legitimate *heteroaffective* couples, but rather to overcome the prejudicial bias against women, like in many other parts of the Constitution. Justice Britto noted that until 1962, married women were accorded only partial legal capacity for civil matters, which was expressly repealed by the 1988 Constitution. Thus, by denying interpreting this constitutional reference to men and women as excluding legal recognition to same-sex couples, the Rapporteur affirmed that '[t]he Constitution's words cannot be used against its intention'.

'homoaffective' instead of homosexual to stress that homosexuality is not only about sex or eroticism, but also – and perhaps mainly – about love and affection. The word gained mainstream use and has even been included in dictionaries.

25 Art 3.
26 Art 3 IV.
27 Art 5 para 1.
28 Art 60 paras 4, IV.
29 Art 226 para 3.

Furthermore, family is a cultural concept and the Brazilian Constitution does not confine it only to marriage – like the former 1937 Constitution did. Currently, families can be composed of unmarried or widowed parents, grandparents and grandchildren and also relations based solely on affection. In fact, according to the STF, all forms of public and lasting relationships based on affection, regardless of the sex of the partners, are families equally protected by the Constitution. During the debates, the justices stressed that the lack of legal regulation on the matter did not mean the absence of the right itself. Hence the Court did not invade legislative function when it recognised the right of same-sex couples to establish a family protected in the same manner as opposite-sex couples, but rather reinforced the Court's interpretation of the Constitution and its duty to protect minorities. The legislature was criticised for not taking any measures to extend equal protection to same-sex couples and sexual minorities in general, especially considering the vulnerability to the daily violence and homophobia they were subjected to. The Court exhorted the National Congress to act and create regulations that include and protect homosexual people and couples.

The final summary of the Court's holding reads as follows, in a free translation:

> Article 1723 of the Civil Statute shall be interpreted according to the Federal Constitution to exclude any meaning that hinders the recognition of the continuous, public, lasting union of same-sex couples as a 'family entity', understood as a synonym of 'family'. To this recognition shall be applied the same rules and consequences derived from heteroaffective 'stable unions'.

3 The foundational ideas of the protection of rights of same-sex couples

The STF decision on same-sex relations reflects a moment of transformative constitutionalism in the Brazilian constitutional history. If a vague concept such as transformative constitutionalism means anything at all,[30] it at least underlies the role of courts in advancing legal changes in order to tackle economic, social, cultural, political or moral dominance.

Therefore, the human rights language, incorporated into the constitutional discourses both in South Africa and Brazil, is useful in this sense. Their universalism, that is, the universal language that seeks to advance the rights of 'everyone' – the standard term in human rights documents – lays a platform for courts to advance the rights of disadvantaged

30 The critique of the vagueness of the transformative concept is well presented by Theunis Roux in his response to Upendra Baxi's article (Chapter 2 above). The underlying rationale of Prof Roux's argument is that transformative constitutionalism is based on a critique against liberalism, without paying due regard, however, to the fact that the most recent constitutional documents (for instance, South Africa's and Brazil's) are not typical liberal documents, or at least not in the sense of legal facets of global capitalism.

groups by highlighting who 'everyone' means and, furthermore, why 'everyone' includes those groups dominated by others in a particular historical and legal context. Hence, as a solid recognition of the rights of sexual minorities, the STF decision on same-sex couples represented a moment of transformative constitutionalism in the Brazilian history for, at least, three reasons.

First, the concept of 'sex', as one of the prohibited grounds of discrimination under article 3, IV of the 1988 Constitution, is interpreted in a broad sense by the Court. Interestingly, in the first place, Justice Britto narrows the concept of sex, defining it as a reference to the different sexual organs of male and female.[31] From this literal interpretation, Justice Britto derives the right to 'free disposition of individual sexuality',[32] once the Constitution prohibits discrimination based on sex, which is interpreted as the expression of sexuality or, more literally, the free use of one's sexual organs. According to Justice Britto, therefore, the right of consenting adults to express their sexuality has a two-fold basis: On the one hand, the prohibition to use 'sex' as a ground of discrimination and, on the other hand, the sexual freedom granted by the Constitution, simply because the Constitution decides to not regulate this matter.[33]

Such a bold affirmation of an individual right to express any form of sexuality between consenting adults, as a facet of the fundamental liberties protected by the Constitution, resembles what Barnard classifies, in regard to the broad definition of sexual orientation by the South African Constitutional Court in the first *National Coalition for Gay and Lesbian Equality* case, as a 'queer moment in the Constitutional Court's jurisprudence and [which] spelt a plethora of possibilities for the recognition of alternative forms of sexuality and sexual relations in post-apartheid South Africa'.[34]

As a matter of comparison, however, to interpret the Brazilian Constitution in *queer* terms is clearly a more challenging task than in South Africa. It is because, unlike the South African Constitution, the Brazilian Constitution does not include 'sexual orientation' as an explicit ground of discrimination, which makes the argumentative effort of the STF considerably harder. Despite this obvious obstacle, the STF decision on same-sex unions successfully recognises an unforeseeable range of possible sexualities by reading in a broad manner the word 'sex' in article 3, IV of the Constitution.

On a critical note, however, Justice Britto's reliance on an anatomical definition of sex, by reference to the male and female sexual organs, should, in turn, be accepted with certain reservation. In future cases regarding diverse gender identities, such as the currently pending case before the

31 Para 10.
32 Para 11.
33 Para 21.
34 Barnard-Naudé (Chapter 14 below).

Supreme Court seeking the recognition of the right to personal identity (specially, right to a name according to one's gender identity) for transsexual persons,[35] the Court should be able to differentiate the issue of sex and gender identity and, more importantly, interpret the word 'sex' in the constitutional text as also embracing different forms of gender identity, which is independent from sexual orientation and transcends the male-female dichotomy. Only with such a wide definition of 'sex', the Court will do justice to its *queer moment*[36] initiated with the case of same-sex unions.

Second, the STF decision applies a higher scrutiny to legal discrimination against same-sex couples based on an 'anti-prejudice argument'. Although the Court does not apply a clear constitutional test (such as the proportionality standard in Germany or strict scrutiny in the United States), the STF decision indicates that laws based on prejudice are unconstitutional. The reference to prejudice is directly derived from the language of article 3, IV, where the Constitution expressly outlaws legal discrimination based on any prejudice, and more importantly forms of discrimination based on the prohibited grounds listed in the constitutional text, amongst them 'sex'.

The so-called 'anti-prejudice argument' enriches the discourse in favour of same-sex unions in, at least, three ways, namely, from a historical, recognition and moral perspective, as explained below.

From a historical perspective, an 'anti-prejudice argument' enables the Court to be sensitive to historical discrimination suffered by vulnerable groups. It is so because prejudice is not a legal concept as such, but rather reflects certain social dynamic historically built around the idea that certain groups or individuals deserve less respect.

The opinion of Justice Celso de Mello in the case of same-sex unions illustrates such an approach. Justice Mello describes the historical discrimination suffered by homosexuals since the Portuguese laws, during the colonisation period, via the crime of sodomy, until the present day, where the practice of same-sex intimate relations within a military establishment is criminalised by the Military Penal Statute.[37]

Such historical rationale, as part of the 'anti-prejudice argument', is also emphasised by Barnard in relation to the apartheid and its hostility to sexual minorities in the South African context. In this regard, the constitutional

35 ADIN 4275 (2009), which ADI requires the Court to declare unconstitutional the interpretation of Article 58 of Law 6.015/73 (amended by Law 9.708/98) that ignores and prevents the right of transsexuals, who so desire, to replace the first name in the registry and sex calendar, regardless of reassignment surgery.

36 It is outside the scope of this article to discuss queer theories in detail. The term is generally used here as a reference to the altogether denial of clear-cut forms of sexual and gender identities. See, for example, S Seidman *The social construction of sexuality* 2nd ed (2010) 92. In addition, see WB Rubenstein *Cases and materials on sexual orientation and the law* 2nd ed (1996) 124-145.

37 Military Penal Statute, Art 235.

litigation on sexual minorities in South Africa can be viewed as a gradual recognition of rights of those groups as part of the democratisation process, from the declaration of unconstitutionality of the crime of sodomy to the recognition of same-sex marriage.

According to Barnard-Naudé, by applying a similar historical approach to the one adopted in Brazil by Justice Mello,

> [i]n its substantial jurisprudence on sexual minority freedom, the Constitutional Court of South Africa has noted that gay men, lesbians and other sexual minorities suffered under apartheid because they were branded as criminals and rejected by society as outcasts and perverts.[38]

A historical approach to prejudice, in this sense, reflects the potential of courts in addressing long-lasting discrimination clearly verifiable by reference to the country's history.

Such historical approach is particularly relevant when judges link the contemporary struggle for recognition by sexual minorities to the overall fight against oppression in the country. As pointed out by Narrain[39] in his piece about the Indian case *Naz Foundation v Union of India,*[40] where the High Court of Justice declared that the sodomy provision (Section 377 of the Indian Penal Code) violates the Constitution, the history of litigation on the rights of sexual minorities in South Africa, Brazil, and South Africa tackles a history of oppression in those countries (apartheid, military dictatorship and imperialism, respectively).

According to him, this approach upholds the 'inclusiveness' principle expressed by the Delhi High Court in *Naz Foundation*, according to which the idea that minorities have also a role in society that must be respected by the majority is one of the core values of the Indian Constitution. Although we do agree that the recent constitutional history in Brazil can be largely explained by the eager to fight against the dictatorial nature of the military regime, interestingly enough the STF decision relies more on the social discrimination faced by the sexual minorities, especially in contemporary times, rather than basing its central arguments on the role played by the Constitution in dealing with past oppressions derived from the military regime. In this sense, the leading vote of the STF decision seems more an attempt to response to a present discrimination/oppression, rather than to react upon a recent history of legal oppression by the law since the 60's. This is partly because the STF decision deals with a novel legal institution (same-sex unions), and therefore it is not a decision about a long-standing institution such as sodomy provisions. Nevertheless, the role of the Brazilian Constitution of 1988 in establishing a democratic era, where minorities should be included in the

38 Barnard-Naudé (Chapter 14 below).
39 A Narrain 'New language of morality: From the trial of Nowshirwan to the judgment in Naz Foundation' (Chapter 13 below).
40 Delhi High Court, Delhi Law Times Vol 160 (2009) 277.

society as equal, led the Justices in the STF decision to strongly emphasise the recognition aspect of its judgment, articulating a moral anti-prejudice argument in explicit terms.

From a recognition perspective, the 'anti-prejudice argument' consolidated by the STF decision on same-sex unions, while interpreting the article 3, IV of the Constitution, also highlights the symbolic nature of discrimination against sexual minorities. Bearing in mind Nancy Fraser's distinction between claims of redistribution, characterised by material injustices and claims of recognition, defined by cultural injustices, the 'anti-prejudice argument', for highlighting the symbolic depreciation of the sexual minorities, enables the Court to publicly affirm that same-sex couples deserve the same respect from society that opposite-sex couples are afforded and, thus, remedy an immaterial injustice.

According to Fraser:

> Gays and lesbians suffer from heterosexism: the authoritative construction of norms that privilege heterosexuality. Along with this goes homophobia: the cultural devaluation of homosexuality. Their sexuality thus disparaged, homosexuals are subject to shaming, harassment, discrimination, and violence, while being denied legal rights and equal protections - all fundamentally denials of recognition.[41]

Such a denial of recognition is what the Court seeks to address when it reads article 3, IV of the Constitution as outlawing all legal measures based on prejudice against sexual minorities.

The symbolic discrimination is often addressed in explicit terms by constitutional courts. As mentioned by Barnard-Naudé, the South African Constitutional Court in the *Fourie* decision, regarding same-sex marriage, expressly noted the issue of symbolic discrimination against gays and lesbians, when it stated that '[w]hen separation implies repudiation, connotes distaste or inferiority and perpetuates a caste-like status that it becomes constitutionally invidious'.[42]

The practical consequence of this approach is to recognise that same-sex unions are not merely a contractual relation between two private or trade partners, which is within the realm of material relations, but rather a more profound relation[43] between two people with the same symbolic value of

41 N Fraser 'From redistribution to recognition? Dilemmas of justice in a "post-socialist" age' (July/August 1995) *New Left Review* 77.

42 Para 152.

43 A similar approach was famously applied by the US Supreme Court in *Lawrence v Texas* 539 US 558 (2003), when, in a often-quoted excerpt, Justice Kennedy affirms that defining same-sex relations as merely the sexual act of sodomy is to demean the right to liberty at stake in those cases, although the Court did not affirm in *Lawrence* the right of same-sex couples to formal legal recognition: 'To say that the issue in *Bowers* was simply the right to

unions between opposite-sex couples. Such a legal consequence is expressly recognised by the STF Justice Ayres Britto.

From a moral perspective, finally, the 'anti-prejudice argument' enables the Court to highlight an important aspect of discrimination against same-sex couples, namely, the moral disapproval suffered by those sexual minorities from a considerable part of the society that derive their prejudices from a feeling of disgust[44] in relation to gays and lesbians.

As noted by José Reinaldo Lopes, in a piece on the right to recognition of gays and lesbians in Brazil, the legal debate on whether laws should endorse moral judgments based on disgust is an old one, particularly referring to the debate in the 1960s between Lord Devlin and Herbert Hart. Such a debate is expressly mentioned by Justice Marco Aurélio in his opinion on the STF case regarding same-sex unions.

Without going into the details of this debate, it is worth noting that the moral perspective brought by the 'anti-prejudice argument' enables the Court to ascertain that, first, a moral based on feelings of disgust towards gays and lesbians 'is uncritical, is not based on any rational discussion of the fundamentals of moral choice, but on impressions and feelings'[45] and, second, only represents the view of the majority without due regard to individual autonomy.

In light of this criticism, José Reinaldo Lopes, based on Dworkin's critical morality, states that 'prejudice is not a valid reason (a belief that homosexuals are inferior because they do not hold heterosexual intercourse is not justified as a moral judgment of superiority or inferiority)'.[46] Such an approach highlights the potential of the 'anti-prejudice argument' in exposing the irrational morality that underlines the legal discrimination against gays and lesbians.

Finally, the third reason why the STF decision represented a moment of transformative constitutionalism was the application by Justice Britto of a feminist approach to article 226, paragraph 3 of the Constitution. This constitutional provision states as follows: 'For purposes of protection by the

engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behaviour, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals' available at http://www.law.cornell.edu/supct/html/02-102.ZO.html (accessed 21 November 2013).

44 The disgust argument is well discussed in MC Nussbaum *From disgust to humanity: Sexual orientation and constitutional law* (2010).

45 Lopes (n 13 above) 64-65.

46 Lopes (n 13 above) 65.

state, the stable union between a man and a woman is recognised as a family entity, and the law shall facilitate the conversion of such entity into marriage'. Due to the reference to 'a man and a woman', this provision represented the most serious obstacle to the recognition of same-sex unions. However, Justice Britto rejected a restrictive interpretation of this provision, which would thus allow only the recognition of opposite-sex unions. He held, instead, that the purpose of this provision is to 'establish legal relations [between man and woman] of horizontal nature or non-hierarchical' (paragraph 35), and therefore this provision should be read as the constitutional opposition to a patriarchal order of society.

Such approach is transformative not only because it expressly rejects a literal interpretation of the constitutional text, but primarily because it reinterprets the Constitution in light of the social structure of domination, in this case the unjust supremacy of men over women. Furthermore, the application of a feminist approach[47] in a case regarding same-sex unions also highlights the complex relations between different claims of recognition (women's and sexual minorities' movements) and the mutual support they might provide to each other.

4 Effects of the decision and the way ahead

While the STF decision holds that the right of same-sex couples to legal recognition is of immediate effect, that is, it applies to all branches of the government (legislature, executive and lower courts) since the publication of the decision, the part of the decision dedicated to the judicial remedies limits itself to affirm that same-sex unions enjoy the same rights and duties as opposite-sex unions do. From the perspective of the judicial protection of sexual minorities, such a lack of specific remedies to expressly tackle the consequences of non-recognition of same-sex unions (such as the right to joint adoption of children, the right to change a stable union into marriage, and so on) weakens the STF decision.

From the perspective of democratic legitimacy, however, the general remedy established by the STF (the clear recognition of same-sex unions) is arguably a proper balance between, on the one hand, what Justice Celso de Mello, in his opinion, called the 'institutional need' of the Court, being activist or counter-majoritarian when minorities' rights are at stake and, on the other hand, the respect by the Court of the legislature's role in passing a law determining how this equal treatment to same-sex unions will be in practice conducted.

47 This article does not discuss the diversity of feminist approaches to law. It rather uses the term 'feminist approach' to refer to a usual feminist critique of law, according to which gender inequality in law serves to perpetuate male dominance over women. See, for instance, CA MacKinnon *Sex equality: Lesbian and gay rights* (2003) 20-24.

It is outside of the scope of the present paper to discuss whether a theory of democratic legitimacy of courts will *necessarily* reject the imposition of specific remedies to address violations of minorities' rights. The argument in this paper is a more practical one: In spite of the strong recognition of the rights of same-sex couples discussed in the previous section, the lack of specific remedies in the STF decision enhances the obstacles that will likely be faced by activists in their efforts to implement the STF decision. This is the case for, at least, two intertwined reasons.

First, the STF decision does not necessarily open the democratic channels to sexual minorities and therefore it is likely that those groups will still face long-lasting resistance from the legislature regarding the recognition of their rights.

Unlike the *Fourie* case in South Africa, the STF decision chose to interpret the Constitution as acknowledging the right of same-sex couples to legal recognition and therefore declined to formally start a dialogue with the legislature about the legal regulation of the consequences of such recognition. According to Barnard-Naudé, the South African Constitutional Court:

> Instead of an immediate reading-in to remedy the unconstitutionality ... suspended the reading-in for one year to give Parliament a chance to address the unconstitutional exclusion of same-sex couples from enjoying the status and entitlements coupled with responsibilities that are accorded to heterosexual couples by the common law and by the Marriage Act.[48]

Although the STF decision has the clear advantage of affirming that rights of same-sex couples are protected by the constitutional principle and not by the force of the legislative majority, the obstacles faced by the LGBTTI population in approaching the political branches will be likely to continue without a more specific judicial intervention. The LGBTTI movement has maintained a strong lobby and proximity with legislative representatives,[49] although those are not yet strong enough to move very necessary legislation forward. Considering that the LGBTTI population is a vulnerable minority, they have faced historical difficulties to obtain legal recognition and protection from the majoritarian representative system. Furthermore, the elevated number of conservative and religious representatives does not allow those discussions to evolve and also obstruct legislative and executive propositions about them. By the same token, the executive branch also suffers the considerable

48 Barnard-Naude (Chapter 14 below).

49 See further in 'Relançada, frente parlamentar LGBT vai lutar pela aprovação do casamento entre pessoas do mesmo sexo' *Agência Brasil* 29 March 2011 http://agenciabrasil.ebc.com.br/noticia/2011-03-29/relancada-frente-parlamentar-lgbt-vai-lutar-pela-aprovacao-do-casamento-entre-pessoas-do-mesmo-sexo (accessed 21 November 2013).

pressure of those groups that threaten to obstruct or reject the debate on LGBTTI rights.[50]

Second, the Brazilian judicial and registry systems are complex, with several actors (such as family law judges and registry officials), and therefore it is likely that activists will still fight several battles on the ground in their attempt to fully implement the legal recognition given by the Supreme Court. In this sense, despite the fact that the STF decisions should be followed by all three branches of government, the STF holding is likely to be challenged by conservative judges and officials at the lower levels. From this perspective, Brazil should not be seen as a solid block but rather a complex web of political, judicial and bureaucratic players, with relative autonomy, which LGBTTI activists and same-sex couples should take into consideration.

It is important to keep in mind that key breakthroughs were obtained in Brazil via judicial decisions and also executive orders in a long process of recognition of rights. For instance, the National Social Security Institute was obliged by a judicial decision in a class action suit to include same-sex partners for social security protection.[51] Recently, the Brazilian National Revenue Service issued an internal order that allowed same-sex couples (that fulfilled the same requisites of opposite-sex partners) to jointly file income tax declarations and even to indicate one of the partners as financially dependent on the other.[52] Following those – and many other – small victories, the Supreme Court's decision in May comes as an important milestone on a road that is not yet completed.

Two examples illustrate the complex web of players mentioned above.

One the one hand, the case of registry officials and the conversion of same-sex unions into marriage.[53] Although the Constitution says that the law should facilitate the conversion of stable unions into marriage, it is unclear whether same-sex unions are included in such a provision. The Supreme

50 Note that President Dilma Rousseff withdrew anti-homophobia educational material that was being developed by the Ministry of Education to be distributed in schools after Congress opposition threatened to block legislation and open an investigation on one of her top ministers. This could even be considered a kickback from the Supreme Court decision. See further 'Brazil sex education material suspended by President' *BBC News* 25 May 2011 http://www.bbc.co.uk/news/world-latin-america-13554077 (accessed 21 November 2013).

51 The decision by the Federal Justice in Porto Alegre in Class Action Suit 2000.71.00.009347-0 forced the National Social Security Institute to amend its bylaws to include same-sex partners (note Instrução Normativa INSS 45/2010, arts 25, 45 para 2, 322 and 335 available at http://www3.dataprev.gov.br/sislex/paginas/38/inss-pres/2010/45_1.htm (accessed 21 November 2013)).

52 The full text of the legal memorandum on this matter is available at http://www.pgfn.fazenda.gov.br/arquivos-de-noticias/Parecer%201503-2010.doc (accessed 21 November 2013).

53 Opposite-sex couples in civil unions can request the conversion of their union into a marriage (art 1726, Civil Code). Their request is analysed through the same process of obtaining a marriage licence and if all the requisites are present, the union is converted into a marriage.

Court decision does not expressly discuss it, apart from highlighting that marriage is not limited by the Constitution to a union between man and woman. Such a reference is only present in the Constitution in relation to same-sex unions, according to Justice Britto.[54]

In relation to registry officials, one should consider the extension of country and the relative autonomy those organs enjoy under administrative law. Some civil register officials in São Paulo are accepting requests to convert same-sex stable unions into marriages, whilst officials in rural areas and the Brazilian northeast region explicitly refuse to even recognise same-sex unions. Despite the discrepancy of practices amongst civil register officials, the federal association of this sector recommended registry officials to process the conversion of same-sex unions into marriage.[55] Those conversion requests are subjected to the same procedure of obtaining a marriage licence and are overseen by the states' prosecution offices[56] and the state courts. In some states, those institutions are known for conservative positions and decisions and are also subjected to all forms of political pressures.

On the other hand, even the recognition of same-sex relationships as civil unions, the core of the STF decision, is likely to be challenged by individual judges. For instance, on 17 June 2011, in the city of Goiania in Goiás state, a judge annulled *ex officio* a civil union declaration.[57] On 21 June 2011, the state court's supervision, also *ex officio*, annulled the previous decision and reinstated the civil union declaration.[58] In Brazil, the registration services are subjected to administrative supervision from the judiciary, hence the *ex officio* decisions in this case. Later the first judge acknowledged that he had a religious motivation for the decision.[59] STF's Justice Marco Aurélio said he was perplexed by that decision and it would not stand if the Supreme Court was to review it.[60] In addition, all family-related suits and claims are decided by the judiciary under secrecy to protect the intimacy of the people involved,[61] hence it is extremely difficult to obtain any statistical or qualitative information about the claims presented and how they were handled.

54 Para 35, II.2.

55 'Registros civis dizem que casamento gay já é possível' *Folha de São Paulo* 27 May 2011 http://www1.folha.uol.com.br/cotidiano/921595-registros-civis-dizem-que-casamento-gay-ja-e-possivel.shtml (accessed 21 November 2013).

56 Acting as *custos legis*.

57 'Justiça de Goiânia cancela registro de união civil entre homossexuais' *Migalhas* 20 June 2011 http://www.migalhas.com.br/Quentes/17,MI135939,11049 (accessed 21 November 2013).

58 'Corregedora-geral da Justiça de GO torna sem efeito decisão que anulou reconhecimento de união homossexual' *Migalhas* 22 June 2011 http://www.migalhas.com.br/Quentes/17,MI136144,71043 (accessed 21 November 2013).

59 'Juiz que cancelou união gay diz que agiu por Deus' *Folha de São Paulo* 22 June 2011 http://folha.com/ct933559 (accessed 21 November 2013).

60 'Decisão contra união homoafetiva causa perplexidade, diz Marco Aurélio' *Conjur* 20 June 2011 http://www.conjur.com.br/2011-jun-20/decisao-uniao-homoafetiva-causa-perplexidade-marco-aurelio (accessed 21 November 2013).

61 Only the parties in the claim and their lawyers have access to it.

Many news articles have been published indicating conflicting judicial decisions regarding same-sex marriage. It is important to note, as mentioned above, that civil unions and civil marriages are two different institutions to protect families under Brazilian law and the protection provided by a marriage is more extensive than the one provided by a civil union, especially in terms of patrimonial and succession rights.

Some judges have authorised the conversion of civil unions into marriage[62] and others have even authorised direct marriage licences.[63] Nevertheless, other judges expressly refused authorisation to the conversion of same-sex unions into marriage.[64] A decision that refused to recognise a same-sex union was overturned by the STF.[65]

Furthermore, in October 2011 the Superior Court of Justice (STJ)[66] decided an appeal presented by two women who had been living in a 'stable union' for three years and had their request to obtain a marriage license refused by registry officials. Their claim to overturn that refusal was not decided in their favour by the local judge and lower court. The STJ overruled in their favour, deciding that their civil union could be converted into a marriage. The leading vote argues that the federal law interpretation must be aligned with the interpretation of the Constitution followed by the Supreme Court.

62 For instance: 'Primeiro casamento civil de casal gay é autorizado, diz ABGLT' *Folha de São Paulo* 27 June 2011 http://folha.com/ct935477 (accessed 21 November 2013); 'Justiça autoriza casamento gay em Jacareí (SP)' *Consultr Jurídico* 27 June 2011 http://www.conjur.com.br/2011-jun-27/justica-autoriza-casamento-entre-dois-homens-jacarei-sp (accessed 21 November 2013); 'Juíza converte união estável gay em casamento' *Consultor Jurídico* 28 June 2011 http://www.conjur.com.br/2011-jun-28/juiza-df-converte-uniao-estavel-homoafetiva-casamento (accessed 21 November 2013); 'Juíza de Brasília/DF converte união estável homoafetiva em casamento' *Migalhas* 29 June 2011 http://www.migalhas.com.br/Quentes/17,MI136395,51045 (accessed 21 November 2013); & 'Mulheres conseguem converter união em casamento' *Consultor Jurídico* 13 July 2011 http://www.conjur.com.br/2011-jul-13/duas-mulheres-ganham-direito-converter-uniao-estavel-casamento (21 November 2013).

63 'Juíza de Santa Catarina se casa com uma mulher' *Consultor Jurídico* 19 July 2011 http://www.conjur.com.br/2011-jul-19/juiza-santa-catarina-assume-homossexualismo-casa (accessed 21 November 2013); & 'Cartório de Cajamar celebra 1° casamento civil' *Consultor Jurídico* 31 July 2011 http://www.conjur.com.br/2011-jul-31/cartorio-cajamar-sp-recebe-autorizacao-celebrar-casamento-civil (accessed 21 November 2013).

64 'Juíza barra casamento gay em São Caetano' *Jornal da Tarde* 3 August 2011 http://blogs.estadao.com.br/jt-cidades/juiza-barra-casamento-gay-em-sao-caetano/ (accessed 21 November 2013); & 'Juiz nega conversão de união estável homoafetiva em casamento' *Migalhas* 15 August 2011 http://www.migalhas.com.br/Quentes/17,MI139300,21048 (accessed 21 November 2013).

65 'Ministro Celso de Mello cassa decisão que não reconheceu união estável homoafetiva' *STF* 26 July 2011 http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=185034 (accessed 21 November 2013).

66 While the Supreme Court (STF) interprets the Brazilian Constitution, the Superior Court of Justice (STJ) interprets and decides on federal law. If a lower court decision is understood to violate both the Constitution and federal law, the plaintiff must present, simultaneously, one appeal for each Court and the one directed to the Superior Court of Justice will be decided upon first.

That considered, the STJ decided that no discrimination against homoaffective couples could be read in the federal law to restrain them from marriage. That is, the sex opposition is not a prerequisite to marriage,[67] as it is often referred to by civil law authors. Whereas this is a valuable pioneering decision, it is not a binding precedent.

More recently, on 18 December 2012, the São Paulo State Court amended its internal rules and bylaws[68] to expressly include the prevision of homoaffective unions and same sex marriages as a right,[69] thus obliging notary and registry officials to celebrate them if the same requisites of opposite sex unions and marriages are present.[70] Those amendments will be in effect only in mid February and by press time, it is impossible to know if they will be effective and if their legality will be challenged in Court. However, it is clear that those amendments derive from the STF and STJ decisions and also from the controversy generated by registry officials and judges conflicting decisions on the matter.

Although the Supreme Court's ruling is progressive in terms of protecting and upholding minority rights, by explicitly declaring that those rights derive directly from the Constitution even when Congress is unable or unwilling to regulate them, some of the effects of the ruling are still uncertain. As far as the implementation of the STF decision is concerned from a normative perspective, part of its effects is nevertheless obvious and should not generate many questions. Same-sex couples were recognised as family entities and their claims regarding their unions are to be judged by family courts rather than ordinary civil courts. Their many rights related to patrimony, patrimonial division in case of separation, inheritance in case of death of one of the partners and also alimony, guardianship and visitation rights for their children derive directly from the Civil Statute. The decision also consolidates their right to accompany and decide treatments for an ill partner in hospital, social security protection, several taxation rights enjoyed by couples, the protection of family patrimony and many other rights related to family entities.

The legal protection of homoaffective couples varies a lot in Brazil, as some states officially recognize same-sex marriages whilst others refuse even to recognize stable unions, in clear violation of the STF decision.

67 REsp 1.183.378/2010, full decision available at http://www.stj.gov.br/portal_stj/publicacao/download.wsp?tmp.arquivo=2249 (accessed 21 November 2013).

68 Notary and Registry services in Brazil are governed by law and also by a Section of the State's Court Bylaws. Considering they are supervised by the State Court, the failure to comply with those bylaws is likely to result in their decisions being overturned.

69 See <http://www.estadao.com.br/noticias/impresso,norma-do-tj-obriga-cartorios-de-sp-a-celebrar-casamento-gay--,975402,0.htm>, for instance.

70 Provimento CG 41/2012 (DJe 18 December 2012 – pages 20 through 46). Subsection V, item 88, reads, in free translation: *'he marriage and the conversion of stable unions into marriage of same-sex people are disciplined by the same rules of this Section'* (page 33).

5 Conclusion

In this paper, we argued that the STF decision represents an important moment of transformative constitutionalism in Brazilian history, as far as rights of sexual minorities are concerned, for tackling the heteronormative nature of Brazilian family law and the country's legal tradition and history. The decision issued by the Court in May 2011 clearly indicates that discriminatory laws based on prejudice are not to be considered constitutional. Furthermore, such a decision also represents a *queer moment* in the STF record: it upholds an individual right to self-determination in issues related to sexuality and the different ways it is expressed.

However, by the lack of specific remedies, the STF decision is likely to be challenged by several political, judicial and bureaucratic institutions. Constitutional lawyers tend to look at a progressive decision by a given constitutional court as the final stage of a litigation strategy. As explained in this article, the STF decision on same-sex couples is rather a first step towards the effective enjoyment of equal rights by sexual minorities.

This is true not only due to the obstacles to the implementation of the STF decision highlighted in the previous section. One should also consider that court decisions have a key, albeit limited, impact on moral, religious, political and cultural reasons that underlie homophobia, transphobia or other forms of deprivation of rights, based on sexual orientation or gender identity, in a certain society. In this sense, it is vital to be reminded that Brazil is known for the effects of homophobia with a high number of often deadly crimes targeting the LGBTTI population and its social exclusion.

Furthermore, advocates face obstacles related to the very structure of the Brazilian judiciary. The swing tendencies of the first instance judges in sometimes conferring marriage licences to same-sex couples, while in other occasions rejecting them clearly reveals that a generous reading of the Supreme Court precedent by the judiciary at large is yet to be seen. Even after the Supreme Court recognised the equality of same-sex couples and the rights derived from it, we expect that it will take years of judicial and political battles to ensure that all civil register officials, judges from state appeal courts and public service officials uphold this decision to its fullest and across the country, unless an unlikely nationwide initiative led by Parliament or the executive is taken.

It is vital that the LGBTTI movement in Brazil understands this Supreme Court ruling as an important milestone in a civil rights movement that is not finished, but rather only starting. Moving forward is as important as securing that equality is enjoyed by sexual minorities at the same level throughout the country. The LGBTTI movement should in fact use this decision and the challenges ahead to advance the discussion, to confront and overcome

homophobia. The May 2011 decision opens a multitude of possibilities in this direction.

CHAPTER 13

A NEW LANGUAGE OF MORALITY: FROM THE TRIAL OF NOWSHIRWAN TO THE JUDGMENT IN *NAZ FOUNDATION*[1]

Arvind Narrain

1 Introduction

> Clauses 361 and 362 (the predecessor provisions to section 377 of the IPC) relate to offences respecting which it is desirable that as little as possible be said ... we are unwilling to insert either in the text or in the notes anything which could give rise to public discussion on this revolting subject, as we are decidedly of the opinion that the injury which could be done to the morals of the community by such discussion would more than compensate for any benefits which might be derived from legislative measures framed with greatest precision.
>
> Lord Macaulay[2]

> The offence is one under section 377 IPC, which implies sexual perversity. No force appears to have been used. Neither the notions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence has influenced our thinking.
>
> *Fazal Rab Choudary v State of Bihar*[3]

> A state that recognises difference does not mean a state without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with people and groups, but is not neutral in its value system. The Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the state, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.
>
> Sachs J, *National Coalition for Gay and Lesbian Equality v Ministry of Justice and Others*[4]

1 A version of this paper has been published in A Narrain & A Gupta (eds) *Law like love* (2011).
2 Report on the Indian Penal Code; see V Dhagamwar *Law, power and justice* (1992)117.
3 (1982) 3 SCC 9.
4 *National Coalition For Gay and Lesbian Equality v Minister of Justice* [1998] (12) BCLR 1517.

> In our view, Indian constitutional law does not permit that statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. It cannot be forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.
>
> Shah CJ, *Naz Foundation v NCR Delhi and Others*[5]

The decision in *Naz Foundation v Union of India*[6] marks the culmination of a very important journey in Indian law. For the first time in Indian judicial history, lesbian, gay, bisexual and transgender (LGBT) persons were looked at not within the frame of criminality or pathology, but rather from within the framework of dignity. The shift or transition is itself remarkable when one considers the history of the interpretation of section 377 by the judiciary.

The historic 'injustice' of the law lay not only in sanctioning arbitrary state action against LGBT persons, but more fundamentally in setting in place a regime of citizenship wherein the lives and loves of LGBT persons were consistently read within the framework of 'unnatural sexual acts'. The question of love or intimacy, desire or longing, was always reduced in the judicial register to 'carnal intercourse against the order of nature'.

Though emotions such as love formed a part of the history of same-sex desiring people in colonial India, this history remains untold. The judicial archive hints at the possibility of recovering a counter-history of love, by reading within the interstices and gaps of decided case law. To recover the lost history of love, this article will focus on the story of Nowshirwan Irani who was persecuted in Sind in the year 1932, for having a consenting relationship with Ratansi. Nowshirwan stands in for a subaltern Oscar Wilde, an unwitting and largely unknown martyr who symbolised in his person the trials and tribulations of LGBT persons for over 158 years.

The history of persecution in colonial India of homosexual desire did not change with the coming into force of the Constitution. Instead, what marked a moment of *azaadi* for LGBT persons in India was the re-interpretation of the fundamental rights by Shah CJ and Muralidhar J in 2009. The shift in what the Constitution was to mean for LGBT persons was signalled by the justices in the oral arguments where, for the first time, the judicial attitude to homosexuality changed. By showing empathy for LBGT persons' suffering and by refusing to think and talk about homosexuality merely within terms of 'excess' and 'societal degeneration', the justices gave a new vocabulary to the law in which to talk about homosexual expression.

The language the justices evolved was the notion of 'constitutional morality', which was an advance in the way morality has been thought of in

4 (CC) para 136.
5 http://www.scribd.com/doc/24710240/Naz-Foundation-v-Government-of-NCT-of-Delhi-Et-Ors (accessed 13 December 2013)../../../../tmp/%09http:/www.lawyerscollective.org/node/1003 (2009) 160 *Delhi Law Times* 277.
6 As above.

law. Morality, as seen from the words of Lord Macaulay, was a justification for the very enactment of section 377, and the judges turned the notion of morality upside down by concluding that constitutional morality requires that section 377 be read down. Constitutional morality requires that the values of the right to form intimate relationships be protected and that freedom from persecution by the law be guaranteed to LGBT persons.

This article will explore the paradigm shift from societal morality to constitutional morality; from carnal intercourse to a right to intimacy and from the tribulations of a Nowshirwan to the celebrations which greeted the *Naz Foundation* judgment. The article will then contextualise the *Naz* judgment within the history of constitutional moments of similar significance in Brazil and South Africa.

2 Nowshirwan Irani: A subaltern Oscar Wilde?

> I never came across anyone in whom the moral sense was dominant who was not heartless, cruel, vindictive, log-stupid and entirely lacking in the smallest sense of humanity. Moral people, as they are termed, are simple beasts. I would sooner have fifty unnatural vices than one unnatural virtue. It is unnatural virtue that makes the world, for those who suffer, such a permanent hell.
>
> Oscar Wilde[7]

> Another requirement of mine was that these personages themselves be obscure, that nothing would have prepared them for any notoriety, that they would not have been endowed with any of the established and recognised nobilities - those of birth, fortune, saintliness, heroism or genius; that they would have belonged to those billions of existences destined to pass away without a trace; that in their misfortunes, their passions, their loves and hatreds, there would be something grey and ordinary in comparison with what is usually deemed worthy of being recounted; that nonetheless they be propelled by a violence, an energy, an excess expressed in the malice, vileness, baseness, obstinacy or ill-fortune this gave them in the eyes of their fellows and in proportion to its very mediocrity – a sort of appalling or pitiful grandeur.
>
> Michel Foucault[8]

If there is one provision in the Indian Penal Code seemingly furthest from the language of love and intimacy, it seems to be section 377. With its focus on 'carnal intercourse against the order of nature' and its requirement of 'penetration sufficient to constitute an offence', there seems little possibility that the dry judicial record can actually speak of emotions such as love and longing. The case law interpretation under section 377 has by and large focused on non-consensual sex between adults and children and the judiciary has been quick to characterise homosexuals and homosexuality as something

7 This is from a letter written by Oscar Wilde after his imprisonment for two years for committing acts of gross indecency, see C Tóibin *Love in a dark time* (2003) 84.

8 M Foucault *Power* (1994) 160.

to 'be abhorred by civil society', 'unnatural', 'animal-like', 'sexual perversity' and 'despicable specimens of humanity'.

While it may be true that the majority of reported cases under the provision have to do with non-consensual sex, there is a hidden narrative of couples who have engaged in consensual intimacy and have been subjected to the persecution of the law. If one reads from within the silent spaces in the judgment, one can see the use of section 377 to persecute homosexual intimacy. A look into the judicial archive finds three Appellate Court decisions in which the protagonists are consenting young men.[9] One of these cases, the case of Nowshirwan Irani, will be examined more closely to get a sense of the forbidden archive of desire which remains a part of the untold history of section 377.

In a reported decision from Sind in 1935, Nowshirwan Irani, a young Irani shopkeeper, was charged with having committed an offence under section 377 with a young man aged around 18 called Ratansi. The prosecution's story is that Ratansi visited the hotel of the appellant and had tea there. Nowshirwan asked Ratansi why he had not come to the hotel for some time and Rantansi replied that he had no occasion for it. He then went to the pier to take a boat, but on finding that he had no money, came back to Masjid Street where he saw Nowshirwan standing on the road a little distance from the hotel. Nowshirwan asked Ratansi to come to his house and when he did, he locked the door and started taking liberties with the youngster, who resented the overtures and wanted to go away. Nowshirwan removed his trousers, loosened the trousers of Ratansi and made the lad to sit on top of his organ. Ratansi got up from his lap, but in the meantime Nowshirwan had spent himself, wiped his organ and put on his pants. The reason this incident came to light was that a police officer, Solomon, along with his friend Gulubuddin, saw the incident through the keyhole, marched in and took both Ratansi and Nowshirwan to the police station.

The judge was not convinced by the story of the prosecution that Ratansi had been subject to forcible carnal intercourse by Nowshirwan. The judge was of the opinion that Ratansi was made to pose as a complainant and hence made hopelessly discrepant statements. The judge was not prepared to rely on the evidence of Solomon and Gulubuddin, the two eyewitnesses, whose conduct he found strange. Furthermore, the medical evidence could neither prove forcible sexual intercourse (the prosecution's story) nor did it prove an attempt to commit the act of sodomy. In the opinion of the judge,

> as the appellant had not even, if we take the worst view against him, gone beyond a certain stage of lascivious companionship, I do not think he deserves to

9 The three obscure couples whose lives take on a kind of 'pitiful grandeur' by mere virtue of having the misfortune to get prosecuted under sec 377 are Minawalla & Tajmahomed (*DP Minwalla v The Emperor* AIR 1935 Sind 78); Nowshirwan Irani & Ratansi (*Nowshirwan Irani v Emperor* AIR 1934 Sind 206); and Ratan Mia & Abdul Nur (*Ratan Mia v State Of Assam* (1988) Cr LJ 980).

> be convicted for any of the offences with which he was charged or could have been charged.

The story of Nowshirwan and Ratansi seems to be a story of sexual desire acting itself out between two men of different class backgrounds. The limited material present in the appellate decision gives us a clue that even the judge was convinced as to the consensual nature of the relationship. As the judge notes:

> Moreover, the medical evidence militates against the story of a forcible connection on the cot, the appellant who is a fairly hefty young man having intercourse in the manner stated originally. There is not the slightest symptom of violence on the hind part of the lad.

He concludes that '[i]f he was in the house of the accused behind locked doors, I have not the slightest hesitation in believing that he had gone there voluntarily'.

The story of desire secreted within the judicial narrative seems to be that Nowshirwan and Ratansi knew each other and that Nowshirwan made the first move on that fateful day. He asked Ratansi why he had not come to the hotel for some time. Rantansi, after finishing his tea, left the hotel only to come back in the same direction. When he came back, Nowshirwan was waiting on the road and asked him to come to his house. They seemed to have some sort of pre-arranged code by which they signalled to each other the desire to meet and subsequently they went to Nowshirwan's room. However, due to the misfortune of an over-zealous policeman or a policeman with a grudge, what should have been an intimate act between two consenting parties in their bedroom became a public scandal.

A consenting act between two men is sought to be twisted by the prosecution into the story of Ratansi being forced into having sex with Nowshirwan. Ratansi is coerced by the demands of those around him to pose as a complainant against the very person with whom he had earlier had a consenting sexual relationship. The fact that it is a consenting relationship does nothing to exculpate Ratansi from ironically becoming a victim of judicial ire. There is indeed a special fury reserved by the judge for Ratansi.

In the judges' words,

> [Ratansi] appears to be a despicable specimen of humanity. On his own admission he is addicted to the vice of a catamite. The doctor who has examined him is of the opinion that the lad must have been used frequently for unnatural carnal intercourse.

In the course of appreciating the medical evidence, the judge notes, '[t]here was not the slightest symptom of violence on the *hind part* of the lad'.

Thus the story of an encounter between two people of the same sex who desire each other gets reduced in the judicial reading to the act of a perverse failed sexual connection. The use of terms like 'animal-like' and 'despicable' places the sexual act within the framework of moral abhorrence. One has to read the silence in the judicial text to hazard a guess as to the nature of the intimacy between Nowshirwan and Ratansi. The two knew each other and possibly had met before in Nowshirwan's room. Nowshirwan's room might possibly have been a space where the coercive heterosexism of the outside world could be forgotten for the brief time which Nowshirwan and Ratansi spent with each other. That brief time they spent together might possibly have been a moment when they imagined a world not yet born and a time yet to come, when their desire would be accepted without a murmur. This imaginative realm of impossible desires is what is rudely interrupted when the policeman, Solomon, spies through the key hole.

One can guess that their meeting together might have been noticed on earlier occasions by Solomon, hence alerting him to take action on that eventful day in 1935 Sind when Nowshirwan met Ratansi with such disastrous consequences. Solomon stands in for the willed heterosexism of the larger world or what Oscar Wilde would have called the 'unnatural virtue' in which the world abounds which will give no space for the expression of any intimacy which challenges its own laws.

It is this fragile experiment of creating a 'little community of love'[10] outside the bounds of law's strictures and society's norms which is set upon by society in the form of Solomon and then given the judicial imprimatur of a 'failed sexual connection'. The tragic story of Nowshirwan and Ratansi speaks to the absence of a certain vocabulary. The language of love and intimacy, longing and desire, and the expression of spontaneous bodily affection find no safe habitation within the terms of the law. What law does is to degrade this act of experimental creation of new forms of intimacy. The language of law has an impoverishing effect as it strips the physical act of its rich emotional connotations and reduces the act of human intimacy to a 'perverse failed sexual connection'. By stripping the act of sex of its multiple meanings, it produces Nowshirwan as a subject of the criminal law.

One could re-read Nowshirwan and Ratansi as unwitting frontiersmen in the history of the battle against section 377 and amongst its first recorded tragic victims. In another register, Nowshirwan and Ratansi stand in for Oscar Wilde and Lord Alfred Douglas, with Ratansi being forced to stand in as witness, not just against Nowshirwan, but also forced to deny a part of his own being in terms of his own part in creating that 'little community of love'. Just as Oscar Wilde was betrayed by Alfred Douglas, who described his lover as 'the greatest force for evil that has appeared in Europe during the last

10 L Liang & S Narrain 'Striving for magic in the city of words' *Himal* August 2009 http://www.himalmag.com/Magic-in-the-city-of-words-nw3197.html (accessed 28 August 2009).

three hundred and fifty years',[11] so too Nowshirwan in his hour of greatest need is betrayed by Ratansi who becomes the complainant against him. The story of Nowshirwan and Ratansi exemplifies the perversities of a law which turns lover against lover and converts the act of intimacy into the crime of carnal intercourse.

Nowshirwan's story remains emblematic of the ethical and moral poverty of the judicial discourse even as it grappled with homosexual expression for over 158 years. It is important to note that, in spite of the coming into force of the Indian Constitution with the language of equality, non-discrimination and dignity, the judiciary continued to characterise homosexuality with terms such as 'unnatural', 'perversity of mind', 'immoral' and 'animal-like'. This ethical language of rights was never seen fit to apply to LGBT persons. The first time the judiciary moved outside the range of responses outlined above was 158 years after the coming into force of the Indian Penal Code and 59 years after the coming into force of the Indian Constitution. The occasion happened to be the hearing of *Naz Foundation v Union of India and Others*.

3 The changed social context: From *Nowshirwan* to *Naz Foundation*

The social context in the late 1990s and the beginning of the new century are dramatically different from the time Nowshirwan happened to be persecuted. The norms which straitjacketed the expression of Nowshirwan and Ratansi and the law which deemed Nowshirwan a criminal were beginning to be questioned. This practice of questioning the set ways of the heterosexist world began with the emergence of the queer struggle with its insistence on problematising norms of gender and sexuality. It is this context of an emerging community far less isolated than the world which Nowshirwan and Ratansi tried to create far ahead of their times which underpins any engagement with section 377 in the contemporary era. In simple terms, when people like Nowshirwan are arrested under the law in contemporary times, it becomes a concern of people beyond the network of family and friends. Queer people across the country rally together and begin to support those who are subjected to the law's persecution. Thus the stories of those who are arrested under section 377, be it the arrest of gay men in Lucknow 2006 or the arrest of HIV/AIDS workers in Lucknow 2001, become part of a contemporary history of struggle against section 377. This stands in

11 D Murray *Bosie* (2000) 221. However, it should be noted that this statement was made long after the three trials of Oscar Wilde. During the trial and its immediate aftermath, Lord Alfred Douglas stood by Oscar Wilde. He was the only one of Oscar Wilde's friends to stay in London during the trial, even though there was the threat of arrest. He also petitioned the authorities to release Oscar Wilde. As Murray notes: 'Unlike Wilde's other friends, Douglas worked for him tirelessly, never giving up hope that he might be able to change if not the sentence, at least other people's attitude to it' 92.

stark contrast to the persecution of unknown frontiersmen such as Nowshirwan and Ratansi and others like them in earlier times.

The bringing together of the stories of Nowshirwan and Ratansi and those persecuted under the law in contemporary times culminated in a legal challenge to the very same law. The petition challenging section 377 was filed by Lawyers Collective on behalf of Naz Foundation before the Delhi High Court in 2001. The petition challenged the constitutional validity of section 377 and made an argument for section 377 to exclude the criminalisation of same-sex acts between consenting adults in private. The petition in technical terms asks for the statute to be 'read down' to exclude the criminalisation of same-sex acts between consenting adults in private so as to limit the use of section 377 to cases of child sexual abuse.

The petition itself, though filed by a single NGO, gradually began to represent the entire community. This process of making 'public interest litigation' truly 'public' began by Lawyers Collective and Naz Foundation hosting a series of meetings on different stages of the petition. Over the next seven years, this process of continuous consultation with the community contributed towards section 377 becoming a more politicised issue. The key stages of the petition included the affidavit filed by the Union of India (Home Ministry) which indicated that the government would stand by the law, the affidavit filed by the National AIDS Control Organisation (NACO), which in effect said that section 377 impeded HIV/AIDS's efforts and the impleadment of Joint Action Kannur (JACK, an organisation which denied that HIV causes AIDS), and BP Singhal (a former BJP Member of Parliament, representing the opinion of the Hindu right wing that homosexuality was against Indian culture) into the petition. This process of discussion fed back into the community fuelling feelings of outrage and indignation, hope and despair and anger and fear as each stage of the petition unleashed a torrent of emotions.

The periodic meetings were thus a way in which the activist community was kept deeply involved in developments and a way in which the community continued to respond to the changing scenario. What particularly tilted the balance was the impleadment of BP Singhal into the petition. Suddenly the scales seemed to have tilted, with Naz appearing increasingly isolated amongst the cacophony of voices opposing the petition. It seemed that a range of forces were coming together to protect what the community saw as a patently unjust law. In a meeting called by Lawyers Collective to discuss this development, it was proposed that some queer groups should also implead themselves within the petition so as to support the petitioner.

It was with the birth of this idea that Voices Against 377 (a Delhi-based coalition of child rights, women's rights and LGBT groups) decided to implead themselves within the petition to support the petitioner. The key emphasis of Voices was the rights of LGBT persons, while Naz Foundation, because of its status as an organisation working on HIV/AIDS, would continue to emphasise

how section 377 impeded HIV/AIDS interventions and hence the right to health of LGBT persons.

There were enormous delays spanning a sum total of seven years when the case was initially dismissed by the Delhi High Court, appealed in the Supreme Court and finally sent back to the Delhi High Court. Initially, the Delhi High Court dismissed the petition just as it was gathering steam on the ground that the petitioner, Naz Foundation, was not affected by section 377 and hence had no *locus standi* to challenge it. However, when the dismissal was challenged before the Supreme Court, the Supreme Court sent the case back to the Delhi High Court to be heard expeditiously. Since the petition was filed by Naz Foundation in 2001, it has gathered greater public support both in terms of public opinion and in terms of an increasing support, even within the sphere of the courtroom. It was in September 2008 that, after a long wait, the matter was finally posted for final arguments before a bench comprising Chief Justice Shah and Justice Muralidhar of the Delhi High Court.

4 The final arguments before the Delhi High Court: Empathy, dignity and group sex

By the time the matter was posted for final arguments in September 2008, seven years after the petition was initially filed, the key difference was that it had become far more a part of the issues which defined contemporary India. There was a real buzz, both in terms of the media coverage, and there was an eager anticipation with respect to the final hearings. The Court itself during the hearings was attended by community members who closely followed each twist in argument and each response by the judges. The proceedings themselves as they unfolded were covered extensively and widely by the media and the community was also kept updated by daily minutes of the hearings which were posted on community online forums.[12]

The petitioner's core argument centred on the right to health and how section 377 impeded HIV/AIDS interventions. The arguments were substantiated by case studies, particularly of Lucknow 2001,[13] when section 377 was used to target HIV/AIDS intervention with the men having sex with men (MSM) community. So section 377, far from being justified by a compelling state interest, was actually an impediment to achieving the right to health of a particularly vulnerable section of the population.

12 Quotations from the proceedings of the Delhi High Court are taken from the transcript of the proceedings. The transcripts do provide a rough idea of the way the proceedings went before the Delhi High Court, however they are not a *verbatim* transcript of all that transpired before the Court. It is available at http://www.altlawforum.org (accessed 10 September 2009).

13 See Human Rights Watch 'Epidemic of abuse: Police harassment of HIV/AIDS outreach workers in India' July 2002, Vol 14, No 5(C) 19. This report was cited by the petitioners in their written arguments.

The core argument of Voices Against 377 was that

> Section 377 is a law which impinges on the dignity of an individual, not in a nebulous sense, but affecting the core of the identity of a person ... Sexual orientation and gender identity are part of the core of the identity of LGBT persons. You cannot take this away.

They argued that:

> Morality is an insufficient reason [to retain the law] in a case like this where you are criminalising a category and affecting a person in all aspects of their lives, from the time the person wakes up to the time they sleep.

The core argument of the government of India astonishingly was that if section 377 was read down to exclude consenting sex acts between adults in private, it would affect the right to health of society.[14] Counsel representing the Union of India was the Additional Solicitor-General (ASG), Mr PP Malhotra. He cited various studies to show that homosexuality caused a very serious health problem. Citing one study, he said:

> The sexual activity enjoyed by homosexuals results in bacterial infections, and even cancer. There are activities like golden showers, and insertion of objects into the rectum which cause oral and anal cancer. A study of homosexual practices shows 37% enjoyed sodomitical activities and 23% enjoyed water sports.

Referring to notions of decency and morality, the ASG noted:

> In our country it is immoral on the face of it. Society has a fundamental right to save itself from AIDS. This right is far greater than any right of the less than 1% who are in this programme. The health of society should be considered and it is the greatest health hazard for this country. If permitted it is bound to have enormous impact on society as young people will then say that the High Court has permitted it.

BP Singhal made a strong submission that section 377 was against Indian morality. In the words of his counsel, homosexuality was

> [A] perverted kind of sex … in the name of thrill, enjoyment and fun the young shall walk into the trap of homosexual addiction. The tragic aspect of this is that alcohol, drugs and disease are the natural concomitants of homosexual activity.

He

> [S]ubmitted that he was on morality, the joint family structure and that we must not import evils from the west. We have traditional values and we must go by

14 It should be noted that the affidavits filed by the Union of India were contradictory to the Home Ministry making the case that the law was required to keep in place a societal morality and NACO making the argument that the law hampered HIV/AIDS interventions.

> that. It would affect the institution of marriage and if women get doubt about what their husbands are doing, there will be a flood of cases of divorce.

JACK's counsel submitted that there was 'no scientific evidence that HIV causes AIDS', that a 'change in this provision would mean that all marriage laws would have to be changed', and that 'under section 269 and 277 of the IPC anyway any intentional spreading of an infectious disease would be an offence'. JACK's counsel then asserted that Naz did not come to court with clean hands and was part of an international network which was using HIV/AIDS to push an agenda.

5 Judicial empathy: Listening to LGBT voices

The court in the post-liberalisation era has not been a hospitable space or indeed the last refuge of what the Supreme Court had characterised as the 'oppressed and the bewildered'. In fact, the court has been positively hostile to a whole range of applicants, right from slum dwellers to all sections of organised labour. So it was with a great deal of trepidation that gay activists awaited the hearing. How would the judges indeed understand the complex issue of sexuality and rights? How indeed would we be able to persuade them that this was an issue of rights? Should we not have learnt from the experience of public interest litigation in the 1990s and stayed away from the court as any guarantor of rights? These were some of the thoughts circulating like a nervous eddy through the gay community.

The judicial response has generally been subject to analysis in terms of the reasoned argument and the decided case. In contrast, little attention has been paid to the gamut of responses by judges on a day-to-day basis in courts. As Liang notes:

> Witnessing the courts functioning on a day-to-day basis also allows you to uncover another secret archive, an archive of humiliation and power. It is said that seventy percent of our communication is non verbal and this must be true of legal communication as well. The secret archive that interests me consists not of well-reasoned judgments or even the unreasonable admonishment of the courts, but the various symbolic signs and gestures that accompany them. An incomplete index of the archive includes the stare, the smirk, the haughty laugh, the raised eyebrow, the indifferent yawn, the disdainful smile and the patronizing nod amongst many others.[15]

In this secret archive of what Liang correctly characterises as 'humiliation and power', what emerged almost as a complete surprise was another index of responses, which can rightly be characterised as standing in for the quality of judicial empathy. What came through the questions and comments of the

15 L Liang 'Devastating looks: Smirks, quirks and judicial authority' *Kafila* 4 May 2007 http://kafila.org/2007/05/04/devastating-looks-smirks-quirks-and-judicial-authority (accessed 10 January 2009).

judges was not an intention to humiliate, but instead a strong sense of empathy for the suffering of LGBT persons.

Shah CJ communicated this judicial empathy in ample measure and took judicial notice of the social discourse of homophobia by saying that we all know what kind of sneers and mockery this issue is treated with in society. To substantiate this point, he narrated the moving instance of a boy who was subjected to jibes and sneers because of his sexuality and so was unable to take his exam. It was only after judicial intervention he was allowed to take his exam without harassment and, in Shah CJ's words, 'he thankfully passed'.

If one were to abstract three important moments in the courtroom arguments spanning over 11 days: The first important moment was when counsel for Naz, Mr Anand Grover, read the opinion of Sachs J in *National Coalition for Gay and Lesbian Equality*.[16] This decision by the South African Constitutional Court ruled that the offence of sodomy violated the right to equality and dignity and struck it down. Sachs J's passionately-argued concurring opinion was in particular animated by the high ideals of the South African Constitution and exceeded the staid limits of conventional judicial prose in its ability to evoke empathy. It conveyed with an intensity and powerfulness the extent of injustice perpetrated by an anti-sodomy law. As Sachs J powerfully noted:

> In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group.[17]

The judges were visibly moved by Sachs J's opinion and conferred amongst themselves. Shah CJ wished the Additional Solicitor-General (ASG) had been in court to listen to Sachs J's opinion. Almost subtly, you could sense that the burden had shifted from counsel to the judges. They now had to contend with the weighty presence of Sachs J and the burden of history when they wrote their judgment. In case there were any doubts on this point, Voices against 377 submitted an outline of submissions which argued:

> This case ranks with other great constitutional challenges that liberated people condemned by their race or gender to live lives as second-class citizens, such as *Mabo v Queensland*[18] (where the High Court of Australia declared that the aboriginal peoples of Australia had title to lands prior to colonisation), *Brown v Board of Education*[19] (where the United States Supreme Court held that segregated schools in the several states are unconstitutional in violation of the

16 n 4 above.
17 n 4 above, para 127.
18 (1992) 175 CLR 1.
19 344 US 1 (1952).

> 14th Amendment) and *Loving v Virginia*[20] (where the United States Supreme Court held that laws that prohibit marriage between blacks and whites were unconstitutional).[21]

The second important moment was when the judges zoned in on what they saw as the core argument for retaining section 377, namely, public morality. They asked counsel for Voices Against 377 how he would respond to the public morality justification for retaining section 377. Mr Shyam Divan's response on behalf of Voices Against 377 was:

> Any law or statutory provision that denies a person's dignity and criminalises his or her core identity violates article 21 of the Constitution. Section 377 operates to criminalise, stigmatise, and treat as 'unapprehended felons' homosexual males. The provision targets individuals whose orientation may have formed before they attained majority. It criminalises individuals upon attaining majority, for no fault of the person and only because he is being himself. Article 21 absolutely proscribes any law that denies an individual the core of his identity and it is submitted that no justification, not even an argument of 'compelling state interest', can sanction a statute that destroys the dignity of an estimated 25 lakh individuals.[22]

This argument, that the state cannot plead 'compelling state interest' when the core value of dignity is at stake, seemed to resonate deeply with the judges with them repeatedly asking the ASG to respond to what they characterised as 'a very strong argument on dignity'.

The third important moment was the series of exchanges between the judges and the ASG and counsel for BP Singhal and JACK. In contrast to the evident empathy with which the judges heard both Naz and Voices Against 377, the ASG as well as counsel for JACK and BP Singhal were subject to questions which showed the judicial impatience with the nature of arguments and hinted at the deep structure of their judicial sympathies. I will just highlight one such exchange.

At one particularly funny moment, counsel for BP Singhal, Mr Sharma, referred to *R v Brown*,[23] which was a decision of the House of Lords in which they had ruled that consensual sado-masochistic practices between adults were not entitled to protection on grounds of privacy to make the point that

> homosexuals enjoy group sex and even enjoy committing violence. This is sexual perversity and when they were consenting adults, criminal acts warranting prosecution were committed in the course of such perversity.

20 388 US 1 (1967).
21 See Outline of Arguments on behalf of Voices Against 377 para 12.4, submitted in *Naz Foundation v Union of India* Writ Petition No 7455 of 2001. See A Narrain & M Eldridge *The right that dares to speak its name: A primer on the Naz Foundation judgment* (2009) 29-47.
22 Outline of Arguments (n 21 above) paras 9.2 and 9.3.
23 [1993] 2 All ER 75.

He said that 'it was disconcerting to see the tendency of homosexuals to indulge in group sex'.

Shah CJ noted:

> When the *R v Brown* judgment was delivered, sodomy was not a crime in the UK. So even if section 377 is read down and homosexual acts between consenting adults do not amount to an offence under section 377, it would still be an offence if grievous hurt is inflicted on the passive partner even if the partner has consented to it.

Shah CJ then inquired about the relevance of the judgment.

Mr Sharma responded that the 'anus is not designed by nature for any intercourse and if the penis enters the rectum, the victim is bound to get injury'. The activity itself causes bodily harm.

Shah CJ asked whether the submission that this act itself causes injury, because it is unnatural or is likely to cause injury, had been argued before; whether in any culture, western or oriental, in several countries where the ban has been lifted, in WHO Reports, anyone has argued that the act itself causes injury. Could *Brown* actually be forced to the logical conclusion that sex between two males itself is a cause of injury? Why had this submission never been raised before any court until now?

Mr Sharma continued to read from *Brown* to make the point that 'drink and drugs are employed to obtain consent and increase enthusiasm, there is genital torture on anus, testis, blood letting. Burning of penis ...'.

Mr Anand Grover intervened to say that *Brown* was to do with violence and dealt with a factual situation not contemplated by Wolfenden and that this was recognised by the judgment itself.

Counsel for BP Singhal continued to read from this judgment to make the point that 'homosexuals enjoy group sex and even enjoy committing violence. This is sexual perversity and criminal acts warranting prosecution were committed in the course of such perversity'. He said that 'it was disconcerting to see tendency of homosexuals to indulge in group sex'.

Shah CJ sharply interjected to ask if it was based on personal knowledge that Mr Sharma knew that homosexuals enjoy group sex.

What the three moments extracted above demonstrate is that the judges in the course of the hearings showed sensitivity not only to instances of brutal violence, but equally to the more subtle language of discrimination and this made the court proceedings, for the brief duration of the hearings, a magical space. LGBT persons who were so used to the sneers and jeers of society suddenly felt that they were not only being heard but also respected. The judges, just through the art of empathetic listening, restored dignity to a

section of society on whom the government seemed intent on pouring nothing but contempt and scorn. The judges in the hearings did something unique. They spoke about sex without a sneer and for the first time in recorded judicial history of the Indian courts managed to actually talk about homosexual sex within the context of intimacy and love. The discourse of love and affection, intimacy and longing became a part of the judicial register and displaced the relentless focus on the stripped-down homosexual act as a threat to civilisation at its very roots. The conflation of homosexuality with excess through the focus on group sex was challenged by the nature of judicial questioning and the discourse about homosexuality was linked to contexts of emotion and feeling. A new path was being forged in learning to talk about the intimacy which Nowshirwan and Ratansi shared, within the terms of the law. For the first time it seemed possible to see Nowshirwan and Ratansi and many others like them in terms other than the basely carnal, and for opening up that possibility, one should credit the empathetic listening which Shah CJ and Muralidhar J demonstrated.

6 The judgment in *Naz Foundation v Union of India*: A new language of morality

While the judgment of *Naz Foundation v Union of India* deserves to be studied from many perspectives,[24] this final section will focus on the judicial use of the term 'constitutional morality'. The question of morality has been central to the concerns around section 377 and was sought to be addressed by different parties in the *Naz Foundation* case. Both the Union of India and intervenors such as BP Singhal and JACK constantly sought to make the point that reading down the section would destroy society's morals. The judges too were deeply troubled by the question of morality and constantly sought to get the parties to respond to the question of morality as ground for retaining section 377.

The way the judgment dealt with the question of morality was by introducing the term 'constitutional morality' which became the term on which the rest of the judgment hinged. To understand the key role that the notion of 'constitutional morality' played in the judgment, it is important to

24 To do a synoptic listing of the innovative approaches taken forward by the *Naz* judgment: (1) It redefines privacy as not just being about the place but also about the person, ie that the right to privacy is also about the protection afforded to decisions about one's intimate life. (2) It reads sexual orientation as an analogous ground of discrimination to sex and thereby opens up the possibility that the prohibited grounds under art 15 could move beyond the specifically-listed grounds. It also notes that the protection of art 15 extends not only to discrimination by the state but also to discrimination by civil society. (3) It links sexuality and identity and makes the case that, although sec 377 may be facially neutral in its operation, it ends up targetting LGBT persons and hence violates the equal protection clause in art 14. (4) It also makes the point that the judiciary is not bound to defer to the legislature when it comes to the question of fundamental rights and has a sovereign role in protecting unpopular minorities from unconstitutional actions. See Narrain & Eldridge (n 21 above).

contextualise the debates on the LGBT rights and morality which were played out historically and which formed a part of the debates before the Delhi High Court.

The very origin of the law has its historical roots in a notion of morality which emerged from a Judeo-Christian sensibility. It can be traced historically to a time when there was no separation between law and morality and law was meant to reflect a religious morality. Thus, the offence of sodomy, for which the initial punishment was the death penalty, was a part of Canon Law which became in turn a part of English Law and finally ended up on the statute of the Indian Penal Code. This notion of law and morality as an integrated system was first challenged by the Wolfenden Committee Report in 1957 which was set up to examine the criminalisation of homosexuality.

The report in its recommendations made a strong argument for the decriminalisation of consenting same-sex acts between adults in private. As the Wolfenden Committee famously noted:

> It is not, in our view, the function of the law to intervene in the private lives of citizens ... Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality, which is, in brief and in crude terms, not the law's business.[25]

The recommendations of the Wolfenden Committee Report in turn became the subject matter of one of the most famous debates in legal history between Lord Devlin and Prof HLA Hart, which has remained a staple of legal education around the world, ever since it first took place.[26] Lord Patrick Devlin articulated the classic defence of why homosexuality should continue to remain a criminal offence. In his view, even if homosexuality was a private immorality, it should continue to be punished as Devlin argued that homosexuality was an attack upon a 'society's constitutive morality'. In his view, a society's existence depended upon the maintenance of shared political and moral values. To maintain those values and in fact to ensure societal survival, it was essential that even a private immorality like homosexuality should continue to remain a criminal offence.

It was as a counter to Devlin's statement that Hart articulated the classic defence of the Wolfenden Committee recommendations. Hart, following from Mill's defence of liberty, argued that the basis of the criminal law lies in preventing harm to others. There is no basis in Hart's philosophy for the law to actually intervene to legislate a public morality. Hart argued that there was no empirical evidence for the proposition that if law did not support a public morality, society would collapse. If such was indeed the case, we should assume that there can be no change in societal morality as any change in

25 Wolfenden Committee Report (1957) para 24.
26 See P Devlin *The enforcement of morals* (1987); HLA Hart *Law, liberty and morality* (1963).

social morality becomes equated to a collapse of societal morality. In effect, Hart offered a resounding defence of the core recommendation of the Wolfenden Committee, that 'there must remain a realm of private morality, which is, in brief and in crude terms, not the law's business'.[27]

The impact of Hart's thinking in India cannot be underestimated. Every student of law and jurisprudence has had to contend with his thinking. So every student of law encounters homosexuality and the defence of decriminalisation through the Hart-Devlin debates. Legal academic circles, and in particular jurisprudence professors, will still swear by Hart's work as the acme of positivist jurisprudence. Academically-minded judges too have cited Hart in the judgments of the Indian High Courts and Supreme Courts. In short, in a difficult terrain of a complete lack of exposure to the discourse of homosexual rights, the work of Hart provides a remarkably useful starting point for speaking to judges, lawyers and legal academics in a language that they not only know, but have been taught to venerate.

Such being the case, the *Naz* judgment could have been well justified in making the argument for the decriminalisation of homosexuality based on Hart's position that it was not the law's business to regulate a zone of private morality. Such an understanding would have been sufficient to achieve the result of reading down section 377 to exclude consensual sex between adults from the ambit of criminalisation. However, the judges choose to tread on a more ambitious path.

The judges begin by referencing Dr Ambedkar, who in the Constituent Assembly had noted that

> [c]onstitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic.[28]

They go on to state:

> Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjective notions of right and wrong. If there is any type of 'morality' that can pass the test of compelling state interest, it must be 'constitutional' morality and not public morality.[29]

Moral indignation, howsoever strong, is not a valid basis for overriding individuals' fundamental rights of dignity and privacy. In our scheme of

27 Wolfenden Committee Report, para 24.
28 *Naz Foundation* para 79.
29 As above.

things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view.[30]

What the judges did by articulating the notion of constitutional morality was to change the terms within which homosexual expression had been thought of by the judiciary. From the first tentative steps when Hart and Wolfenden had made space within the law for 'private immorality', now homosexual expression was to be seen as not just something which needs to be 'tolerated', but rather as something which needs to be protected, as protecting the expression of homosexuality goes to the heart of the meaning of the freedoms guaranteed under the Indian Constitution. In a reversal of the terms of the debate, it became 'moral' to protect LGBT rights and 'immoral' to criminalise people on grounds of their sexuality. To protect what the judges called 'constitutional morality', it becomes essential to ensure that LGBT expression is protected.

Constitutional morality in the judges' reading requires that LGBT persons are treated as equal citizens of India, that they cannot be discriminated against on grounds of their sexual orientation and that their right to express themselves through their intimate choices of who their partner is, is to be fully respected. It is only when the dignity of LGBT persons is respected that the Indian Constitution lives up to its foundational promise. Taken one step further, constitutional morality also requires the court to play the role of a counter-majoritarian institution which takes upon itself the responsibility of protecting constitutionally-entrenched rights, regardless of what the majority may believe.

In the judges' fitting conclusion:

> If there is one constitutional tenet that can be said to be the underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that the Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracised.[31]

The theme of 'constitutional morality' thus brings about a paradigm shift in the way the law thinks about LGBT persons. Protecting the rights of LGBT persons is not only about guaranteeing a despised minority their rightful place in the constitutional shade, but it equally speaks to the vision of the kind of country we all want to live in.

Indian law seems to have traversed the journey from Nowshirwan to the Naz Foundation, from persecution for intimacy to making some space for the

30 *Naz Foundation* para 86.
31 *Naz Foundation* para 130.

'little communities of love'. However, the victory still remains fragile and needs to be nurtured and safeguarded.[32] One of the hopes of what the *Naz* judgment could portend is best articulated by the judge who was one of the inspirations for the judges in *Naz Foundation*, Justice Albie Sachs. Sachs, looking to the future of a South Africa, post-decriminalisation of homosexual expression, noted:

> It leads me to hope that the emancipatory effects of the elimination of institutionalised prejudice against gays and lesbians will encourage amongst the heterosexual population a greater sensitivity to the variability of the human kind.[33]

7 *Naz Foundation*: Resonances in the global South

As can be seen by the extensive quotations from the *National Coalition* decision as well as decisions of other constitutional courts, *Naz Foundation* drew from global constitutional springs and in particular from the jurisprudence of the South African Constitutional Court. Two years after *Naz Foundation*, Brazil had its important constitutional moment, when the Supreme Court recognised same-sex civil unions. The Brazilian decision too referenced South African Constitutional Court decisions on same-sex rights.

Clearly, India, South Africa and Brazil are at very different phases of the struggle for LGBT rights. South Africa in some ways is the leader, having pioneered constitutional protection against discrimination on grounds of sexual orientation as well as the recognition of same-sex marriage through a series of Constitutional Court decisions. Brazil has borrowed from South Africa, but has also taken the discourse in a uniquely Brazilian direction.[34] India has just taken the first tentative steps towards full civil and political rights for LGBT persons with the *Naz Foundation* decision.[35]

The papers by both Amparo and Barnard allude to the continuing problems which confront Brazilian as well as South African society in the light of judicial decisions which, in South Africa's case, in the words of Barnard are

32 At the time of writing, the judgment is being appealed to the Supreme Court by a number of parties.

33 *National Coalition for Gay and Lesbian Equality* para 138.

34 See the discussion on the use of homo-affective instead of homosexual in S Friedman & T Amparo 'On pluralism and its limits: The constitutional approach to sexual minority freedom in brazil and the way ahead' (Chapter 12 above).

35 *Naz Foundation* is presently being appealed in the Supreme Court in *Suresh Kumar Koushal v Naz Foundation*. Since then, 14 other parties have also filed special leave petitions challenging the judgment. They are *Apostolic Churches Alliance through its Bishop v Naz Foundation*; *Bhim Singh v Naz Foundation*; *B Krishna Bhat v Naz Foundation*; *BP Singhal v Naz Foundation*; *SD Pratinidhi Sabha v Naz Foundation*; *Delhi Commission for Protection of Child Rights v Naz Foundation*; *Ram Murti v Government of NCT of Delhi; Krantikari Manuvadi Morcha Party v Naz Foundation*; *Raza Academy v Naz Foundation*; *Tamil Nadu Muslim Munnetra Kazhagam v Naz Foundation*; *Utkal Christian Council v Naz Foundation*; *Joint Action Kannur v Naz Foundation*; *All India Muslim Personal Law Board v Naz Foundation*; and *Joint Action Kannur v Naz Foundation*.

still within the framework of 'heterosexual hegemony' and in the case of Brazil has to confront societal homophobia as well as problems of implementation.

While being cognisant of the problems, one needs to recognise the striking nature of the achievements of the Constitutional Courts in Brazil, South Africa and India.

Firstly, what is common to all three jurisdictions is that key decisions upholding LGBT rights in Brazil, South Africa and India focus on love and intimacy as a signifier of LGBT lives.

The evocative prose of both the *Fourie* decision in South Africa as well as the Brazilian decision in *APDF* and *API*, which recognise same-sex marriages and civil unions respectively, foreground a certain understanding of the relation between sex, love and intimacy.

In the language of *Fourie*, the non-recognition of same-sex marriage would mean that

> [i]t reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.[36]

In the language of the Brazilian decision in *APDF* and *ADI*:

> Justice Britto said that the right to sexual freedom is an elementary part of one's human dignity and autonomy, in their personal pursuit of a meaningful life. It is also based on the rights to freedom, privacy and intimacy, resulting, in fact, in an individual right to personality, which is both immediately applicable and irrevocable. That considered, there are no licit grounds for unequal treatment of *homoaffective* and *heteroaffective* people.[37]

The eloquence of *Naz*, in its shift from a relentless focus on the act of sex to the emerging discourse on intimacy and dignity, has already been alluded to in the course of this article.

Secondly, *Fourie, APDF* and *ADI* as well as *Naz* are also powerful illustrations of a historical sensitivity to national histories of oppression. *Fourie* was cognisant of the history of apartheid in South Africa, and *APDF and ADI* were profoundly conscious of the suppression of personal liberty under military rule in Brazil. *Naz* implicitly recognised the values of the freedom

36 *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).
37 See Friedman & Amparo (Chapter 12 above).

struggle by quoting the words of the founding fathers of India, Jawaharlal Nehru and BR Ambedkar to articulate a notion of inclusivity. In all three countries, the edifice of the law recognising equality for LGBT persons was built upon a profound reflection that discrimination against minority population was antithetical to the constitutional ethos and disrespectful to the historical memory of the oppression suffered by the people.

Thirdly, all three decisions embody the best values of the Constitution and signify that the law can sometimes play the role of what Sachs J called 'a great teacher' and establish 'public norms that become assimilated into daily life'.[38] It is this future towards which these three decisions gesture – a future marked by a deep respect for constitutional values.

However, there is a gap between the normative articulation of the law and the realities of society in all three countries. In all three countries, while the decision was an extraordinary constitutional moment, the challenges of ensuring that the decisions become a key turning point in the struggle against invidious and discriminatory treatment on the basis of sexual orientation and gender identity remain. Citing these key constitutional norms in the everyday life of society, reducing discrimination and hatred and building a culture of inclusiveness remain a continuing challenge in Brazil, South Africa and India. The long journey from the ethical promise of law to social transformation, such that the values that animate the Constitution actually transform heteronormative social structures, remains to be completed.

38 *Fourie* (n 36 above) para 138.

CHAPTER 14 SEXUAL MINORITY FREEDOM AND THE HETERONORMATIVE HEGEMONY IN SOUTH AFRICA

Jaco Barnard-Naudé

Abstract

The inclusion of 'sexual orientation' as a ground of presumed unfair discrimination in the equality provisions of the South African Constitution paved the way for significant advances in the achievement of freedom for those who find themselves outside of the heterosexual and heteronormative hegemony in South Africa. Arguing that South Africa has been, *vis à vis* Brazil and India, at the forefront of legal developments in this area, this chapter tracks and considers these developments, arguing that any evaluation of them should not lose sight of the fact that they both challenge and acknowledge (although they do not necessarily accept or celebrate) the disciplinary power of the heteronormative hegemony that prevails in post-apartheid South Africa. The chapter concludes with a consideration of the societal challenges that sexual minorities continue to face amidst legal transformation.

> Language does not only allow one to say what has hitherto been unsayable, it also allows one and indeed requires one to say also what has hitherto remained unsayable. It requires one to say the unsayable for the sake of the existential significance of the linguistic utterance, an existential significance that often goes by the name of justice.[1]

1 Introduction

The many years of authoritarian and totalitarian rule in apartheid South Africa resulted in various pieces of legislation that were introduced as attempts to regulate and police – in a characteristically totalitarian fashion – private aspects of citizens' lives according to the racist and oppressive logic of

1 J van der Walt 'Reply' in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 190.

apartheid.[2] The oppressive regulation of sexuality featured particularly prominently in this regard. Examples of apartheid legislation in this regard include the Immorality Act,[3] which criminalised interracial sexual intercourse as well the Prohibition of Mixed Marriages Act,[4] which prohibited interracial marriage. The Sexual Offences Act, in addition, provided for the criminal proscription of unnatural sexual acts committed between men 'at a party'.[5] By the inclusion of the common law crime of consensual male sodomy in schedule 1 of the Criminal Procedure Act of 1977, a person who was suspected of having committed the crime of sodomy could be killed if, during the pursuit of the suspect, such suspect resisted arrest.[6]

With the advent of democracy in South Africa, it became common cause that the democratisation process would have to address all measures that had been taken by the apartheid government with a view to oppressing sexual minorities. Recognising the particularly harsh fate sexual minorities suffered under this legislative dispensation during apartheid, section 8(2) of the interim Constitution of the Republic of South Africa[7] famously became the first constitutional provision in the world expressly to prohibit unfair discrimination, directly or indirectly, on the ground of sexual orientation.[8] Of course, the inclusion of prohibitions on unfair discrimination on the grounds of race, sex and gender were at least in part informed by the oppression suffered in the context of sexuality as a result of the racist legislation referred to above.[9]

In its substantial jurisprudence on sexual minority freedom, the Constitutional Court of South Africa has noted that gay men, lesbians and other sexual minorities suffered under apartheid because they were branded as criminals and rejected by society as outcasts and perverts.[10] This exclusion and marginalisation on the basis of belonging to a sexual minority – and the concomitant hatred and violence that it invariably produced and fuelled – was experienced more intensely by those South Africans already suffering

2 See J Barnard 'Totalitarianism, (same-sex) marriage and democratic politics in post-apartheid South Africa' (2007) 23 *South African Journal on Human Rights* 500.
3 Act 21 of 1950.
4 Act 55 of 1949.
5 Sec 20A of the Sexual Offences Act 53 of 1957.
6 See in this regard sch 1 of the Criminal Procedure Act of 1977.
7 Constitution of the Republic of South Africa, 1993 (interim Constitution).
8 Commentators refer, somewhat carelessly, to this inclusion as the 'key challenge to the edifice of heteronormativity through the 'queering' of the Constitution'. See M Steyn & M Van Zyl 'The prize and the price' in M Steyn & M Van Zyl (eds) *The prize and the price: Shaping sexualities in South Africa* (2009) 3. I use the word 'careless' here because it does not follow, without more, that the mere inclusion of sexual orientation as a ground for presumed unfair discrimination sparks any meaningful queering of the Constitution. A Constitution is read, interpreted and given effect to by the courts, the legislature, the executive and the body politic. Queering the Constitution – if there is such a thing – depends in the final instance on the collective (ethico-political) practices of these bodies.
9 See sec 8(2) of the interim Constitution and sec 9(3) of the Constitution of the Republic of South Africa, 1996.
10 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) 27F-28B; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) 31A-B and 32E-G.

under the yoke of apartheid because of their race and/or sex and/or gender designation and/or economic status. Gay anti-apartheid activist Simon Nkoli is an important example in this regard. Nkoli and his prominence as a freedom fighter and openly gay black man within the struggle played a key role in forging a particularly strategic alliance between the gay rights movement and the mass democratic movement.[11] This alliance contributed significantly to the inclusion in the African National Congress (ANC)'s pre-democracy constitutional proposals[12] that the 'right to be protected from unfair discrimination must specifically include those discriminated against on the grounds of ethnicity, language, race, birth, sexual orientation and disability'.[13]

The interim Constitution was clearly a result of the above-mentioned proposals and the progressive equality provisions of its section 8 were carried over to section 9 of the so-called 'final' Constitution.[14] These equality provisions paved the way for significant advances in the achievement of freedom for those who find themselves outside of the heterosexual and heteronormative hegemony[15] in South Africa. This chapter tracks and considers those developments, arguing that any evaluation of these developments should not lose sight of the fact that they both challenge and acknowledge (although they do not necessarily accept or celebrate) the disciplinary power of the heteronormative hegemony that prevails in post-apartheid South Africa.

2 In the beginning

In the case of *S v K*[16] the Cape High Court became the first court in South Africa to declare that the common law crime of male sodomy ceased to exist after the coming into operation of the interim Constitution on 27 April 1994.[17] The decision, however, only applied in the geographical jurisdiction

11 For an excellent rendition of this history, see J Cock 'Engendering gay and lesbian rights: The equality clause in the South African Constitution' (2003) 26 *Women's Studies International Forum* 35 36-38.

12 ANC Policy Proposals for a Final Constitution available at http://www.anc.org.za/show.php?id=284 (accessed 1 October 2006). Adopted by the National Conference of the African National Congress on 31 May 2002.

13 As above (emphasis added). For a detailed account of the way in which the sexual orientation clause found its way into the South African Constitution, see EC Christiansen 'Ending the apartheid of the closet: Sexual orientation in the South African constitutional process' (2000) 32 *New York University Journal of International Law and Politics* 997. See also MF Massoud 'The evolution of gay rights in South Africa' (2003) 15 *Peace Review: A Journal of Social Justice* 301; and S Croucher 'South Africa's democratisation and the politics of gay liberation' (2002) 28 *Journal of Southern African Studies* 315.

14 Constitution of the Republic of South Africa, 1996.

15 I follow the definition of 'heteronormativity' as provided in Steyn & Van Zyl (n 9 above): 'Heteronormativity is the institutionalisation of exclusive heterosexuality in society. Based on the assumption that there are only two sexes and that each has predetermined gender roles, it pervades all social attitudes, but is particularly visible in "family" and "kinship" ideologies'.

16 1997 (4) SA 469 (C).

17 n 7 above.

of the Cape High Court. In addition, the final Constitution had not yet come into operation when the alleged offence occurred that led to the accused in *S v K* being charged (although the High Court in *S v K* held that the criminalisation of sodomy was, in any event, also inconsistent with the provisions of the final Constitution that had come into effect when the accused appeared in court for the first time).[18] The National Coalition for Gay and Lesbian Equality – a non-governmental organisation (NGO) specifically committed to the advancement of sexual minority freedom – consequently brought a case before the Cape High Court applying for an order declaring unconstitutional the common law crimes of sodomy and the commission of 'unnatural sexual acts between men' as well as various legislative provisions in connection with such criminalisation, including the infamous 'men at a party' provisions of section 20A of the Sexual Offences Act.[19]

The Cape High Court declared the common law crimes as well as all the related statutory provisions unconstitutional.[20] The Constitution, however, provides that where a lower court declares an Act of Parliament unconstitutional, such an order, to have force and effect, must be referred to the Constitutional Court for confirmation.[21] In *National Coalition for Gay and Lesbian Equality v Minister of Justice*[22] the Constitutional Court held that a confirmation of the constitutional invalidity of the statutory provisions necessarily required it to pronounce on the constitutionality of the underlying common law crimes.[23] To this extent, the Court carefully considered the meaning of 'sexual orientation' in section 9(3) of the Constitution and adopted a broad and generous interpretation of the phrase:

> [S]exual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex.[24]

The Court held that the phrase applied equally to bisexual and transgendered orientations as well as to those who, on a single occasion, find themselves attracted to a member of their own sex.[25]

Given that sexual orientation is included in the Constitution's equality clause, the Court proceeded to lay out the relationship between equality and

18 *S v K* para 3.
19 See in this regard *National Coalition v Minister of Justice* paras 7-9 and 13.
20 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (6) BCLR 726 (W).
21 Sec 172(2)(a) of the Constitution provides as follows: 'The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court'.
22 n 10 above.
23 Para 9.
24 Para 20.
25 Para 21.

(sexual) difference. It linked the concept of equality in a specific way with difference stating that '[t]he desire for equality is not a hope for the elimination of all differences' and that it is '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'.[26]

The Court continued to evaluate the impact of the discrimination and noted that the criminal proscriptions and prohibitions in question, in addition to violating the dignity of gay men, enforce already existing prejudices and increase the negative effects of these prejudices which leads to psychological if not physical harm that often ensues from these prejudices.[27] In addition, the impact of the discriminatory prohibitions is more serious precisely because they are aimed at a political minority that cannot rely on political power in order to secure favourable legislation. It is here that the Court first recognises the often harsh effect of the prevailing heteronormative hegemony on sexual minorities.

The Court concluded that, in the light of the above, the discrimination was unfair and therefore contrary to the right to equality envisaged in section 9 of the Constitution.[28] It also held that the criminal proscriptions violated the right to dignity under section 10 of the Constitution:

> There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.[29]

Given that the South African Constitution introduces a legal culture of justification by virtue of its section 36 provisions, the Court was required to visit the question whether the violation of the rights mentioned above were justifiable in 'an open and democratic society based on human dignity, equality and freedom'.[30] It held that this exercise was essentially one of the balancing of different interests: 'In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose'.[31] In accordance with this approach, the Court held that no valid purpose for the limitation had been suggested and that, accordingly, there was no justification for the

26 Para 22.
27 Para 23.
28 Para 27.
29 Para 28. The Court also held that the constitutional right to privacy had been violated independent of the violations of the rights to equality and dignity.
30 See sec 36 of the Constitution.
31 Para 35.

limitation.[32] The Court also placed significant emphasis on the fact that the general trend in open and democratic societies had been towards decriminalisation of sodomy – a trend which provides further support for the contention that there is no legitimate purpose served by criminalisation.[33] It accordingly endorsed the order of the High Court that the common law offence of sodomy, as well as its incorporation into the relevant statutes, were unconstitutional and invalid.[34] The Court went on to declare section 20A of the Sexual Offences Act unconstitutional for fundamentally the same reasons as were advanced in relation to sodomy.[35]

In a separate concurring judgment, Sachs, J emphasised the importance of the privacy right and its relation to equality:

> [E]quality and privacy cannot be separated, because they are both violated simultaneously by anti-sodomy laws. In the present matter, such laws deny equal respect for difference, which lies at the heart of equality, and become the basis for the invasion of privacy.[36]

Sachs, J argued for an integrative approach to human rights based on context and impact.[37] As regards the nature of the privacy right, he argued that privacy suggested that it is closely linked to autonomy and self-realisation. This required some responsibility on the part of the state and did not mean that the Constitution assumes a rights bearer as 'a disembodied and socially-disconnected self'.[38] This, in turn, means that sometimes the privacy interest will be trumped by social standards, particularly where harm would continue as a result of the protection of the privacy interest.[39] Any limitation on the privacy interest, however, must pass constitutional muster.

In this regard, Sachs, J described dignity as the 'motif which links and unites equality and privacy'.[40] This acceptance of dignity in the context of sexual orientation discrimination requires that the incorporation into law of

32 In this regard, it should be pointed out that it was held that 'it is very difficult to conceive that this particular offence would have come into existence purely in order to criminalise male rape' (para 70) since male rape (at the time) qualified as a form of assault. The sole reason for the existence of the common law offence of sodomy 'was the perceived need to criminalise a particular form of gay sexual expression; motives and objectives which we have found to be flagrantly inconsistent with the Constitution' (para 69). The judgment raised the question whether the legislature would deal with male rape by way of new statutory provisions that would presumably include male rape in the criminal offence of rape. Sec 3 (read with sec 1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 abolished the common law definition of rape and introduced an expanded definition of rape that includes male rape within the ambit of the offence. Successful prosecution of male rape under this regime has already been reported. See S Tau 'Male jail rape case a first' *The Citizen* 1 February 2009.
33 Paras 39-57.
34 Para 73.
35 Para 76.
36 Para 112.
37 Para 113.
38 Para 117.
39 Paras 118-119.
40 Para 120.

the prejudices of heterosexual society cannot simply be accepted as objective. Rather, the matter must be evaluated from 'the perspective of those whose lives and sense of self-worth are affected by the measures'.[41]

Sachs, J's wording here is, without stretching the wording to any non-conventional meaning, capable of a radical reading. On such a reading one could say that Sachs J accepts that the heteronormative order and its values and beliefs cannot be employed to judge those who do not conform to its constraints. Both the judgments of Ackermann and Sachs JJ reveal a marked sensitivity for the disciplinary effect of heteronormative power. This, coupled with the generous definition of sexual orientation that was adopted here, makes it hardly surprising that the judgment has been described as a queer moment in the Constitutional Court's jurisprudence and spelt a plethora of possibilities for the recognition of alternative forms of sexuality and sexual relations in post-apartheid South Africa.[42] The judgment is clearly avoidant of the pitfalls of identity politics in that it does not posit any stable, ideal and therefore 'protection-worthy' gay identity against the heteronormative prejudices that it dismisses. It is this judgment that interpreted the sexual orientation provision in the Constitution in such a way that it could be said that it allowed for a 'queering' of the Constitution. This is the case, inter alia, because the sexual orientation provision was read in the context of the foundational norm of the Constitution, namely dignity.

3 Reining in the queer

Given the profoundly anti-heteronormative or 'queer' spin that the first *National Coalition* judgment put on the emergence of sexual minority freedom in the new South Africa, one would have hoped that further cases would be decided with reference to, or along the lines of, this apparently strong queer and indeed anti-foundational 'foundation' for the sexual minority freedom discourse. Yet, as De Vos indicates, when the Court was, for the first time, faced with the question of legal protection (as opposed to decriminalisation) of same-sex partnerships in the second *National Coalition* case,[43] it lapsed into the more 'familiar' rhetoric of heteronormativity and the politics of passing.[44] As Johnson indicates, passing involves the construction by the heteronormative hegemony of a '"good homosexual" subject that still reinforces heteronormative conceptions of citizenship'.[45]

41 Para 121.
42 P de Vos 'From heteronormativity to full sexual citizenship?: Equality and sexual freedom in Laurie Ackermann's constitutional jurisprudence' (2008) *Acta Juridica* 254. In so far as 'queer' is capable of further definition here, I suggest the description by Judith Butler as a 'site of collective contestations, the point of departure for a set of historical considerations and future imaginings': J Butler *Bodies that matter: On the discursive limits of 'sex'* (1993) 228.
43 *National Coalition v Minister of Home Affairs*.
44 De Vos (n 42 above) 266-271.
45 C Johnson 'Heteronormative citizenship and the politics of passing' (2002) 5 *Sexualities* 317 320.

In the second *National Coalition* judgment, the construction of a 'good homosexual subject' occurred in an interesting way. First, the Court decided that the word 'spouse' in the legislation that was being challenged[46] could not in its context be construed as including a partner in a permanent same-sex life partnership.[47] According to the Court, such a construction would 'distort' the meaning of the expression. The Court relied explicitly on what it called the 'ordinary' meaning of the word 'spouse' as denoting a husband or a wife.[48] Clearly the Court played its (unconsciously) ideological hand when it unproblematically conflated the heteronormative meaning of the word with its so-called 'ordinary' meaning, thereby sending the message that what is ordinary is what is heteronormative. This was further emphasised when the Court held that the word 'marriage', as used in the relevant legislation, did not extend 'any further than those marriages that are ordinarily recognised by our law'.[49] In short, the Court's decision was that a same-sex life partnership could not, at the time, pass as a marriage. From this perspective, the judgment could be read as having conveyed the heteronormative sentiment that the same-sex life partnership was not sufficiently 'ordinary' or 'normal' to warrant protection under the existing institutions of family law. There can be no doubt that many gay and lesbian couples would find such a sentiment deeply hurtful and demeaning.

Compared to the decision in the first *National Coalition* case, this approach stands in stark contrast to the rejection by Sachs, J in the first *National Coalition* case of 'the so-called reasonable lawmaker who accepts as objective all the prejudices of heterosexual society as incorporated into the laws in question' and the willingness 'to look at the matter from the perspective of those whose lives and sense of self-worth are affected by the measures'.[50] Clearly, there were limits to the Court's embrace of queer subjectivities.

This is not to say that the Court was incapable of or unwilling to recognise that the discrimination in this case was based on 'harmful and hurtful stereotypes of gays and lesbians'[51] and accordingly 'denies to gays and lesbians that which is foundational to our Constitution ... the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be'.[52] It continued to find that there

46 The relevant legislation was sec 25 of the Aliens Control Act 96 of 1991, which provided that only the 'spouse' or 'dependent child' of a person who is permanently and lawfully resident in South Africa can apply for an immigration permit. The applicants contended that the section was unconstitutional because it did not allow the partners of permanently resident South Africans in permanent same-sex life partnerships to also apply for such permits.

47 *National Coalition v Minister of Home Affairs* para 23.

48 *National Coalition v Minister of Home Affairs* para 25.

49 As above.

50 *National Coalition v Minister of Justice* para 121.

51 *National Coalition v Minister of Home Affairs* para 49.

52 *National Coalition v Minister of Home Affairs* para 42.

was no justification for the limitation of the section 9 right to equality. Accordingly, the relevant legislation was found to be unconstitutional.

Given the Court's approach to the interpretation of the words 'spouse' and 'marriage' in the contested legislation, the unconstitutionality of the relevant legislation could only be cured by reading the words 'permanent same-sex life partnership' into the statute. This remedy would afford partners in same-sex life partnerships the same rights as spouses in legally-recognised marriages.[53]

Against this backdrop, the politics of passing came most explicitly to the fore when the Court provided a list of factors[54] which would assist in the determination of whether the same-sex life partnership was 'permanent' and thus worthy of protection.[55] These factors were basically made up of the characteristics of a heterosexual marriage. The use of these factors implied that the type of same-sex life partnership that the law would protect had to approximate as closely as possible the idealised, ordinary – and one is tempted to add mythical – heterosexual marriage. As De Vos indicates, the judgment 'emphasised that what was needed was to determine whether the same-sex partnership was sufficiently similar to that of the idealised heterosexual marriage'.[56] It is thus only the same-sex partnership that looks like or passes as a heterosexual marriage (but for the fact that the partners are of the same sex) that is worthy of the law's protection. Yet, by separating the same-sex life partnership from the legal institutions of 'marriage' and 'spouse', the Court conveyed the sentiment that 'marriage' had to be insulated from possible intrusions by queer relationships – no matter how unqueer they are – because, after all, queer relationships are still, well, queer.

In turn, as De Vos notes, the judgment was not sufficiently sensitive to South Africa's political history in that it could be read as putting in place a 'separate but equal' dispensation for the recognition of same-sex partnerships.[57] This was evident in the very fact that the court used the language of protection in its judgment: '*Protecting* the traditional institution of marriage as recognised by law may not be done in a way which

53 *National Coalition v Minister of Home Affairs* para 82.
54 *National Coalition v Minister of Home Affairs* para 88: 'Such facts would include the following: the respective ages of the partners; the duration of the partnership; whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it; how the partnership is viewed by the relations and friends of the partners; whether the partners share a common abode; whether the partners own or lease the common abode jointly; whether and to what extent the partners share responsibility for living expenses and the upkeep of the joint home; whether and to what extent one partner provides financial support for the other; whether and to what extent the partners have made provision for one another in relation to medical, pension and related benefits; whether there is a partnership agreement and what its contents are; and whether and to what extent the partners have made provision in their wills for one another.'
55 *National Coalition v Minister of Home Affairs* para 88.
56 De Vos (n 42 above) 269.
57 De Vos (n 42 above) 268.

unjustifiably limits the constitutional rights of partners in a permanent same-sex life partnership'.[58] In this sense, the Court failed to heed its own emphasis on the important role of history and the past in South Africa's constitutional project.[59]

The point to be made here is that the Court still considered it necessary to 'protect' the traditional institution of marriage, albeit that it added the *caveat* that this protection of marriage may not fall foul of the Constitution.[60] The obvious question is, of course, why it was still necessary to protect traditional marriage if the new democratic constitutional order required the affirmation and celebration of difference and plurality.[61] The Court's creation of the legal institution of a permanent same-sex life partnership could, in this way, be read as having conveyed the message that a separate but equal dispensation in this context was not only warranted but also constitutional.

4 Permanent same-sex life partnerships and the achievement of sexual minority freedom

A flurry of decisions which vindicated important rights for same-sex couples followed the decision in the second *National Coalition* case. These

58 *National Coalition v Minister of Home Affairs* para 55 (my emphasis).

59 See *S v Zuma* 1995 (2) SA 642 (CC) 651F-H, where it was stated that 'regard must be paid to the legal history, traditions and usages of the country concerned'; *S v Makwanyane* 1995 (3) SA 391 (CC) 415D-E, where Chaskalson P held that 'we are required to construe the South African Constitution … with due regard to our legal system, our history and circumstances'; at 488H-I, where Mahomed DP remarked that '[i]t is against this historical background and ethos that the constitutionality of capital punishment must be determined'; and at 504I-505B, where O'Regan J stated that 'the values urged upon the Court are not those that have informed our past … [and in] … interpreting the rights enshrined in chapter 3, therefore, the Court is directed to the future'. See also *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) 903J-904B-C, where it was held (per Chaskalson P) that the nature and extent of the power of Parliament to delegate its legislative powers ultimately depends 'on the language of the Constitution, construed in the light of the country's own history'; *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) 657B, where Sachs J said the following: 'Rights are not self-explanatory. They are principled constructions informed by social history'. See also *Brink v Kitshoff* 1996 (4) SA 197 (CC) 216I-217B, where the court held that the equality provision was the product of our own particular history and that 'its interpretation must be based on the specific language of [the provision], as well as our own constitutional context', and went on to say that our 'history is of particular relevance to the concept of equality'.

60 Y Merin *Equality for same-sex couples: The legal recognition of gay partnerships in Europe and the United States* (2002) 279 links the separate-but-equal doctrine with second-class citizenship: 'The fact that the [separate but equal] models are self-consciously separate from marriage renders them inherently unequal to opposite-sex marriage; "separate but equal" in this context instantiates the same constitutional evil that led the US Supreme Court to condemn this doctrine in the racial domain. This is yet another reason why marriage substitutes constitute second-class marriage. The only remedy for the existing discrimination against same-sex couples would be their inclusion in the institution of marriage'.

61 *National Coalition v Minister of Justice* (n 10 above) para 22: 'The desire for equality is not a hope for the elimination of all differences. "The experience of subordination – of personal subordination, above all – lies behind the vision of equality"'. Also see para 112: '[E]qual respect for difference, which lies at the heart of equality'.

developments occurred against the background of a society in which heteronormativity and extreme conservatism regarding sexuality and sexual orientation still remain the order of the day. After the second *National Coalition* case, it was clear that the developments and advances in respect of sexual freedom were most likely to be structured (and thus constrained) by the pervasiveness of the heteronormative hegemony. This is perhaps an inevitable conclusion to be drawn of any sexual minority empowerment discourse that asserts itself within a particularly conservative heteronormative society. What is certainly reflected by the history of these decisions is the tension between majoritarian democracy, on the one hand, and constitutional protection and legal recognition of minorities by the courts, on the other. For the sake of continuity I include below a short summary of this jurisprudence.

In *Satchwell*,[62] the applicant challenged the constitutional validity of two sections of the Judges' Remuneration and Conditions of Employment Act[63] (as well as certain regulations promulgated in terms of this Act). The contention by the applicant was that these sections were unconstitutional in that they failed to extend the benefits contained in them to partners in permanent same-sex life partnerships. Madala J held that the denial of these benefits to the same-sex life partners of judges constituted unfair discrimination on the grounds of sexual orientation and that there was no justification for the limitation of the right to equality.[64] The judgment emphasised that the equality clause does not generally require benefits extended to spouses also to be extended to same-sex life partners.[65] The Constitution will only impose these benefits on same-sex partners where reciprocal duties of support have been undertaken. Whether such duties of support exist or not depends on the circumstances of each case.[66] Accordingly the Court ordered the reading in of the words 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' after the word 'spouse' wherever it occurred in the challenged legislation and regulations.[67]

On the basis of this decision, the Supreme Court of Appeal subsequently extended statutory benefits for spouses of road accident victims to partners in permanent same-sex life partnerships.[68] The decision also had a significant impact on the extension of joint adoption rights to same-sex life partners in the case of *Du Toit*,[69] where it was held as follows:

62 *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC).
63 Act 88 of 1989.
64 *Satchwell* para 26.
65 *Satchwell* para 24.
66 *Satchwell* para 25.
67 *Satchwell* para 34.
68 *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA).
69 *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as* Amicus Curiae) 2003 (2) SA 198 (CC) para 39.

> The impugned provisions do not prevent lesbian or gay people from adopting children at all. They make no provision however for gay and lesbian couples to adopt children jointly. In this regard, they are not the only legislative provisions which do not acknowledge the legitimacy and value of same-sex permanent life partnerships. It is a matter of our history (and that of many countries) that these relationships have been the subject of unfair discrimination in the past. However, our Constitution requires that unfairly discriminatory treatment of such relationships cease.[70]

In this case Skweyiya J also referred to the many statutes recognising permanent same-sex life partnerships that had been passed since the advent of democracy in South Africa.[71]

In *J*,[72] the Constitutional Court similarly made use of the reading-in remedy in order to cure the unconstitutionality of section 5 of the Child Care Act[73] that did not make it possible for the partner of a permanent same-sex life partnership who did not give birth to a child, conceived by artificial insemination, to become a legitimate parent of that child. In this case, the Court made it clear that 'comprehensive legislation regularising relationships between gay and lesbian persons' had become necessary, because 'it is unsatisfactory for the Courts to grant piecemeal relief to members of the gay and lesbian community as and when aspects of their relationships are found to be prejudiced by unconstitutional legislation'.[74]

5 The *Fourie* judgment and the legalisation of same-sex 'marriage' in South Africa

The above cases and legislative developments clearly set the scene for the Constitutional Court's decision in which it declared unconstitutional the common law definition of 'marriage' as well as the 1961 Marriage Act to the extent that it relied on that definition.[75] Below I consider the basis of the Court's decision in *Fourie*.

Throughout its jurisprudence on sexual minority freedom, the Constitutional Court highlighted the obvious significance of the concepts of human dignity and equality. Out of this jurisprudence developed a detailed set of assumptions that must guide any such enquiry. In the process of setting out these assumptions, the Court rejected many of the stereotypical assumptions made about gay men and lesbians and their intimate relationships. In *Fourie*, these guiding assumptions were said to include:[76]

70 Para 32.
71 Para 32 fn 33.
72 *J v Director General, Department of Home Affairs* 2003 (5) SA 621 (CC).
73 Act 82 of 1987.
74 *J* para 23.
75 *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC) para 162.
76 *National Coalition v Minister of Home Affairs* 32F-33C, restated in *Fourie* 545F/G-546D/E.

- Gays and lesbians have a constitutionally-entrenched right to dignity and equality; sexual orientation is a ground expressly listed in section 9(3) of the Constitution and under section 9(5), discrimination on the basis thereof is unfair unless the contrary is established.
- Prior criminal proscription of private and consensual sexual expression between gays, arising from their sexual orientation and which had been directed at gay men, has been struck down as unconstitutional.
- Gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms, including affection, friendship, eros and charity.
- They are likewise as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household.
- They are individually able to adopt children and, in the case of lesbians, to bear them.
- In short, they have the same ability to establish a consortium *omnis vitae*; and finally ... they are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses.

The Constitutional Court thus concluded that the family and family life of gay men and lesbians are in all significant respects indistinguishable from those of heterosexual spouses and in human terms as important.[77] Where the law fails to recognise the relationship of same-sex couples,

> the message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudice and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity.[78]

Conservative arguments before the Court in *Fourie* nevertheless charged that, even if one recognises that the absence of a comprehensive legal regime to protect same-sex couples is discriminatory, the remedy does not lie in radically altering the law of marriage, which by its very nature and, as it has evolved historically, is concerned with heterosexual relationships.[79] The answer, they said, is to provide appropriate alternative forms of recognition to same-sex family relationships.

The Court considered the age-old argument that the constitutive and definitional characteristic of marriage is its procreative potential and can

77 *Fourie* 546D-E/F.
78 *Fourie* 546E-G/H, quoting from the judgment in *National Coalition v Minister of Home Affairs* 33E-G.
79 *Fourie* 556G-557A.

therefore never include same-sex couples.[80] It found this argument to be deeply demeaning to couples (married or not) who, for whatever reason, either choose not to procreate or are incapable of procreating when they start a relationship or become so at any time thereafter. It is also demeaning for couples who start a relationship at a stage when they no longer have the capacity to conceive or for adoptive parents.[81] Although this view might have some traction in the context of a particular religious world view, from a legal and constitutional point of view, the Court found, it could not hold.[82]

Another familiar argument that was rejected is the assertion that marriage is by its very nature a religious institution and that to change its definition would violate religious freedom in a most fundamental way.[83] Although the Court recognised that religious bodies play a large and important part in public life and are part of the fabric of our society,[84] the open and democratic society contemplated by the Constitution requires mutual respect and co-existence between the secular and the sacred:

> [T]he acknowledgment by the state of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. *The constitutional claims of same-sex couples can accordingly not be negated by invoking the rights of believers to have their religious freedom respected.* The two sets of interests involved do not collide; they co-exist in a constitutional realm based on accommodation of diversity.[85]

This entails, plainly, that the religious beliefs of some cannot be used to determine the constitutional rights of others.[86] In an open and democratic society there should be a capacity to accommodate and manage difference and not to enforce the view of the (religious) majority on marginalised minorities in ways that would reinforce unfair discrimination against a minority.[87] A contrary view smacks unpleasantly of the authoritarian/ totalitarian tactics so characteristic of the National Party government during the apartheid era.

The Court dismissed, in addition, the argument that legalising same-sex marriage in South Africa would put our law at odds with international law that protects heterosexual marriage only. In this regard, the Court rejected a literal reading of the phrase 'men and women' in the Universal Declaration of Human Rights and pointed out that this phrase was historically descriptive

80 *Fourie* 558B-H. For a typical account of the 'procreative potential' argument, see J Finnis 'Law, morality and "sexual orientation"' (1994) 69 *Notre Dame Law Review* 1049 1066.
81 *Fourie* 558E-F.
82 *Fourie* 558D.
83 *Fourie* 558H-563B.
84 *Fourie* 560 E-G.
85 *Fourie* 562F-563B (emphasis added).
86 *Fourie* 560D-E.
87 *Fourie* 561A-D.

rather than normatively prescriptive.[88] Conceptions of rights take on a new meaning as the conditions of humanity change – they are not cast in stone. Moreover, in light of the protection afforded on the basis of sexual orientation in section 9(3) of the Constitution, the Court held that international law could not be utilised to take away a right guaranteed by the Constitution.[89]

Having found that the discrimination is unfair, the Court was obliged to consider the question whether justification existed under section 36 of the Constitution for the violation of the equality and dignity of same-sex couples by virtue of their exclusion from civil marriage.[90] Two interrelated grounds of justification were advanced that intricately related to the arguments for the preservation of marriage: First, the argument was that the inclusion of same-sex couples would undermine the institution of marriage.[91] The second ground of justification was part and parcel of this view. It argued that the inclusion would undermine and intrude upon strong religious beliefs about marriage.[92]

Both these grounds were rejected. The Court held that granting same-sex couples the right to marry would in no way impair the capacity of heterosexual couples to marry in the form they wished and in accordance with their religious beliefs. As regards the second ground, the Court held that it was based on a prejudice that is at odds with the constitutional requirements of equal treatment and respect for difference.[93]

The arguments that same-sex marriage would have adverse effects on the dignity of heterosexual marriage and would destroy that institution is not so different from arguing that the recognition of interracial marriage would have an adverse effect on the dignity of partners to a same-race marriage. This latter notion was of course embraced by the apartheid government when it passed the Mixed Marriages Act[94] in 1950. Fortunately, we have moved far beyond such offensive and racist logic. To accept this logic would also mean that the Recognition of Customary Marriages Act[95] would have adverse effects on the dignity of individuals in monogamous marriages and would destroy monogamous marriage as endorsed by most Christian churches. To make such an argument would be an insult to those who take part in customary polygamous marriages.[96]

88 *Fourie* 564A-B.
89 *Fourie* 565C-D.
90 *Fourie* 567D.
91 *Fourie* 567E.
92 *Fourie* 567F-G.
93 *Fourie* 568F-H.
94 Act 55 of 1949.
95 Act 120 of 1998.
96 It is beyond the scope of this article to deal with the question of whether the Recognition of Customary Marriages Act is unconstitutional because it possibly discriminates unfairly against women on the basis of sex and gender.

The Court concluded that the common law definition of marriage and the Marriage Act, to the extent that it relies on this definition, were unconstitutional.[97] Instead of an immediate reading-in to remedy the unconstitutionality, the Court suspended the reading-in for one year to give Parliament a chance to address the unconstitutional exclusion of same-sex couples from enjoying the status and entitlements coupled with responsibilities that are accorded to heterosexual couples by common law and by the Marriage Act.[98] As to the confines of this mandate to Parliament, it was very clear from the decision that the mandate was extremely narrow. The Court expressly held that whatever legislative measures Parliament takes, it could not subject same-sex couples to new forms of marginalisation or exclusion by the law, either directly or indirectly.[99]

It is important to note in this regard that the Court affirmed the importance of marriage in South African society. Marriage, the Court held, is a unique institution and constitutes 'much more than a piece of paper'.[100] On the one hand, until recently marriage was the only institution from which a number of socio-economic benefits would accrue. These include the right to maintenance, medical insurance coverage, adoption, access to wrongful death claims and post-divorce rights. On the other hand, marriage also bestows a myriad of intangible benefits on those who choose to enter into it.[101] As such, marriage entitles a couple to celebrate their commitment to each other at a public event so celebrated in our culture.[102] Well aware of and affirming the centrality attributed to marriage and its consequences in our culture, the Court held that to deny same-sex couples a choice in this regard 'is to negate their right to self-definition in a most profound way'.[103] As Sachs J put it:

> The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such,

97 *Fourie* 569C-E.
98 *Fourie* 576C-D. In a dissenting judgment (*Fourie* para 167-169), O'Regan J held that it was not appropriate in this case to suspend the order of invalidity, given that Parliament's choice was a narrow one that would be unaffected by providing immediate relief.
99 *Fourie* 579G-H.
100 *Fourie* 552F.
101 See L Schäfer 'Marriage and marriage-like relationships: Constructing a new hierarchy of life partnerships' (2006) 123 *South African Law Journal* 626 633 on the intangible advantages of marriage, and D Wides 'Family and equality in post-constitutional South Africa: An argument for same-sex marriage' (2003) *Responsa Meridiana* 81, who argues that the jurisprudence developed in such a way that the only way in which a successful constitutional challenge could be avoided would be to legislate for no other form of recognition but same-sex marriage.
102 *Fourie* 553C-D.
103 *Fourie* 554B.

> do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.[104]

It is clear, then, that the Court contemplated in its judgment that the exclusion of same-sex couples from marriage has both a practical and symbolic impact, which means that the unconstitutionality could not be rectified through the recognition of same-sex unions outside the law of marriage. In responding to the unconstitutionality of the existing marriage regime, both the practical and the symbolic aspects had to be taken into account.[105]

In the light of the above, Parliament had to be 'sensitive to the need to avoid a remedy that on the face of it would provide equal protection, but would do so in a manner that in its context and application would be calculated to reproduce new forms of marginalisation'.[106] It would therefore be completely unacceptable for Parliament to adopt a 'separate but equal' approach because this would serve 'as a threadbare cloak for covering distaste for or repudiation by those in power of the group subjected to segregation'.[107] The Court referred to the famous case of *S v Pitje*,[108] where the appellant, an African candidate attorney, occupied a place at a table in court that was reserved for 'European practitioners' and refused to take his place at a table reserved for 'non-European practitioners'. Steyn CJ upheld the appellant's conviction for contempt of court as it was

> clear [from the record] that a practitioner would in every way be as well seated at the one table as at the other, and that he could not possibly have been hampered in the slightest in the conduct of his case by having to use a particular table.[109]

According to Sachs J, '[t]he above approach is *unthinkable* in our constitutional democracy today, not simply because the law has changed dramatically, but because our society is completely different'.[110] The Court

104 *Fourie* 552G-553C.
105 *Fourie* 557D-E, where Sachs, J stated: 'Thus, it would not be sufficient merely to deal with all the practical consequences of exclusion from marriage. It would also have to accord to same-sex couples *a public and private status equal to that which heterosexual couples achieve from being married*' (emphasis added).
106 *Fourie* 580E.
107 *Fourie* 580E-F. Sachs J explained this view with reference to South Africa's apartheid past: 'The very notion that integration would lead to miscegenation, mongrelisation or contamination, was offensive in concept and wounding in practice. Yet, just as is frequently the case when proposals are made for recognising same-sex unions in desiccated and marginalised forms, proponents of segregation would vehemently deny any intention to cause insult. On the contrary, they would justify the apartness as being a reflection of a natural or divinely ordained state of affairs. Alternatively they would assert that the separation was neutral if the facilities provided by the law were substantially the same for both groups'.
108 1960 (4) SA 709 (A).
109 *Pitje* 710.
110 *Fourie* 581A (my emphasis).

warned explicitly against providing an apparently neutral remedy that could have a severe impact on the dignity and sense of self-worth of the persons affected. Although different treatment itself does not necessarily violate the dignity of those affected, as soon as 'separation implies repudiation, connotes distaste or inferiority and perpetuates a caste-like status it becomes constitutionally invidious'.[111]

> This means that whatever legislative remedy is chosen must be as generous and accepting towards same-sex couples as it is to heterosexual couples, both in terms of the intangibles as well as the tangibles involved. In a context of patterns of deep past discrimination and continuing homophobia, appropriate sensitivity must be shown to providing a remedy that is truly and manifestly respectful of the dignity of same-sex couples.[112]

In the light of the above, the Constitutional Court ordered, first, the common law definition of marriage inconsistent with the Constitution and invalid 'to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples' and, second, that the omission from section 30(1) of the Marriage Act after the words 'or husband' of the words 'or spouse' was declared to be inconsistent with the Constitution, with the result that the Marriage Act was declared to be invalid to the extent of this inconsistency'.[113] In the result, Parliament was given one year to remedy the defect.[114]

6 The Law Reform Commission's recommendations

In March 2006, the South African Law Reform Commission (SALRC) – having provided the Constitutional Court in the *Fourie* matter with a memorandum on its project regarding domestic partnerships – published its report on domestic partnerships in which it recommended that the institution of 'civil unions' without the simultaneous institution of 'marriage' for same-sex life partnerships would not, in its opinion, satisfy the Constitutional Court's judgment in *Fourie*.[115] These recommendations were based on the Commission's understanding of the requirements set out in the *Fourie* judgment for the constitutionally valid regulation of same-sex relationships. The Commission referred to the fact that Sachs J 'clearly stated that the solution lay in the correction of the Marriage Act and the common law definition of marriage, hence the order for the amendment of the Marriage Act if Parliament fails to correct the defects in the legislation by 1 December 2006'.[116] In the Commission's opinion, civil partnerships (as the only remedy

111 *Fourie* 582D-E.
112 *Fourie* 582E-583A.
113 *Fourie* 586E-G.
114 *Fourie* para 158.
115 South African Law Reform Commission Report on Domestic Partnerships (Project 118) (2006) 292 para 5.3.15, 296 para 5.4.11 and 305 para 5.6.2.
116 SALRC Report (n 115 above) 300 para 5.5.15.

and as exclusively applying to the formalisation of same-sex unions) could be successfully challenged constitutionally. It concluded that '[s]ince the tenet of equal treatment was an important part of the motivation for permitting same-sex marriage, the creation of a separate but equal status would be discriminatory'.[117]

The SALRC thus recommended, as its 'first choice', that the Marriage Act be amended as follows:

- inserting the following definition of 'marriage' into the Act: 'Marriage' means the union, while it lasts, between two adult persons to the exclusion of all others for life;
- inserting the words 'or spouse' after the words 'or husband' in section 30 of the Act; and
- inserting the following definition of 'spouse' in the Marriage Act: 'Spouse' means a partner in a marriage as defined by this Act.[118]

The second route that the SALRC indicated was the Dual Act option. In terms of this option, an Orthodox Marriage Act would be enacted together with a Reformed Marriage Act. The Orthodox Marriage Act would have the same format as the current Marriage Act with a limited definition of 'orthodox marriage' as 'the voluntary union of a man and a woman concluded in terms of this Act to the exclusion of all others'.[119] The Commission justified the need for this Act on the basis of the 'religious concerns' expressed by opponents to same-sex marriage. The Reformed Marriage Act, proposed to be enacted simultaneously with the Orthodox Marriage Act, would be the generic Act, open to everybody, and the Commission insisted specifically that the state's marriage officers had to be appointed under the generic Act.[120] The Commission also envisaged that the Orthodox Marriage Act would ultimately resort to an Islamic Marriages Act, the Recognition of Customary Marriages Act and perhaps a Hindu Marriage Act in a 'religious marriages' category of legislation.[121] Ultimately, the recommendation of the Orthodox Marriage Act would be a concession to the religious majority which, in the opinion of the Commission, would not impugn the dignity of homosexual couples, because the differential treatment of opposite-sex couples who would choose to be treated differently would not violate the dignity of same-sex couples.[122]

117 SALRC Report (n 115 above) 296 para 5.4.11.
118 SALRC Report (n 115 above) 306 paras 5.6.4-5.6.6.
119 SALRC Report (n 115 above) 310 para 5.6.17.
120 SALRC Report (n 115 above) 310 para 5.6.19.
121 SALRC Report (n 115 above) 311 para 5.6.20.
122 SALRC Report (n 115 above) 310 para 5.6.18. For criticism of this view, see P de Vos & AJ Barnard 'Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga' (2007) 124 *South African Law Journal* 795.

7 The first draft of the Civil Union Bill, public participation hearings and the Civil Union Act 17 of 2006

Parliament's response to *Fourie* eventually came in September 2006,[123] two months before the deadline of 30 November 2006. The first draft of the Civil Union Bill[124] did not provide same-sex couples with the choice to enter into a marriage or to conclude a civil union. The long title of the Bill made this abundantly clear: The purpose was to 'provide for the solemnisation of civil partnerships [and] the legal consequences of civil partnerships …'.[125] Another way of stating the long title of the Bill would simply have been 'to preserve the traditional, historic nature and meaning of the institution of civil marriage'.[126]

The argument was made that, although it was not called 'marriage', in substance, the 'civil partnership' provisions of the first draft complied with the Constitutional Court's directions.[127] However, it was never made clear why it would be necessary to create the separate institution of 'civil partnership' for same-sex couples exclusively, if this was in substance exactly the same as a heterosexual marriage. As there was absolutely no rational justification for this differentiation between same-sex and different-sex couples, it was clear that the civil partnership provisions of the first draft of the Civil Union Bill discriminated unfairly on the ground of sexual orientation against homosexual couples. The Bill's repeated reservation of the category of 'marriage' for relationships other than same-sex partnerships (that is, heterosexual relationships) effectively meant that the legislature's drafters denied the re-definition of 'marriage' endorsed in *Fourie*. Ultimately, the Bill purported to create precisely the separate but equal regime declared as 'absolutely unthinkable' in the *Fourie* decision.

Conservative arguments pointed to section 11 of this draft of the Bill, which required a marriage officer to refer to the civil partnership as a 'marriage' upon the request of the parties during the solemnisation of the civil partnership, and argued that this meant that the terms 'civil partnership' and 'marriage' could indeed be used interchangeably.[128] While this section seemed to be an attempt to address the *Fourie* judgment's concern with the negative symbolic impact of exclusion, the section did not have the effect of providing 'same-sex couples a public and private *status* equal to that which

123 A Quintal 'Same-sex marriages bill tabled in parliament' *IOL News* 25 August 2006 available at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20060825011114223C978307 (accessed 15 December 2006).
124 Civil Union Bill 26 of 2006.
125 As above.
126 This was in fact the long title of the Massachusetts Civil Union Bill (Senate No 2175) that was struck down as unconstitutional by the highest court of that state.
127 See A Quintal 'Civil Union Bill will codify inequality' *Cape Times* 23 October 2006 4.
128 See Quintal (n 127 above).

heterosexual couples achieve from being married'.[129] As opposed to a mere contingent reference upon solemnisation contemplated in section 11, *being married* implies a continuing state of existence/being under a legal-symbolic category with representational, linguistic and practical consequences. Section 11 and the Bill as a whole did not afford this opportunity to same-sex partners – an assertion which is supported by the fact that a couple that entered into a 'civil partnership' would be registered in a separate register and would receive a registration certificate as opposed to a marriage certificate.[130]

From the above it should be clear that the Bill created an inferior form of legal recognition for same-sex relationships. Given the Constitutional Court's view that the concept of marriage has a profound symbolic, emotional and political power in our culture that gives it a special status, the refusal to allow same-sex couples the right to enter into an institution called 'marriage' meant that the Bill deprived them of the right to access the status associated with the term 'marriage'. Members of the LGBTI community throughout South Africa were outraged,[131] and not unjustifiably so. These provisions of the Bill that were supposed to vindicate gay and lesbian rights instead became a source of insult and humiliation. This was most devastatingly reflected in the public participation hearings that followed.

The Constitutional Court clearly provided Parliament in the *Fourie* judgment with a set of clear guidelines to assist it with the drafting of the new legislation and that, arguably, determined the parameters within which public participation on this issue could be entertained. It nevertheless noted that one of the principle functions of Parliament was to ensure that the values of the Constitution, as set out in the Preamble and section 1, permeate every area of the law.[132] In this context, it encouraged Parliament to consult widely before adopting legislation in this regard.

Unfortunately, during this consultation process Parliament failed in its constitutional duty, because it failed to inform the public of the constitutional and legal parameters within which the consultation was supposed to take place.[133] This meant that the crisp legal question posed by the Court, namely, what legal mechanism should be adopted in order to provide same-sex

129 *Fourie* 557E (emphasis added).
130 Civil Union Bill clause 12.
131 J du Plessis 'Gay activists see red over Civil Union Bill' *Pretoria News* 18 October 2006 3; WJ da Costa 'Same-Sex Bill will make it harder for gays' *Cape Times* 17 October 2006 4; G Bough 'Same-Sex Union Bill gets passions going' *Cape Times* 10 October 2006 4.
132 *Fourie* 557B.
133 See secs 59(1) and 72(1)(a) of the Constitution. In *Doctors for Life International v The Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 131, it was held that the meaning of the word 'facilitate' in these sections requires parliament to 'provide public education that builds capacity for such participation' and to facilitate 'learning and understanding in order to achieve meaningful involvement by ordinary citizens'. This should be done 'in order to ensure that the public participates in the law-making process consistent with our democracy' (para 135).

couples with equal legal protection, was lost on most of those who came to participate in the hearings.

Instead, the hearings often turned into homophobic rants in which members of the public took the opportunity to rail against the evils of homosexuality.[134] It also led to the raising of legal issues which have long since been settled by the Constitutional Court. For example, many contributions objected to the recognition of same-sex marriage because it would allow such couples to adopt and raise children, something which had been legal in South Africa for several years.[135] Given Parliament's failure to conduct the public participation hearings within the parameters set out by the Constitutional Court, it is no wonder that opponents of same-sex marriage raised objections to the Bill based on stereotypical misconceptions and widely accepted myths.[136]

Ultimately, it was the pressure exerted by parliamentary legal advisors, activists as well as the support of these views by the SALRC (discussed above) and a significant number of submissions authored by constitutional lawyers that resulted – at the last moment – in a radical redrafting of the first draft of the Civil Union Bill. From the outset, the first draft of the Civil Union Bill did not carry the stamp of approval from government's own legal advisors. The State Law Advisor refused to certify the Bill before it was tabled in Parliament,[137] and parliamentary legal advisors continuously advised the portfolio committee that the Bill would probably not survive a constitutional challenge.[138]

134 This aspect of the hearings was well documented in the press. See WJ da Costa, 'Hearings "a platform for hate speech"' *Cape Times* 11 October 2006 4; WJ da Costa 'Gays protest tone of Civil Union Bill debate' *Cape Times* 16 October 2006 4; and WJ da Costa 'Activists slam hearings on Same-Sex Unions' *Pretoria News* 11 October 2006 4.

135 See *Du Toit*.

136 See, inter alia, 'Civil Union Bill: A response by His People Christian Ministries (South Africa)' available at http://www.pmg.org.za/docs/2006/061016hispeople.htm (accessed 18 November 2006); Southern African Catholic Bishops' Conference Submission to the Portfolio Committee on Home Affairs on the Civil Union Bill available at http://www.pmg.org.za/docs/2006/061016catholic.htm (accessed 3 March 2007); Gereformeerde Kerke in Suid-Afrika Presentation to the Portfolio Committee on Home Affairs Regarding the Amendment of the Marriages Act (25/1961) Reaction to the Proposed Civil Unions Bill available at http://www.pmg.org.za/docs/2006/061016reformed.htm (accessed 3 March 2007); Muslim Judicial Council (SA) Submission on Civil Union Bill available at http://www.pmg.org.za/docs/2006/061016mjc.pdf (accessed 18 November 2006); Christian Lawyers Association Submission to the Portfolio Committee of Home Affairs Stakeholder Public Hearings October 2006 Civil Union Bill available at http://www.pmg.org.za/docs/2006/061017vilakazi.doc (accessed 19 November 2006); Christian Brethren on the Civil Union Bill available at http://www.pmg.org.za/docs/2006/061017stakeholder.pdf (accessed 19 November 2006); Couples for Christ Submission to Parliamentary Portfolio Committee available at http://www.pmg.org.za/docs/2006/061017couples.pdf (accessed 19 November 2006); and Christian Action Network Submission regarding Civil Union Bill available at http://www.pmg.org.za/docs/2006/061017couples.pdf (accessed 19 November 2006).

137 A Quintal 'Concern about Civil Union Bill' *Daily News* 8 September 2006.

138 See Home Affairs Minutes of the Home Affairs Portfolio Committee Civil Union Bill Deliberations, 1, 7 and 8 November 2006 available at http://www.pmg.org.za/minutes.php?q= 2&comid=11 (accessed 9 November 2007).

The ruling ANC came out in favour of a sober (if somewhat conservative) interpretation of the Constitutional Court's judgment on 7 November 2006 when it tabled a proposal that would become the Civil Union Act[139] before the Parliamentary Portfolio Committee on Home Affairs. This version of the legislation differed markedly from the first draft. Gone were the provisions relating to domestic partnerships. Gone was the proposed 'civil partnership' institution exclusively for same-sex couples. In came the right to conclude a civil union by way of either a civil partnership or a marriage. Clearly, this version of the legislation was a vast improvement on the regime initially proposed. And, despite the religious outcries, the charges that Parliament had gone too far in testing the patience of God,[140] et cetera, the ANC eventually used its political power in the committee and in the houses of parliament to pass this version of the legislation in time to meet the deadline of the Constitutional Court.

The Civil Union Act finally entrenches (at least on a formal level) the choice between civil marriage and the registration of a civil partnership. The importance of this legislation for sexual minority freedom – as the first of its sort in Africa – as well as the importance of the choice it affords cannot be overemphasised. In addition, the choice to enter a civil partnership as a true alternative to marriage is as important a form of dissent as the choice to enter into a marriage is a form of assent to the mainstream. In a constitutional democracy, attaching the same legal consequences to both forms of union affirms the fundamental democratic separation between church and state.[141] It also purports a certain severance of the concept of marriage from conservative religious connotations while emphasising that a marriage can be a sacred ritual without conforming to any particular religious proscriptions.

8 Challenges to the future of sexual minority freedom in South Africa

In some ways it would be most responsible to leave this section of this contribution simply blank – a page or space to write the future on. But perhaps it is useful (if not responsible) to provide some markers for a route that is still uncharted.

139 Act 17 of 2006.

140 'Same-Sex couples can now legally tie the knot' *SABC News* available at http://www.sabcnews.com/politics/government/0,2172,138457,00.html (accessed 11 December 2006), quoting the African Christian Democratic Party President, Kenneth Meshoe. Provide date of article.

141 See D Bradley 'Radical principles and the legal institution of marriage: Domestic relations law and social democracy in Sweden' (1990) 4 *International Journal of Law, Policy and the Family* 154. Also see J Nancy 'Church, state, resistance' (2007) 34 *Journal of Law and Society* 3.

8.1 The Civil Union Act

To begin with, the Civil Union Act is hardly perfect, especially given the fact that it was enacted without the amendment or repeal of the 1961 Marriage Act. The choice for heterosexual couples who want to marry is a choice between the Civil Union Act and the Marriage Act. The choice for their homosexual counterparts is the Civil Union Act. While this inequality of choices may seem inconsequential, the continuing existence of the 1961 Marriage Act could be read as suggesting that it is still necessary and constitutionally justified for heterosexual couples to want to separate themselves from the marriage statute for homosexuals.

The above aspects aside, the Civil Union Act itself contains unconstitutional inequalities in urgent need of resolution. For instance, section 6 of the Act allows for the state's marriage officers to refuse solemnisation of a civil union by way of marriage or civil partnership on grounds of conscience where that civil union is proposed between two people of the same sex. Section 8(6), in addition, creates the impression that the application of the Act is limited to same-sex unions. In addition, as Berger argues in a recent contribution, the requirement that religious organisations and denominations be designated before religious marriage officers can apply to conduct civil unions is a 'key problematic provision' of the Civil Union Act.[142]

8.2 Domestic partnerships

One matter that has not been raised up to now is the question of non-marital, non-formalised heterosexual partnerships in South Africa. In the 2005 judgment in *Volks v Robinson*,[143] the Constitutional Court decided that a woman who had, for all intents and purposes, lived with a man as his wife for more than 20 years, could not benefit from his estate as the surviving spouse in terms of the Maintenance of Surviving Spouses Act 27 of 1990. The reasoning of the Court was that Mrs Robinson could have entered into a marriage in terms of the 1961 Marriage Act, but chose not to do so and therefore could not claim benefits from Mr Volks's estate in death that she did not enjoy while he was still alive.[144]

As a result of this decision and the Constitutional Court's decisions in the 'same-sex life partnership' cases, heterosexual life partners who have not concluded a civil union or marriage remain outside of the law's protection. Interestingly, as a result of the way in which these developments played out, permanent same-sex life partners who do not formalise their relationships

142 J Berger 'Getting to the Constitutional Court on time' in M Judge *et al To have and to hold: The making of same-sex marriage in South Africa* (2008) 26.
143 2005 (5) BCLR 446 (CC).
144 *Volks* paras 55-6.

have acquired a myriad of rights in each other's estate and other benefits,[145] whereas their heterosexual counterparts have not. This constitutes an important hiatus in need of urgent attention as regards the achievement of sexual minority freedom under the law in South Africa, especially given the pervasive phenomenon known as '*vat en sit*' – a phenomenon that is directly related to the migrant labour system imposed by the political economy of apartheid[146] – and especially given, as Sachs J noted in the *Volks* case, that '[w]omen and children are vulnerable groups in our society … [t]he lack of legal protection afforded to domestic partnerships increases the vulnerability of these groups living within such arrangements'.

8.3 Structural inequalities and continuing persecution

Finally, there are and remain the structural inequalities coupled with the prevailing societal prejudices against sexual minorities in post-apartheid South Africa. As Berger argues, 'rights claims need to be made real by ensuring broad access to legal services'.[147] It cannot admit of any doubt that, without such broad access to effective and protective legal services, the greatest part of the sexual minority in South Africa will continue to suffer the violence of societal prejudice – violence that has claimed the lives of many gays and lesbians who lived in 'post-apartheid' South Africa.[148] It also hardly contributes to the eradication of this dangerous and violent societal prejudice when a governmental institution, the National House of Traditional Leaders, as recently as a few months ago, continues to advocate a constitutional amendment to remove the reference to 'sexual orientation' in section 9(3) of the Constitution.[149]

9 Conclusion

This chapter has argued that South Africa is probably, judicially speaking, at least, at the forefront of the progressive legal realisation of sexual minority freedom. However, it has also claimed that the realisation of this freedom has not avoided the pitfalls of the disciplinary power of a heteronormative, homophobic hegemony. It has also attempted to highlight the enormous difference between the legal and the practical recognition of sexual minority

145 De Vos & Barnard (n 122 above) 824.
146 See B Goldblatt 'Case note: Same-Sex marriage in South Africa: The Constitutional Court's judgment' (2006) 14 *Feminist Legal Studies* 261 for a compelling socio-legal argument in favour of domestic partnership legislation.
147 Berger (n 142 above) 26.
148 See B Ndaba '"Hate crime" against lesbians slated' *The Star* 12 July 2007 2; 'I have lost a partner and everything' *The Star* 6 May 2008 3; W Brümmer 'Litanie van haat' *Die Burger* 3 August 2009 available at http://jv.dieburger.com//Stories/Features/By/19.0.1746080588.aspx (accessed ?); and W Brümmer 'Verkrag omdat ek gay is' ('Raped because I am gay') *Beeld* 31 July 2009.
149 SAPA 'Traditional leaders oppose gay rights' *News24* 6 May 2012 available at http://www.news24.com/SouthAfrica/News/Traditional-leaders-oppose-gay-rights-20120506 (accessed 23 November 2013).

freedom. For how does one marry, if you are poor and immobile, your same-sex partner if an official at your branch of the Department of Home Affairs in rural Eastern Cape or KwaZulu-Natal refuses to marry you on grounds of conscience? How does one marry or conclude a civil partnership with your same-sex partner if you risk being correctively raped or, worse, when you set your foot out of the door of your house into the public street of the township? How does one stay alive and unharmed in a married or civilly-partnered same-sex relationship when you know that there are people in your community who seek your blood and that there is no protection to be had from the local police? These are the urgent and necessary questions that anyone interested in the realisation of sexual minority freedom in South Africa and across the world are required to ask.

If it is the case that, as Justice Sachs told the country in the *Fourie* matter, the law can serve as 'a great teacher' that 'establishes public norms that become assimilated into daily life and protects vulnerable people from unjust marginalisation and abuse',[150] then 'what has hitherto remained unsayable' urgently needs not only to be said and, indeed, affirmed, by the law and legal institutions. The law and legal institutions of post-apartheid South Africa are also responsible for the practical *realisation* of that which 'has hitherto remained unsayable'. The very answer to the question of justice for and freedom of sexual minorities in South Africa depends on the possibility of these utterances, the imperative that these practices will at last be free.

150 *Fourie* para 138.

PART C: SPECIFIC RIGHTS AND THEMES

Religion

CHAPTER 15 COMMENTARY ON THE CONSTITUTIONAL ASPECTS OF RELIGIOUS FREEDOM IN BRAZIL

Eloísa Machado de Almeida

1 Introduction

This brief comment aims at clarifying two main issues regarding religious freedom in Brazil: (i) the Brazilian constitutional approach to religious freedom, as defined in the Federal Constitution of 1988; and (ii) the influence that South African cases might have on Brazilian jurisprudence.

To develop the first topic, while seeking a dialogue with the approach taken by Shankar and Mhango in their pieces, I will present a brief history of the religion-state relationship in Brazil, as defined in the Brazilian Constitutions, including therein the Constitution of 1988 and the current framework of the various obligations related to religious freedom, as mentioned below.

Such an account of the historical development of Brazilian constitutionalism is essential in order to understand the formation of the Brazilian secular state, whose secularism, I argue, is a precondition of the religious freedom as protected by the Constitution of 1988.

To develop the second topic, I will conduct a brief overview of the constitutional issues pertaining to religious freedom, which are currently pending before the Brazilian Supreme Court (herein, Supreme Court) at the time of writing of this article (December, 2011), in order to verify to which extent the decisions of the South African Constitutional Court commented by Mhango might have an impact on the Brazilian constitutional jurisprudence.

At this point, it is important to clarify that, notwithstanding numerous decisions of state courts on the issue of religious freedom, it can be stated that there is no relevant pronouncement from the Brazilian Supreme Court on this issue, which leads one to inquire how future decisions might structure their reasoning.

2 Development of constitutional religious freedom and its relation with the formation of the Brazilian State

During the historical period of the so-called 'Empire' (1822-1889), Brazil adopted Catholicism as the official religion. Even then, freedom of belief in other religions was accorded to individuals, although such freedom was absolutely restricted to the private realm and to the domestic exercise of religion, therefore, any public religious exercise or, in the words of the Constitution of 1824, 'outside the temple' was prohibited.

The 1824 Constitution thus provided:

> Article 5. The Roman Apostolic Catholic Religion remains the religion of the Empire. All other religions are allowed to domestic worship, or in private homes designed for it, not in any way outside the Temple.

Only when the country was heading to the formation of a republic in the early 1890s, the concept of the secular state, which in its turn guarantees religious freedom as an essential aspect of people's private lives, was included in the constitution.[1]

The Constitution of 1891 is the first one to formally interrupt the relations between the state and religion. The 1891 Constitution reads as follows:

> Article 72. The Constitution guarantees to Brazilians and foreigners residing in the country the inviolability of the rights to liberty, security of person and property, as follows: ... *§ 3.* All individuals and religious groups can publicly and freely exercise their religion, associate among themselves for that purpose and acquire assets, subject to the provisions of the ordinary law.

Several Constitutions of the Republic have reaffirmed the secular character of the state, while the specific delimitations of religious freedom have been better defined later on.

1 There are several studies on the process of secularisation in Brazil. Amongst the historical and cultural factors that were essential in the gradual secularisation of the country, besides the pressure exerted by England to allow the Protestant religious service, many authors mention the system of patronage in which the monarch exercised both civil and ecclesiastical power. These authors identify that this system subjected, increasingly, the religious power to the civil control, identifying certain incidents such as the Feijó Schism (1827-1838) and the Religious Question (1872-1875) as key events that contributed to this subordination of religious power. Other authors, on the other hand, suggest that the freedom of private worship other than the Catholic one since the Constitution of 1824 contributed to the survival and strengthening of other religions until the consolidation of the secular state by the Republican Constitution of 1891: AP Oro *Considerações sobre liberdade religiosa no Brasil,* Revista de Ciências e Letras da Faculdade Porto Alegrense, No 37, 433-447.

In this sense, the Constitution of 1988 reaffirms the secular character of the state. From a constitutional perspective, the Brazilian secular state is configured as follows: Firstly, it is forbidden for the Brazilian state to promote any religious practice; on the other hand, the State is also prevented from hindering the exercise of religion. According to the Federal Constitution of 1988:

> Article 19. The Union, the states, the Federal District and the municipalities are forbidden to: I – establish religious sects or churches, subsidize them, hinder their activities, or maintain relationships of dependence or alliance with them or their representatives, without prejudice to collaboration in the public interest in the manner set forth by law.

The secular nature of the state has a direct relation with the level of freedom enjoyed within the state. The greater the degree of secularism of a state, the less it will interfere in one or more religions.[2] In fact, freedom of religion as part of an intimate and private sphere of the individual[3] should not be subject to any kind of obstacle or incentive by the state, as a prerequisite for the free development of all faiths – including non-belief.

Once understood, in constitutional terms, the nature of the relationship between state and Religion, it is worth mentioning that religious freedom is defined in a number of other articles. Firstly, it is important to indicate that religious freedom has the *status* of fundamental right,[4] considering the inviolability of the freedom of conscience and belief, being guaranteed the free exercise of religious cults and ensured the protection of places of worship, which are exempt from paying taxes (Article 5, VI and Article 150, VI, b, Federal Constitution of 1988). Furthermore, the Constitution provides, for people who are in an establishment of collective confinement, the possibility of obtaining religious assistance (Article 5, VII, Federal Constitution of 1988) and provides that no one shall be deprived of rights on the grounds of religious belief, unless one invokes religious beliefs to exempt oneself from a legal obligation required of all (Article 5, VIII, Federal Constitution of 1988).

2 See W Durham 'Perspectives on religion liberty: A comparative framework' in Jakson Vicki & Mark Tushnet (eds) *Comparative constitutional law* (1998) 1157ff.

3 See J Rivero & H Moutouh *Liberdades Públicas* (2006) 539.

4 The Brazilian Federal Constitution provides for fundamental rights in its Title II, 'Fundamental Rights and Guarantees', including chapters relating to individual and collective rights and duties, social rights, political rights and political parties, as provided in the Articles 5 to 17. Thus, the special status of fundamental rights, formally, is expressly provided for by the Constitution of 1988. Such rights are considered eternity constitutional clauses, thus immutable even through constitutional amendments (Article 60, paragraph 4, IV). However, from a substantial perspective, the Brazilian constitutional literature defines fundamental rights as those that, 'at least in general, can be considered concrete derivations of the requirements of the principle of human dignity'.: IW Sarlet *A eficácia dos direitos fundamentais* (1998) 109. The Supreme Court, in its decision ADI MC 939, held that the principle of prohibition of ex-post facto taxation is a fundamental right, even not being part of the Title II mentioned above, upholding the thesis that the fundamental rights in the Constitution of 1988 are not limited to the list provided for in its Title II. See more in G Mendes *Curso de Direito Constitutional* (2008).

This last point deserves some attention: The Constitution of 1988, while prohibiting religious-based conscientious objection to generally applicable laws, also recognises, nevertheless, the possibility of alleging the necessity of conscience in order to be assigned an alternative activity as a substitute to the compulsory military service. Accordingly, believers in faiths professing pacifism, or even those who adopted pacifism as a political ideal, for example, could be exempt from serving in the military in peacetime, being assigned, however, an alternative service (Article 143, paragraph 1, Federal Constitution of 1988).[5] As far as secularism is concerned, there is, however, what can be considered an internal contradiction in the text of the Constitution of 1988: While it proclaims a secular state, the Constitution is promulgated 'under the protection of God' as described in its preamble.[6]

Moreover, the Constitution of 1988 provides for optional religious education in public primary schools (Article 210, paragraph 1).[7] While many argue that the religious education provided for in the 1988 Constitution is of a 'non-confessional' character, as the only interpretation compatible with the ntion of secularism which is also enshrined in this Constitution, this issue has in fact generated controversy between those who defend the confessional character of religious education, as provided for in previous Constitutions,[8] and those who support the view that religious education should not have been included in the Federal Constitution of 1988 at all.[9] There are pending cases before the Supreme Court on this issue of religious education, which will be better explained below.

5 There is legislation establishing alternatives to military service. See, for example, Law 8.239/1991, which regulates such alternative services.

6 Preamble to the Constitution of 1988: 'We, the representatives of the Brazilian People, convened in the National Constituent Assembly to institute a democratic state for the purpose of ensuring the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society, founded on social harmony and committed, in the internal and international orders, to the peaceful settlement of disputes, promulgate, under the protection of God, this CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL'.

7 Article 210, paragraph 1: 'The teaching of religion is optional and shall be offered during the regular school hours of public elementary schools'.

8 Previous constitutions expressly provided for the confessional character of religious education. For example, the Constitution of 1946, in its Article 168, Section V established that: 'Religious Education shall constitute a subject in the program of public schools, enrollment is optional and it will be conducted in accordance with the student's religious confession, manifested by him, if capable, or his legal representative or guardian'.

9 The inclusion of religious education in the Federal Constitution of 1988 was the result mainly of the lobbying of Catholic organisations during the Constituent Assembly of 1987-1988. R Romano 'Catholic educational entities achieved the "miracle" of combining, in one amendment, the proposed public support for private schools with the initiative of keeping religious education in public schools, with 750,000 signatures' in Sobre o Ensino Religioso *Educação & Sociedade,* Campinas, CEDES, No 42 (1992) 268-273.

3 Challenges of the Brazilian Constitutional Court in the relation to religious freedom

Although the Brazilian Constitution contains many rules regarding religious freedom, the jurisprudential debate is more consolidated at the level of the state courts of justice than before the constitutional court itself.

In fact, amongst the decisions at the state level, one can find rulings directly related to religious issues, such as religious education, or regarding the prohibition of the use of emergency contraceptives.[10] Those rulings raise, in a straightforward manner, the question of state secularism and religious freedom. The National Council of Justice[11] has also held that the existence of sacred and religious images (such as crucifix) in courtrooms does not violate the secular nature of the state nor the rights of the litigants, because those symbols do not profess any belief, but rather represent a cultural symbol and a tribute to peace, and thus do not establish any link between the state and Religion.[12]

However, before the constitutional tribunal, there are no relevant decisions on the subject.[13] Although the Supreme Court has already addressed issues relating to tax exemption for churches as well as cases on conscientious objection, there is no sufficient jurisprudence in order to affirm that there is a jurisprudential interpretation of the constitutional provisions relating to religious freedom.

There is only one recent decision, issued during the writing of this piece, which addressed the matter of religious freedom in relation to the attendance to public tenders on days considered sacred. This is the case of the Suspension of Preliminary Injunction STA 389 (originally, *Supensão de Tutela Antecipada*), in which students of the Jewish faith as well as the Jewish Education Center requested a change of the date assigned for the ENEM –

10 For example, in a case challenging the constitutionality of a municipal law, No 166129-0, the State Court of Justice of São Paulo, by majority, decided that emergency contraception is a necessary measure for the policies regarding women's health and family planning, affirming that its ban on this medicine on the basis of religion constitutes a violation of the secularism of the state and of the rights of non-religious women.

11 The National Council of Justice (originally, *Conselho Nacional de Justiça*) is an organ of the judiciary (Article 92, Federal Constitution of 1988) established by the 45th Constitutional Amendment from 2004, entitled the 'Judicial Reform' Amendment. It is an organ in charge of the control of the financial and administrative operation of the Judicial Branch, as well as responsibility for monitoring the discharge of official duties by judges (Article 103-B, para. 4, Federal Constitution of 1988).

12 See decisions of Proceedings of Protective Measures [originally, *Pedidos de Providência*] pp 1344-1345: www.cnj.jus.br (accessed 23 November 2013).

13 The Supreme Court referred to the question of religious influence in the state and the issue of secularism in two cases: ADI 3510 (embryonic stem cell research) and ADPF 54 (therapeutic termination of pregnancy). However, in both cases the issue of religious freedom is not argued in a way that would deserve special attention in this article.

National Test for High School, for another date compatible with their faith, specifically not on the *Sabbath.*

The arguments raised by the students referred to the Section VII of the Constitution of 1988, namely, the definition of an alternative date for the test as a way to ensure the students' religious freedom.

The case was filed against the Federal government and the National Institute of Studies Anísio Teixeira (INEP), before the first instance judge, in the 16th Federal Trial Court of São Paulo, which rejected the request for preliminary injunction. The plaintiffs presented an appeal to the Federal Regional Court of the 3rd Region, which granted the injunction, arguing that the establishment of an alternative date to enable students of the Jewish faith to complete the test would be a way of realising the fundamental right to freedom of belief, provided in item IV of the Article 5 of Federal Constitution of 1988.

The case reached the Supreme Court via Suspension of Security (originally, *Supensão de Segurança*), which is a judicial measure exclusive to state organs, aimed at suspending judicial decisions that endanger public order.

The monocratic decision adopted by the then President of the Federal Supreme Court, Justice Gilmar Mendes, presented a series of arguments aimed at clarifying the constitutional interpretation of religious liberty. Firstly, the decision highlighted the secular nature of the Brazilian state, which requires from it a position of neutrality, being forbidden the allocation of privileges to religious beliefs.

The decision noted that only this neutrality principle allows a 'free circulation in the marketplace of religious ideas'. From these considerations, the Court held that the Constitution of 1988 permits positive action to eliminate barriers and burdens that hinder the exercise of different faiths, but only if arranged in a way that enables the flow of religious ideas in an equal manner and if all other means have been exhausted. In other words, positive measures can only be adopted by the secular state as an incentive to equality and, therefore, a discouragement to privilege and favoritism.

Finally, the Court decided that scheduling the test on Saturdays would eliminate the barriers, but, on the other hand, it would violate the equality between religions, and therefore it would be qualified as a prohibited privilege in light of the Constitution. In this sense, the religious pluralism in the country constituted an essential part of the reasoning of the decision, to the extent that, according to Justice Mendes, the state would not be able to accommodate all faiths through the selection of different testing dates.

Therefore, bearing in mind that it is neither possible nor feasible for the State to accommodate all the faiths in different dates, the State should not

set up any alternative testing date, as a measure to protect equality and religious freedom:

> [O]ne must note the existence of other religious faiths, for which there are different 'days of rest' other than the applicants'. Thus assigning an alternative date to a particular religious group would, in a mere limited analysis, constitute a violation of the principle of equality and of the state duty of neutrality before religions ... This fact also confirms the 'multiplier effect' of the decision under dispute, considering that, if other religious groups existing in our country also assert their claims, it would become impossible to conduct any public tender, test or evaluation nationwide, in light of the variety of possible claims, which would require several versions of the same tests.[14]

The plaintiffs appealed the decision through an internal interlocutory appeal (originally, *agravo regimental*). Although the decision had been maintained, Justice Marco Aurelio presented a dissenting opinion, considering it feasible to schedule the test on a working day, being what he considered the best alternative.

This decision, for now the only one of its kind in the STF has identified that this issue is of great relevance and will in all likelihood be considered more fully by the Court when it decides the direct actions of unconstitutionality ADIs 3714 and 3901, as well as the extraordinary appeal RE 611874. In this last case, derived from the principle of diffuse judicial review, the plaintiffs requested the permission to conduct a public tender on a date and time, other than the ones provided for in the call for tender, for religious reasons. The Court recognised the general repercussion[15] of the constitutional matter presented therein. The case still awaits a decision by the Court.

In addition to the specific topic of the sacred days of rest, other cases about the meaning of religious education under Article 210, paragraph 1 of the Constitution (mentioned above) are currently pending before the Supreme Court. These are the direct actions of unconstitutionality ADI 3268

14 STA 389, excerpt of the monocratic decision.

15 The definition of General Repercussion, according to the glossary of legal terms by the Supreme Court is: 'General Repercussion is a procedural instrument inserted into the Constitution of 1988 by the 45th Constitutional Amendment, known as the "Judicial Reform" Amendment. The purpose of this tool is to allow the Supreme Court to grant leave to Extraordinary Appeals based on the legal, political, social or economic relevance of the matters brought by them to the Court. The use of this appeal obstacle is responsible for a decrease in the number of cases referred to the Supreme Court. Once confirmed the existence of general repercussion of the constitutional matter discussed in the particular case, the Supreme Court will analyze the merits of the case and lower courts must subsequently apply the decision in identical cases. The preliminary arguments regarding the General Repercussion are analyzed by the Plenary of the Supreme Court, through a computerized system with electronic voting, i.e. dispensing the physical meeting of the members of the Court. To reject the analysis of an Extraordinary Appeal, 8 votes are required at least; otherwise the Court must decide the appeal. After the rapporteur publishes in the system its opinion on the relevance of the matter, the other Justices must vote within 20 days. Abstentions are counted as votes in favor of the occurrence of general repercussion on the subject', see www.stf.jus.br (accessed 23 November 2013).

and ADI 3901, both challenging laws that allegedly provide for religious education in accordance with the Federal Constitution. The main issue[16] raised in those cases is the meaning of the term religious education in public schools under the Constitution: Confessional or not, as a mandatory part of the curriculum or as an extracurricular optional activity. These cases also raise another controversial issue: How to promote religious education while ensuring equal representation of all religions.

Other cases also raise the issue of the limits of religious freedom – in this regard, it is entirely appropriate to understand the standards established by the South African Constitutional Court. In the decision of the action of non-compliance with a fundamental precept ADPF 187, regarding the constitutionality of the 'Marijuana Parades', namely demonstrations in favour of the decriminalisation of marijuana; Justice Celso de Mello, rapporteur of the case, considered a request for legal intervention via *amicus curiae* from the Brazilian Association of Social Studies of the Use of Psychoactive Substances – Abesup, which requested the Court to review the constitutionality of the use of marijuana in religious ceremonies, while deciding the main issue of the case, specifically the constitutionality of demonstrations in favor of the use of marijuana and its decriminalisation.

The issue of the constitutionality of the use of marijuana for religious purposes was not considered by the Supreme Court, taking into consideration the impossibility of expanding the matter of the case before the Court. Nevertheless, Justice Celso de Mello noted that this would be a very relevant topic for a broad understanding of religious freedom in Brazil.

When mentioning a Resolution of the National Drug Policy Council – CONAD, that allows the use, in religious rituals, of a drink called Ayahuasca which contains psychoactive substances; Justice Celso de Mello suggested that measures such as this would be protected under the constitutional religious freedom:

> The resolution in question, while defining the issue, preserves religious freedom, which includes in its material content, in its broad meaning, certain essential prerogatives, inter alia, the freedom of belief (which incorporates one of the facets of the freedom of thought), freedom of worship, freedom of religious organization, freedom of drafting a doctrinal 'corpus' and freedom from state interference, which represent values intrinsically intertwined with and necessary for the proper design of the idea of democracy, whose notion is continuously driven, among other relevant factors, by the respect for pluralism[17]

16 Several human rights organisations, religious groups and education experts have been admitted in those cases as amici curiae and each group presents different ways of how it religious education in public schools should be interpreted, under Article 210, para 1 of the Constitution of 1988.

17 ADPF 187, STF, Excerpt from the opinion accepting the *amicus curiae*, Rapporteur Justice Celso de Mello.

However, this topic was not analysed in the case of ADPF 187, which dealt specifically with another issue, namely: Constitutionality of demonstrations in favor of the use of marijuana and its decriminalisation. There is currently no case pending before the Brazilian Supreme Court raising the issue of drugs in religious rituals. But the case *Prince v President of the Law Society of the Cape of Good Hope*[18] and *Member of the Executive Council for Education: Kwazulu-Natal v Pillay*[19] from the South African Constitutional Court, which already dealt specifically with religious accommodations, will certainly contribute to shaping the standards and arguments likely to be raised by the Brazilian Supreme Court when it will be confronted with a case on this matter, as part of a constitutional dialogue – so already signaled by the Justice Celso de Mello in his opinion above.

By way of example, and therefore not in an exhaustive manner, I list the cases still pending before the Supreme Court, dealing with religious freedom:

- Direct action of unconstitutionality ADI 3901, proposed by the General Attorney against the laws of the State of Pará preventing public tenders and university admission tests from taking place on religious days of rest, specifically from 6 pm on Friday until 6 pm on Saturday;
- Direct action of unconstitutionality ADI 3714, proposed by the National Confederation of Educational Institutions – Confenen against the laws of the State of São Paulo which also prevent public tests and university admission exams from taking place on Saturdays for being religious days of rest;
- Direct action of unconstitutionality ADI 3268, proposed by the National Confederation of Workers in Education – CNTE against laws of the State of Rio de Janeiro, which regulate the confessional nature of religious education, stating that teachers must be accredited before a religious authority in order to be qualified as teacher in the subject of religious education;
- Direct action of unconstitutionality ADI 3478, proposed by the Association of Military Pensioners on Reserve against the law of the Government of Rio de Janeiro, which refers to designation of an evangelical pastor to provide religious guidance in the units of military police and firefighters.
- Direct action of unconstitutionality ADI 4439, proposed by the General Attorney against the interpretation of religious education as confessional, provided for in the Law regarding Guidelines and Principles of National Education (originally, *Lei de Diretrizes e Bases da Educação Nacional*), and against the norm which resulted from the agreement between Brazil and Holy See about Catholic religious teaching in public schools.

18 2002 (2) SA 794 (CC). According to O Mhango 'Right to recognition and protection of religion in South Africa' (Chapter 17 below), in this case, the South African Constitutional Court 'ruled that a Rastafari lawyer was not entitled to an exemption to use marijuana as part of his religious and cultural practice'.

19 2008 (2) BCLR 99 (CC). Also in Mhango's words, in this case 'the Court ruled that a learner was entitled to an exemption under the school code of conduct to wear a nose ring as part of her religious and cultural tradition'.

These direct actions of unconstitutionality will offer an opportunity for the Supreme Court to decide about the specific issue of religious freedom.[20]

In this sense, the *Pillay* and *Prince* cases by the South African Constitutional can contribute to the reasoning of similar decisions in future cases to be delivered by the Brazilian Supreme Court, particularly regarding the centrality and relevance of conflicting religious practices, as well as to what extent the genuine nature of a person's faith is constitutionally relevant,[21] in order to determine the level of protection of religious freedom. Furthermore, the Brazilian Supreme Court can also contribute with a distinct perspective[22] when it decides the cases on religious freedom currently pending by asking: How important are atheist or agnostic beliefs for the preservation of the secular state? What is the protection of religious freedom, which certainly includes non-religious belief, conferred by the Federal Constitution when the state proves being susceptible to one or more specific religions? What are the boundaries between religious identity and cultural identity?

I hope these comments will be informed soon by Brazilian Constitutional Court decisions in favor of the protection and guarantee of religious freedom in a secular state, as provided in the Federal Constitution of 1988.

20 In this regard, it is worth mentioning the ADI 4319, proposed by the Convention of the Ministers of the United Churches of Assemblies of God in Ceará State against the Decree 698/2009, which incorporated the Legal Statute of the Catholic Church in Brazil. The decree incorporated in the country an agreement between Brazil and the Holy See, which addresses controversial issues about religious freedom, especially with regard to the Catholic Church's role in religious education in public schools. The ADI proposed by the neo-Pentecostal religious organisation was not considered in its merits by the Court considering the lack of standing of the applicant, which is not amongst those who have constitutional standing to present direct claims of unconstitutionality, as provided in the Article 102 of the Constitution of 1988. However, the Decree 698/2009 is still vulnerable to potential constitutional litigation and might be challenged again by some applicant with standing to do so.

21 It is important to note that the arguments in *Pillay* and *Prince* by the South African Constitutional Court incorporate elements of the decision of the European Court of Human Rights in the case of *Campbell and Cosans v The United Kingdom* ECHR 25 February 1982.

22 We believe that future decisions of the Brazilian Supreme Court will eventually deal with the peculiar formation of the Brazilian secularism and its relationship with religious plurality. The incorporation of religious aspects into the national culture and the strong syncretism between religions are also factors of Brazilian society that will in all likelihood be reflected in future decisions of the Supreme Court.

CHAPTER 16 RIGHT TO RELIGIOUS RECOGNITION IN INDIA: A COMMENT

Shylashri Shankar

1 Introduction

My comment focuses on two questions that emerge from the analysis of the South African cases. First, should the judiciary extend greater protection to practices that are central to a religion and therefore assess the centrality or otherwise of a religious practice? Mhango submits that in South Africa, courts ought to do so in the name of celebrating religious freedom. Second, should courts widen the scope of protection to include voluntary and mandatory religious and cultural practices and in deciding on what qualifies for constitutional protection, focus more on the sincerity of the claimant's belief rather than on the mandatory or voluntary nature of the practices?

Assessing how the apex court in a multi-religious country like India has dealt with these two questions will help us unpack the complexities involved in the Court's task of interpreting religious freedom and establishing the boundaries between the state and religion. I draw on examples from India's case law to show the pitfalls introduced by widening the scope of protections in the name of celebrating, and not just permitting, religious freedom. In *Member of the Executive Council for Education: Kwazulu-Natal v Pillay*[1] in South Africa, the court said that differentiating between mandatory and voluntary practices does not celebrate or affirm diversity; it simply permits it, thus falling short of the constitutional project. The South African apex court chose to judge the centrality of a practice with reference only to how important the practice was to the claimant's religious or cultural identity. But what happens when such a subjective standard conflicts with other imperatives of the constitution? For instance, if the Indian Supreme Court had used the subjective test in India to assess religious practices, such as untouchability (in Hindu religion) or the refusal by Hindu sects to allow some castes to enter temples, it would have delivered a blow to the constitutional project of delivering social justice to historically-discriminated lower castes.

1 2008 (2) BCLR 99 (CC).

In this comment, I focus on how the apex court in India has dealt with religious freedom. In a country where the constitutional projects are not always complementary, India's judges face the difficult task of simultaneously preserving religious freedom, ensuring social justice and promoting individual liberties. The Indian state's intervention in the domain of religious affairs has increased because of the difficulties faced by the Court in generating deep principles to deal with such claims.

The first section outlines the contradictory impulses of the Indian Constitution with regard to religious freedom. The second section, through a discussion of a case dealing with recognising religious practices fit for constitutional protection, focuses on how the Court's answers have introduced more complications for free exercise. The third section, through a comparative analysis, highlights the positive and negative aspects inherent in giving the state (and courts) a role in 'celebrating and affirming diversity'.

2 The Indian Constitution and freedom of religion

The Indian Constitution was adopted against a backdrop of sectarian violence that was only the latest chapter in a complex centuries-old story of Hindu-Muslim relations on the Asian subcontinent. Much of that history had been marked by peaceful co-existence; nevertheless the bloodbath that accompanied Partition reflected ancient contestations and insured that the goal of communal harmony would be a priority in the constitution-making process. If not as urgent, then certainly as important, was the goal of social reconstruction, which could not be addressed without constitutional recognition of the state's interest in the 'essentials of religion'.[2] The depth of religion's penetration into a social structure (the caste hierarchy in Hindu religion) that was by any reasonable standard grossly unjust, meant that the framers' hopes for a democratic polity would have to be accompanied by state intervention in the spiritual domain. The design for secularism in India required a creative balance between socio-economic reform that could limit religious options and political toleration of diverse religious practices and communal development.[3]

Liberal democracies face the problem of upholding the values of religious freedom and pluralism without falling into the chasm of partiality to one religion or introducing unequal treatment of religious groups into the laws.

2 What this means is that justices in India often find it difficult to avoid what their counterparts in many other countries can, namely, an inquiry into theological issues so as to determine what exactly is integral to a given religion. For example, in an important early polygamy case, the opinion for the Court observed: '[I[t is rather difficult to accept that polygamy is an integral part of Hindu religion'. *State of Bombay v Appa* AIR Bombay 84 (1952) 86. In another case, the Court similarly concluded that polygamy is not 'an essential part of the Hindu religion': *Ram Prasad v State of UP* AIR Allahabad 411 (1957) 413.

3 This section draws on a forthcoming chapter by GJ Jacobsohn & S Shankar 'Constitutional borrowing in South Asia: India, Sri Lanka, and secular constitutional identity' in S Khilnani *et al* (eds) *Constitutional borrowing in South Asia* (2013).

Most states adopt one or a combination of these arrangements: (a) Encourage the principle of accommodation (when the state co-operates with religious authorities by adjusting the schedule of public events to sectarian needs); (b) the principle of separation (of church and state); and (c) the principle of neutrality (in which a state benefit or burden has been shifted to religious and non-religious groups). The Indian Constitution, which chose a combination of the above arrangements, articulated three principles in its treatment of religion: The principle of religious freedom; state neutrality towards all religions by neutrally assisting and celebrating all faiths; and regulatory and reformative justice whereby religious freedom would be curtailed on grounds of 'public order, health and morality', and religious practices and institutions could be regulated by the state in areas of economic, financial, political or other secular activity.[4] The Preamble to the Constitution of India (1950) contains the word 'secular' without explaining the meaning of the term. There is no separation of religion and public life (but there is a separation of religion and political life, that is, no reserved constituencies for religious groups and no use of religious rhetoric in elections), and no procedure to determine who would represent the minority community in their dealings with the state.

The Constitution, which is divided into justiciable (fundamental rights) and non-justiciable (Directive Principles) sections, provides for a fundamental right to freedom of religion in articles 14-16 and articles 25-30 and, in addition, in the Directive Principles section (articles 44 and 46). Article 25, after providing for religious freedom, declares that the state shall not be prevented from 'regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice'. Additional provisions were designed to accommodate the other principal facet of Indian social reality, the entrenched character of communal affiliation. Article 26 grants all religious denominations the freedom to manage their 'own affairs in matters of religion', and grants religious denominations the right to establish and maintain institutions for religious and charitable purposes. The same right is extended to the creation and administration of religiously-based educational structures in article 30.

3 Recognition of 'religion' in India

Unlike South Africa, the Indian Constitution does not have a list of recognised religions. The Supreme Court of India has performed the task of determining which beliefs are recognised as religion and protected by the Constitution by assessing to the doctrine and practices of a particular religion. The Court has a three-pronged test to assess any free exercise claim that demands constitutional protection: (a) Does the belief constitute a religion? (b) Is the

4 R Dhavan 'Religious freedom in India' (1987) 35 *The American Journal of Comparative Law* 209.

religious practice/ritual that seeks protection an essential part or practice of that religion? (c) Is the applicant's belief in the religious practice sincere? In this section, I will focus on the first two aspects of the test and show how the Court's answers have drawn them deeper into the domain of religion.

Unlike South Africa, where the court first assesses whether the source of the applicant's claim is a recognised religion, the Indian Supreme Court had to create the criteria for determining whether a belief constitutes a religion. Immediately after achieving independence from the British in 1947, the Indian Parliament, responding to the Constitution's imperative to ensure social justice, reformed Hindu religion by abolishing untouchability, and allowed lower castes access to temples and to priesthood. The judiciary faced a slew of cases from groups claiming that they were separate from the Hindu religion, and that their practices (such as hereditary priesthood or banning entry of lower castes into the *sanctum sanctorum*) were essential parts of their religious belief. The Supreme Court devised a test for a religion. A religion had a collection of individuals, with a system of beliefs which they regard as conducive to their spiritual well-being, a common organisation, and a distinctive name. But the diversity contained within the Hindu religion (practised by 85 per cent of India), which encompassed a plurality of beliefs, texts and sects, made it hard for the Court to determine whether a sect belonged to the Hindu religion or could be classified as a separate religion, and drew the judiciary into judging sectarian claims and drawing the boundaries of a religion. For instance, in order to evaluate the claims of the Swaminarayan sect of not belonging to the Hindu religion, the judges were drawn into the question of what constituted Hindu religion.

Having established that a group was indeed a religion, the judges had to decide whether the group's claim was entitled to constitutional protection. Here, because of conflicting constitutional imperatives of ensuring state neutrality between religions, and the imperative of ensuring reformative justice, the Court made two sets of distinctions: Between 'matters of religion' (which were firmly within the ambit of constitutional protection of article 25) and 'matters associated with religious practice' (which were subject to state regulation); and between essential and non-essential parts of religion wherein only the former would be protected.[5]

Within matters of religion, as in the *Srirur Mutt* case, where the Court was asked to decide which aspects of any particular religion were entitled to constitutional protection, the judges faced a clash between the constitutional projects of state neutrality and reformative justice.[6] The Court, as Dhavan points out, implicitly rejected what could be called the 'assertion' test, whereby a petitioner could simply assert that a particular practice was a

5 A number of cases have challenged the ambit of state regulation but I will not discuss them in this comment.

6 *Commissioner v LT Swamiar of Srirur Mutt* 1954 SCR 1005; *SSTS Saheb v State of Bombay* 1962 (supp) 2 SCR 496.

religious practice. It was the Court's (self-assigned) task to assess the sufficiency of evidence required to establish the existence of such a practice. One justice proposed the test (which Dhavan terms as dangerous) that a 'practice' or set of beliefs must not only exist, but must be 'essential' to that religion. Here, we see a divergence from the South African case of *Prince v President of the Law Society of the Cape of Good Hope*,[7] where the Court declined to enter into the debate on whether a practice was central. Even in the *Pillay* case, where the Court had to assess the centrality of the practice, the Court opted to give constitutional protection based on the sincerity of the applicant's belief rather than an objective classification of the voluntary or mandatory nature of the practice. In India, on the other hand, the Court proposed a test to determine whether the nature of the religion would be changed without that part or practice. The implication of this test was that only the permanent essential part was protected by the Constitution, and this part was perceived to be mandatory.

Let us take a case where a religious sect (Ananda Margis) wanted to perform the *tandava* dance with skulls and knives on the streets of Calcutta but was denied permission by the police commissioner. Here, the principle of neutrality conflicted with the principle of regulative justice. In *Commissioner of Police v Acharya Jagdishwarananda Avadhuta*,[8] the Court reiterated its test:

> The test to determine whether a part or practice is essential to the religion is to find out whether the nature of religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part. There cannot be additions or subtractions to such part. Because it is the very essence of that religion and alterations will change its fundamental character. It is such permanent essential parts is what is protected by the Constitution. Nobody can say that essential part or practice of one's religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the 'core' of religion where the belief is based and religion is founded upon.[9]

The majority opinion held that the Ananda Margis order was founded in 1955, and the dance was introduced as a practice in 1966. Hence, the *tandava* dance was not the core upon which the order was founded.

But the minority opinion of Justice Lakshmanan disagreed, and rightly so in the author's opinion, and argued that the authorities could not sit in judgment over the professed views of the adherents of the religion or to determine whether the practice is warranted by the religion or not. 'That is not their function,' said Justice Lakshmanan, quoting from an earlier

7 2002 (2) SA 794 (CC).
8 (2004) 12 SCC 770.
9 Supreme Court of India, Appeal (civil) 6230 of 1990, http://indiankanoon.org/doc/1612501 (accessed 13 December 2013).

judgment,[10] which emphasised that no outside authority had the right 'to say that these are not essential parts of religion and it is not open to a secular authority of the state to restrict and prohibit them in any manner they like'. He made a distinction between 'public order' and 'law and order' and said that the contravention of law to affect public order must affect the community or the public at large. A mere disturbance of law and order leading to disorder was not one that affected public order.[11] Similar processions with swords and arms by other religious groups were permitted by the Commissioner of Police on grounds that those practices were well established. Quoting from *US v Ballard*, 'to allow any authority to judge the truth or falsity of a religious belief or practice is to destroy the guarantee of religious freedom in the Constitution,' the judge said that it was not for the police commissioner to decide whether a practice was well established.

The majority and minority opinions in the *Ananda Margis* case demonstrate two ways of framing the answers to the questions posed in the opening paragraph:

(a) Permitting the *tandava* dance would contravene public order and criminal laws (similar to the *Prince* case) and hence the emphasis of the majority opinion was on the essential/non-essential nature of the practice, rather than on the sincerity of belief held by the Ananda Margis. In South Africa, the Court refused to allow Rastafarians to use marijuana on grounds of public order, but refused to be drawn into a discussion of the centrality of the practice for Rastafarian religion.

(b) Permitting the dance would not contravene public order and, in fact, not allowing the dance would contravene the state's neutrality and the religious freedom of the Ananda Margis because other religious groups were allowed to march with arms on the streets. The minority opinion took this view and emphasised the sincerity of belief, and said that the Court should stay away from determining whether the practice was essential or not. This rationale is similar to the majority ruling in the *Pillay* case in South Africa, where the Court judged the centrality of the practice subjectively with reference only to how important the belief or practice was to the claimant's cultural/religious identity.

In other cases, too, the Indian judiciary has distinguished between essential and non-essential practices in contradictory ways, has left itself open to the charge of bias against some groups, and of favouring other groups. For instance, in a case dealing with the validity of a law banning cow slaughter, the Court ruled that the sacrifice of a cow by Muslims on *Id Kurban* was not an 'essential' part of Islam since a camel or a goat could be substituted for the cow.[12] The ruling left the Court open to charges of a bias towards the majority religion, Hinduism, which does not permit cow slaughter. Contrast this with a recent case (*Hinsa Virodhak Sangh v Mirzapur Moti Kuresh Jamat and Others*, Appeal (civil) 5469 of 2005), where Jains (a religion that believes in non-

10 *Ratilal Pannachand Gandhi v State of Bombay* AIR 1953 Bom 242.
11 *RM Lohia v State of Bihar* 1966 AIR 740.
12 *State of West Bengal v Ashutosh Lahiri* AIR 1995 SC 464.

violence) wanted the closure of municipal slaughter houses during a nine-day festival. Here the principle of state neutrality in assisting religions to celebrate their faith clashed with the right to trade. The two-judge bench allowed the closure and mentioned tolerance as a key feature of a multi-cultural society.

> In a multi-cultural country like ours with such diversity, one should not be over-sensitive and over-touchy about a short restriction when it is being done out of respect for the sentiments of a particular section of society.

Contrary to Mhango's contention that the centrality of the claim for which protection is claimed is a relevant factor for the Court's consideration, Indian case law shows that judges may not be the right interpreters of what constitutes a central/essential religious practice. As Dhavan rightly points out, when judges intervene in the religious domain, they do not have indicators on what kind of evidence should be considered authoritative; no rules of interpretation; no emphasis on detailed research; and no requirement to consult authoritative exponents and material.

4 Conclusion

The danger with courts exercising their interpretive powers in multi-cultural societies with transformative constitutions is that judges can get drawn into adjudicating issues that force the state into the realm of religious freedom. India's state institutions (the legislature and the judiciary) face the problem of where the boundaries of state secularism ought to be drawn and are drawn, and who ought to determine these boundaries in India, leading to what many commentators have referred to as 'the crisis of secularism' in India.[13] The judgments could become idiosyncratic, and depend more on the judge's personal predilections rather than on deep principles. Perhaps one cannot even evolve such principles in matters of faith, as the Indian cases so amply demonstrate, and therefore judges should be wary of venturing forth to 'celebrate' diversity.

13 AD Needham & RS Rajan (eds) *The crisis of secularism in India* (2007).

CHAPTER 17

RIGHT TO RECOGNITION AND PROTECTION OF RELIGION IN SOUTH AFRICA

Mtende Mhango

1 Introduction

In an introduction section of a 1998 law review article, Richard Cameron Blake and Lonn Litchfield made the following observation and point:[1]

> While South Africa's human rights record has historically been the poorest in Southern Africa, its abolition of apartheid and its new constitutional dispensation has made it a leader in democracy for other Southern African nations. While some Southern African countries are regressing in their commitments to democracy and human rights, South Africa is boldly moving ahead. There is certainly an opportunity for South Africa to set the jurisprudential trend in terms of religious freedom case law in Southern Africa. There have not been many recent freedom of religion cases in Southern African courts; however, in the last two years, three important cases involving religious freedom have been decided in South Africa.

Since then, a number of other important cases involving freedom of religion have been decided in South Africa.[2] For example, in 2002 the South African Constitutional Court decided *Prince v President of the Law Society of the Cape of Good Hope*,[3] where it ruled that a Rastafarian lawyer was not entitled to an exemption to use marijuana as part of his religious and cultural practice. In another case, *Member of the Executive Council for Education: KwaZulu-Natal v Pillay*,[4] the Court ruled that a learner was entitled to an exemption under the school code of conduct to wear a nose ring as part of her religious and cultural tradition.

1 RC Blake & L Litchfield 'Religious freedom in Southern Africa: The developing jurisprudence' (1998) *Brigham Young University Law Review* 515.

2 For example *Antonie v Governing Body, Settlers High School* 2002 (4) SA 738 (C); *Taylor v Kurtstag NO* 2005 (7) BCLR 705 (W); *Worcester Muslim Jamaa v Valley* 2002 (6) BCLR 591 (C); *Department of Correctional Services & another v POPCRU & others* [2012] 2 BLLR 110 (LAC); and *POPCRU & others v Department of Correctional Services & another* [2010] 10 BLLR 1067 (LC)

3 2002 (2) SA 794 (CC).

4 2008 (2) BCLR 99 (CC).

In light of the recent decisions in *Pillay* and *Prince* interpreting religious rights and freedom, this chapter seeks to analyse the challenges faced by the Court, through a comparative assessment of legal and political strategies, judicial precedents and institutional designs that have impacted on issues related to constitutional and human rights in Brazil, India and South Africa.

The chapter is organised into three sections. Section one briefly discusses the history of religious freedom under the apartheid government of South Africa. It argues that the laws during the apartheid government were inclined towards Christian religious values, and that this preference was not completely eradicated with the new constitutional dispensation. The purpose of this historical discussion is to demonstrate the social context in which freedom of religion jurisprudence emerged, and perhaps speculate on the impact of this context on the Court and current interpretations of freedom of religion in South Africa. Section two discusses the current interpretation of freedom of religion under the South African Constitution. It examines the decisions of the Court in *Prince* and *Pillay*, and their impact on human rights and the transformative agenda of the South African society. This examination is situated within the normative and institutional and social context of South Africa. Section three encompasses the final thoughts and conclusions.

2 History of religious freedom under the apartheid government

South Africa's constitutional history prior to 1994 is characterised by the rise of parliamentary sovereignty as a theory of governance. This is why one commentator has argued that 'parliamentary sovereignty is the starting point of any discussion about rights in South Africa'.[5] Under this system of government, Parliament had a monopoly of power and all other organs of state were subordinate to Parliament. More importantly, Parliament could make or unmake any law it chose without any substantive restriction.[6] The only restriction was that South African courts could strike down Acts of Parliament if procedural requirements were not met or satisfied.[7] Parliament therefore had a great deal of autonomy to enact laws without concern that any other organ of state could declare them invalid as a violation of human rights.[8]

5 J Dugard *Human rights and the South African legal order* (1978) 14.

6 I Currie & J de Waal *The new constitutional and administrative law* (2001) 44.

7 *Harris v Minister of the Interior* 1952 (2) SA 428 (A); *Collins v Minister of the Interior* 1957 (1) SA 552 (A) (upholding the validity of the Separate Representation Voters Act of 1951); and *Minister of the Interior v Harris* 1952 (4) SA 769 (A), holding that Parliament could only amend the entrenched provisions of the Union Constitution by complying with the procedural requirements on constitutional amendments.

8 Some commentators writing in the post-1994 South Africa have argued that 'ironically then, perhaps more so in South Africa than elsewhere, while the legislature is now more representative than ever before, it has become the least powerful branch of government'. See M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights'

Therefore, while the law of South Africa included the Union Constitution, this Union Constitution was not supreme and it did not incorporate a bill of rights. Under the Union Constitution, human rights could be violated by the state without recourse to the courts. Freedom of religion was amongst the rights that were violated under National Party rule. According to Lave, when the National Party came to power in 1948 and officially introduced apartheid as a national governing policy, it declared its legitimacy on religious grounds with the moral support of the Dutch Reformed Church.[9] As a result, the laws during the apartheid period demonstrated a manifest preference for a particular interpretation of Christianity. For example, in 1957, the National Party enacted the Immorality Act 23 of 1957, which forbade inter-racial marriage and inter-racial intercourse between blacks and whites. In 1950, the National Party enacted the Group Areas Act 41 of 1950, which created different residential areas for different races, and the Populations Registration Act 30 of 1950, which classified all South Africans into particular racial groups. The Church approved these apartheid laws. For instance, at the Cape Synod of 1949, the Church supported the legislation that banned inter-racial sex and marriage, when Dominee Vorster stated:[10]

> We felt very strongly that we had to preserve our identity, because that is a God-given right that every man has, the black man, the coloured, and the white. God created us differently, and it is to the honour of God that we must preserve that difference. We felt so strongly that we pointed out to people that God gave mankind Ten Commandments and one of them said Honour thy father and mother. That means it is not just a matter of being obedient to your parents. You must also honour your parents and preserve their identity too.

The National Party enacted other laws that had a profound Christian preference and an objective to protect Christian doctrines and practices. For example, the Publications Act 42 of 1974 was enacted for purposes of protecting a Christian view of life. Blake and Litchfield have noted that 'religious instruction in state schools had a Christian bias … Only Christian oaths were adequate in criminal tribunals'.[11]

It is submitted that this Christian preference has not been completely eradicated even with the advent of the new constitutionalism founded upon freedom, equality and human dignity. Instead, some could argue that the

8 (2004) 20 *South African Journal on Human Rights* 383 387; Currie & De Waal (n 6 above) 96; and Z Motala 'Towards an appropriate understanding of the separation of powers, and accountability of the executive and public service under the new South African order' (1995) 112 *South African Law Journal* 503 516.

9 TR Lave 'A nation at prayer, a nation in hate: Apartheid in South Africa' (1994) 30 *Stanford Journal of International Law* 483 500 (noting that, in 1948, the church accepted a report called *Racial and National Apartheid in the Bible,* which was the first attempt to justify apartheid based on the Bible), citing J Kinghorn 'The theology of separate equality: A critical outline of the DRC's position on apartheid' in M Prozesky (ed) *Christianity amidst apartheid: Selected perspectives on the church in South Africa* (1990) 57-58.

10 Vorster also supported the Group Areas Act. See Lave (n 9 above), citing D Harrison *The white tribe of Africa: South Africa in perspective* (1981) 14.

11 Blake & Litchfield (n 1 above) 521.

state had continued to sustain laws that advanced Christian values and practices in the early years under the new constitutional dispensation. For example, one of the first cases decided by the newly-established Court involving freedom of religion was *State v Lawrence*.[12] In this case, certain provisions of the Liquor Act 27 of 1989, which prohibited the sale of liquor on Sundays and other significant Christian days, like Ascension Day, Day of the Covenant, Good Friday and Christmas, were challenged under the interim Constitution of South Africa on the basis that their purpose was to induce submission to a sectarian Christian conception of the proper observance of the Christian Sabbath and Christian holidays. There were three judgments written in this case. Chaskalson CJ wrote the majority judgment, O'Regan J a dissenting judgment, and Sachs J a concurring judgment to the majority. A plurality of six justices of the Court found that the Liquor Act did not violate section 14 of the interim Constitution, which protected freedom of religion. The disagreement between the majority and the dissent focused on the element of coercion in the individuals' right to entertain religious beliefs as they might choose, or to declare their religious beliefs openly under the interim Constitution.[13] However, there were a number of areas of agreement between the two camps, about which this article is particularly concerned. The following brief discussion of the decision in *Lawrence* focuses primarily on the pronouncements made by O'Regan J concerning the status of Christianity under the apartheid era.

In her dissenting judgment, O'Regan J concluded that the legislature's purpose in enacting the definition of a closed day was not a secular one.[14] O'Regan J reasoned that '[e]ven if it were that would not necessarily be the end of the matter'.[15] In her view, 'the question in each case will not be the question of purpose alone, but the question of whether the overall purpose and effect of the provision constitutes a breach of freedom of religion'.[16] O'Regan J further and correctly reasoned that, although it was permissible for the state to allow religious observances, the state was not permitted to favour one religion over another. Instead, the state was required to act even-handedly in relation to different religions. She explained that the

> requirement of equity in the conception of freedom of religion as expressed in the interim Constitution was a rejection of our history, in which Christianity was given favoured status by government in many areas of life regardless of the wide range of religions observed in our society … The explicit endorsement of one religion over others would not be permitted in our new constitutional order.[17]

According to O'Regan J, it was not possible to read the closed day provisions in the Liquor Act as not having the unjustified effect of offending the interim

12 *S v Lawrence; S v Negal; S v Solberg* 1997 (10) BCLR 1348 (CC).
13 Para 128.
14 Para 127.
15 As above.
16 As above.
17 Para 123.

Constitution.[18] She emphasised that the conclusion was unavoidable that closed days were selected because of their religious significance for Christians and that the inevitable effect was to give a legislative endorsement and dominance to Christianity, and not to other religions.[19] It is in this historical context that Fourie has argued that the dominance of Christianity amongst the religions was widely regarded as the norm in South Africa.[20] However, the courts in South Africa subsequently began to reverse this norm.

3 Free exercise and religious exemptions in South Africa

Since *Lawrence,* the Court has had several occasions to interpret the freedom of religion provisions in the Constitution. In this section, we will examine two of the cases that have recently been decided by assessing their impact on the South African social and political context. Although not clearly stated in these cases, the Court has adopted a three-prong balancing test to review conduct that unlawfully affects religious beliefs or practices and to determine which beliefs qualify for constitutional religious status or exemption. The test, which was first formulated in *Prince* and later modified in *Pillay*, translates into three parts. Generally, under this test, a court will ask the following questions: first, whether the source of the applicant's constitutional claim is a recognised religion; secondly, whether the practice sought to be protected is a central part of the religion; and thirdly, whether the applicant's belief in the religious practice is sincere.

3.1 Limitation of religious practices

The *Prince* case was one of the first cases in which the Court ruled to limit freedom of religion and applied the three-prong balancing test. In *Prince*, the plaintiff was a devout Rastafarian and citizen of South Africa. After he became interested in Rastafari in 1988, he converted to Rastafari the following year by adopting the vow of the Nazarene. As a symbol of his conversion, he began to wear his hair in dreadlocks and to observe the dietary and other commands of the religion.[21] For instance, as part of his religion, he partook in the use of marijuana at religious ceremonies. He also stated that he 'uses

18 Para 125. O'Regan J further stated that this contravened sec 14 of the interim Constitution, and found that this was not justified in terms of sec 33, the limitations clause. See also the concurring judgment of Sachs J, where he held that the Liquor Act infringed the interim Constitution but found that the infringement was sanctioned by sec 33 of the interim Constitution.

19 Para 125.

20 P Fourie 'The SA Constitution and religious freedom: Perverter or preserver of religion's contribution to the public debate on morality? (2003) 82 *Scriptura: International Journal of Bible, Religion and Theology in Southern Africa* 94 100.

21 Para 21.

[marijuana] by either burning it as incense or smoking, drinking, or eating it in the privacy of his home.[22]

In addition to his religious conviction, the plaintiff was a law graduate and was employed by the Legal Aid Clinic of the University of Cape Town. At the time of this litigation, the plaintiff was pursuing a Master of Laws degree on a part-time basis. As part of his wish to qualify as an attorney, he entered into a required contract of community service for one year with his principal at the Legal Aid Clinic.[23] However, the Secretary of the Law Society of the Cape of Good Hope refused to register his contract. The refusal was based on its opinion that the plaintiff was not a fit and proper person in terms of the Attorneys Act 53 of 1979 because he had two previous convictions for the possession of marijuana and had made it clear that he intends to continue to use marijuana in the future.[24] The plaintiff challenged the decision of the Law Society, arguing that it violated his freedom of religion under sections 15(1) and 31 of the Constitution. Section 15(1) provides: 'Everyone has the right to freedom of conscience, religion, thought, belief and opinion'; and section 31 provides:

> Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, (a) to enjoy their culture, practice their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

Both the High Court and Supreme Court of Appeal dismissed his applications.[25] He then filed an appeal with the Court, challenging the constitutionality of the Drugs and Drug Trafficking Act 104 of 1994 (Drugs Act) and the Medicines and Related Substances Control Act 101 of 1965 (Medicines Act) in so far as they fail to provide an exemption from criminal prohibition in the case of persons requiring to possess and use marijuana for religious purposes. His appeal was dismissed by a narrow majority.[26] Two opinions were written in this case. Chaskalson CJ wrote the majority opinion and Ngcobo J the minority opinion. The disagreement between the majority and minority focused on the application of the limitation clause under section

22 As above.
23 His only outstanding requirement to becoming an attorney was a period of community service in terms of sec 2A(a)(ii) of the Attorneys Act 53 of 1979, para 1.
24 Para 1.
25 See *Prince* (n 3 above) and *Prince v President of the Law Society of the Cape of Good Hope* 2000 (7) BCLR 823 (SCA).
26 *Prince* (n 3 above). See also *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004), where Gareth Prince brought his claim against South Africa before the African Commission on Human and Peoples' Rights, which generally upheld the decision of the Court and found no violation of the complainant's rights as alleged; and *Prince v South Africa* Communication 1474/2006, views adopted on 31 October 2007, paras 7.1-7.5, where Prince filed a communication with the Human Rights Committee alleging South Africa's continued violation of arts 18, 26 and 27 of the International Covenant on Civil and Political Rights. While the Committee concluded that the communication was admissible on the merits, it ruled that the facts before it did not reveal a breach of arts 18, 26 or 27 of the Covenant.

36 of the Constitution.[27] The majority in *Prince* held that the use of marijuana by Rastafari adherents could not be sanctioned without impairing the state's ability to enforce its legislation in the interests of the public and honour its international obligations; and that the failure to make provisions for an exemption in the possession of marijuana by Rastafari was reasonable and justifiable under the Constitution. However, there were a number of areas of agreement between the two camps in relation to the recognition of the Rastafari religion with which this chapter is particularly concerned. The following discussion of the decision in *Prince* primarily focuses on the background set out in the minority opinion by Ngcobo J. It is submitted that, while Ngcobo J's opinion is the preferred opinion and the focus of this chapter in terms of its background analysis, it should be noted that the majority opinion also deferred to the background analysis set out in Ngcobo J's opinion.[28] Therefore, it is unnecessary for this chapter to distinguish between the majority and minority opinions in the discussion that follows because these matters were not in dispute.

In addressing the first question under the balancing test (is Rastafari a religion?), the Court unanimously observed that 'it is not in dispute that Rastafari is a religion that is protected by sections 15 and 31 of our Constitution'.[29] However, the Court noted that what was in issue was the practice of the Rastafari religion that requires its adherents to use marijuana.[30] As a result of the first observation, the Court was not obliged to engage in a detailed discussion of the religious status of Rastafari except for a brief account of its history and origin.[31] Presumably, however, if the Court had been dealing with an unfamiliar religious group, it would have likely explored the questions of recognition in great detail before addressing the second prong of the test.

In addressing the second part of the test (is the smoking of marijuana a central part of the Rastafari religion?), the Court ruled that it 'is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice'.[32] Such dispute was not present in *Prince.* The Court justified this ruling when it noted as follows:[33]

> Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or

27 See I Currie & J de Waal *The Bill of Rights Handbook* (2005) 344-346, discussing the disagreements between the majority and minority decisions.
28 Para 91.
29 Para 15 & para 40, citing *In re Chikweche* 1995 (4) SA 284 (ZS) 288G-289H; *Reed v Faulkner* [1988] USCA7 200; 842 F2d 960 at 962 (7th Cir 1988); *Crown Suppliers (Property Services Agency) v Dawkins* [1993] ICR 517 519-520 (CA); and TB Taylor 'Soul rebels: The Rastafari and the free exercise clause' (1984) 72 *Georgetown Law Journal* 1605.
30 Para 15.
31 Paras 15-17.
32 Para 42.
33 As above.

> irrational. Human beings may freely believe in what they cannot prove. Yet, that their beliefs are bizarre, illogical or irrational to others or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith.

The Court's position on this question should be welcomed in circumstances where a religion is familiar to a court, as was the case in *Prince*. It is submitted, however, that the centrality of the religious practice, for which protection is claimed, is a relevant factor for a court to consider because it could be crucial to the success and validity of a claim.[34] The underlying principle supporting this consideration is the observation that an action that restricts a practice central to a religion successfully limits the practice of that religion. Therefore, courts should extend greater protection to practices that are deemed central to a religion. Some commentators have urged that the ultimate inquiry must be subjective and look to whether 'for this particular Rastafari [the practice at issue] was central to the practice of his religious beliefs'.[35] Despite the refusal to inquire into the centrality of the use of marijuana in the Rastafari religion, the Court was unanimous in ruling that the use of marijuana was central to the practice of the Rastafari religion.[36] This implies that the question of centrality of a religious practice is susceptible to viable constitutional inquiry and that, given the appropriate set of facts, the Court may expressly examine this question in the future. In fact, as will be demonstrated later in the context of *Pillay*, the Court has pronounced on the inquiry into the centrality of a practice to a particular religion.

The last question addressed by the Court was the sincerity of the plaintiff's Rastafari beliefs. In addressing this question, the Court accepted that 'there is no question about the genuineness of the plaintiff's religious belief. He has demonstrated that he is a bona fide member of the Rastafari religion'.[37] This finding was presumably based on the fact that the plaintiff demonstrated knowledge of the history and tenets of Rastafari, and the Court felt no need to examine the sincerity of his beliefs. It is important to note that the purpose for inquiring into the sincerity of a claimant's religious beliefs for which protection is claimed is to screen unreliable claims.[38] As in South Africa, courts in the United States have relied on this examination and have viewed it as a proper subject for judicial examination.[39] This examination was also present in the jurisprudence of the European Commission on Human

34 See *Wisconsin v Yoder* 406 US 205 1972; *People v Wood* 394 p 2d 813 (cal 1964), where the centrality of the religious practice was crucial to the resolution of the claim; and *Pillay* para 86.

35 D O'Brien & V Carter 'Chant down Babylon: Freedom of religion and the Rastafarian challenge to majoritarianism' (2002-2003) 18 *Journal of Law and Religion* 219 239.

36 Para 43.

37 As above.

38 O'Brien & Carter (n 35 above) 219 & 235-238.

39 See *United States v Ballard* 322 US 78 (1944), explaining that sincerity was a proper subject for judicial scrutiny.

Rights.[40] The advantage of this examination is that it enables courts to distinguish between real and counterfeit Rastafari in a society where not all who wear dreadlocks are Rastafari and not all Rastafari wear dreadlocks. In fact, Rastafari have argued that you don't have to have dreadlocks to be a Rastafari; it is rather one's conception that makes you a Rastafari.[41]

There are a number of socio-political effects and importance of the *Prince* decision. The following paragraph discusses four of them.

The first is that the Court unequivocally recognised that Rastafari is a religion and that its adherents are part of the South African society protected under the Constitution. The fact that Rastafari are a small and marginalised group means that the Bill of Rights is of a particular significance to them.[42] From a socio-political view point, this recognition and pronouncement by the Court is important because it says that there are religions other than Islam, Judaism, and the once-preferred Christian religions that are recognised and protected in South African society; and that minority religions like Rastafari should not be rejected or discriminated against, but should be welcomed and celebrated under the new legal order. This is an important development in religious jurisprudence in light of South Africa's previous history of privileging some religions above others. Furthermore, the effects of the *Prince* decision on the Rastafari adherents is that it reinforces their sense of dignity, belonging, worth and recognition in the society of which they are part. What is more, it reaffirms South Africa as an open and democratic society based on human dignity, equality and freedom. Since *Prince,* schools, employers and other organisations have exemplified a renewed commitment to recognising the Rastafari religion and its practices and have in many respects accommodated the views of Rastafari as part of the market place of ideas.[43]

Secondly, the *Prince* decision demonstrates a shift from protecting Christian views towards giving recognition to non-Christian religious movements that continue to face persecution in many parts of the Southern African region, such as South Africa, Zimbabwe[44] and Malawi.[45] Despite the plaintiff not being successful in this case, without doubt the Court was mindful of the persecution of Rastafari during the previous regime and must have considered this case as an opportunity to right the past and send a

40 O'Brien & Carter (n 35 above) 235, quoting MD Evans *Religious liberty and international law in Europe* (1997) 307.
41 See M Heritage's song 'Don't Haffi dread' (1999).
42 Para 112.
43 For example, recently a community television station, *Soweto Television*, which broadcasts on DSTV channel 158, has devoted a weekly one-hour air time to a programme hosted by a Rastafari where Rastafari are able to discuss issues relevant to their movement and the society at large. Furthermore, there are more schools in South Africa that allow learners who come from Rastafari families to wear dreadlocks to school, something that was never the norm previously.
44 MO Mhango 'Upholding the Rastafari religion in Zimbabwe: *Farai Dzvova v Minister of Education, Sports and Culture and Others*' (2008) 8 *African Human Rights Law Journal* 221.
45 See MO Mhango 'The constitutional protection of minority religious rights in Malawi: The case of Rastafari students' (2008) 52 *Journal of African Law* 218.

message of recognition and accommodation of other previously persecuted or unrecognised religions. Moreover, the decision to create a special court on constitutional matters was motivated by a number of considerations, including the need for transformation, and to create a new guardian of the Constitution. Currie and De Waal have observed that during the negotiations over the interim Constitution, the negotiators realised that, unlike the new legislature and executive, the judiciary would continue to be dominated by the same views and people who operated under the old regime.[46] In addition, they observe that for many of the negotiators, these old members of the judiciary lacked the political legitimacy to be able to perform the politically-controversial task of constitutional adjudication and transformation in South Africa.[47] Currie and De Waal note that some viewed the judiciary as complicit in the laws they were enforcing, and saw the need for the judiciary to share responsibility with the other branches of state for the policies of segregation and apartheid and the denial of human rights that accompanied the implementation of these policies.[48] In the light of this socio-political history of the judiciary and the perceptions that may have emerged from this, there were social pressures such as credibility, institutional implementation of its decisions, the challenge of mainstream religious views, for the Court to be seen as doing something new and different when it came to the protection and recognition of religious pluralism. On this point, it is important that the Court agreed to hear the case and confront society's conservative views over religious matters, and was narrowly divided over the question of whether Rastafari should be granted the right to use marijuana for religious purpose. The Court could have refused to hear the matter on the basis that there was no prospect of success in the matter.[49] In fact, it could be argued that since *Prince*, the Court has been reconstituted and that, if in its current form it were to be given an opportunity to decide this question again, there is a strong possibility that the Court would reverse *Prince*.[50] This argument is informed by the fact that the current Court is composed of more liberal and pragmatic judges than when *Prince* was first decided.[51]

Third, there was an international rationale for the Court's decision in *Prince*. The Court highlighted South Africa's international obligations under international law in the fight against drug-related crimes, including the trade of marijuana, as a basis for upholding the challenged legislations. Clearly, the Court was reluctant to ignore the realities and interests in the fight against drug related crimes in deciding whether a right such as that to freedom of religion could be outweighed by those interests. Therefore, the Court ruled

46 Currie & De Waal (n 6 above) 270-274.
47 As above.
48 As above.
49 See, for example *Food and Allied Workers Union v Ngcobo NO* 2013 (12) BCLR 1343 (CC); and *Minister of Home Affairs v Yene Bula* CCT 133/11.
50 Four of the justices who were in the majority have retired. They are Ackermann J, Kriegler J, Chaskalson CJ and Goldstone J.
51 Since then, the Italian Supreme Court has ruled in favour of Rastafari on a similar question raised in *Prince*.

against the plaintiff and found that the Drugs Act and Medicines Act were not overbroad because there were no less restrictive means to achieve the state's interests. It is important to point out that one of the peculiarities of the Constitution is the requirement it places on courts to consider international law when interpreting the Constitution.[52] Clearly this requirement played a major role in the Court's rationale to justify the limitation on freedom of religion in *Prince.*

Lastly, *Prince* presents a strategic opportunity for future litigants. As pointed out elsewhere, the plaintiff's challenge was that the Drugs Act and Medicines Act were overbroad and thus unconstitutional. In other words, the plaintiff did not take constitutional aim at any of those two statutes; he did not dispute the legitimate government purpose sought to be achieved by the prohibition on the possession and use of marijuana by the general public. What he argued was that the legitimate purpose could be achieved by less restrictive means. Ngcobo J described the issue before the Court appropriately when he said the following:[53]

> We are not therefore called upon to decide whether the legislature's general prohibition on the use and possession of cannabis is consistent with the Constitution or not. Equally, we are not called upon to decide whether the use and possession of cannabis should be legalised. Finally, we are not called upon to determine what exemption should be granted to the appellant or to fashion any exemption. What we are called upon to decide is whether the impugned provisions are overbroad.

In the light of this, the Court limited its discussion to whether the relevant provisions of the Drugs Act and Medicines Act were unconstitutional. Therefore, legally the Court left open the question whether the Drugs Act and Medicines Act are unconstitutional in their entirety. It is possible that the plaintiff could have been successful had he attacked the legislature's interests in the Drugs Act and Medicines Act. It is my view that the plaintiff's legal strategy may have been self-defeating. In any event, the question of the constitutionality of these Acts in their entirety remains open, as does the opportunity for future litigants. While the plaintiff lost in the final analysis, the Court granted protection to another religion minority member and expanded the scope of the freedom of religion and/or culture in *Pillay.*

3.2 Recognition of religious observances in schools

Despite adopting a liberal Constitution, which generously protects individual rights to all who reside in South Africa, in 2002 a South African public school, the Durban High School, denied one of its students, Sunali Pillay, the right to wear a nose stud while at the school. According to the school, Sunali was prohibited to wear any jewellery under the requirements of the school's code

52 See sec 39(1)(b).
53 Para 31.

of conduct. The school threatened to expel Sunali from school if she continued to wear the nose stud. Prior to the school executing its threat Sunali's mother brought a discrimination complaint before the Equality Court under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act). The Equality Court ruled in favour of the school, and on appeal to the High Court, its decision was reversed. The school appealed the matter to the Court.

On appeal, the Court modified the balancing test first adopted in *Prince,* which courts should employ to review government and private conduct that affects religious or cultural practices and determine if a practice or belief qualifies for constitutional protection. Under the new test, which was formulated by Langa CJ, the courts are required to determine whether a practice or belief is central to the claimant, and whether the claimant is sincere in his or her belief or practice. Though not clearly stated in *Pillay*, the balancing test translates into two parts. Generally, under this test a court should only ask the following two questions: The first question is whether the practice sought to be protected is a central feature of the religion or culture,[54] and the second, whether the claimant professes a sincere practice or belief. Furthermore, unlike in *Prince*, the Court ruled that constitutional protection to a sincere practice or belief, which is central to a religion or culture, will be had regardless of whether the practice or belief is mandatory or voluntary. The Court reasoned that the fact that people 'choose voluntarily [to adhere to a practice] rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity'.[55]

The Court further observed that the 'protection of voluntary as well as mandatory practices conforms to the Constitution's commitment to affirming diversity; that differentiating between mandatory and voluntary practices does not celebrate or affirm diversity, but simply permits it', and added that this 'falls short of our constitutional project which not only affirms diversity, but promotes and celebrates it'.[56] In the final analysis, the Court held that whether a religious or cultural practice is voluntary or mandatory is irrelevant at the threshold stage of determining whether it qualifies for constitutional protection. Therefore, the Court found and ruled that Sunali was

54 See *Prince* paras 42-43, discussing that it is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice, and found that the use of cannabis was central to the Rastafari religion.

55 Para 64. See also *LaFevers v Saffle* 936 F 2d 1117 1119 (10th Cir 1991), holding that free exercise rights violated by a denial of a special vegetarian diet when inmate's beliefs sincerely held, regardless of whether the Seventh Day Adventist Church required vegetarianism; *Martinelli v Dugger* 817 F 2d 1499, 1503-OS (11th Cir 1987), holding that although the prisoner must be sincere in his religious beliefs, there is no requirement that the beliefs be held by a majority of the members of the particular religion in order to have free exercise protection.

56 Para 65.

discriminated against on the basis of both religion and culture in terms of section 6 of the Equality Act.

According to the Court, the difficult question under the first prong of the test is whether the centrality of a practice should be determined based on an objective or subjective standard with reference to the goal of further enhancing religious pluralism. It ruled in favour of judging the centrality of a practice with reference only to how important the belief or practice is to the claimant's religious or cultural identity.[57] What is relevant, according to the Court, is not whether a practice is characterised as religious or cultural or whether it is voluntary or obligatory, but its meaning to the person involved. Tribe has advocated for a similar method and points out that 'the ultimate inquiry in these matters must look to the claimant's sincerity in stating that the conflict is indeed with a tenet central for that individual'.[58] Other commentators have also argued in favour of a subjective standard of review in these matters.[59]

One of the significant effects of the Court adopting a subjective test is that the Court has ensured that almost every practice in respect of which an exemption is sought will be considered important in itself. This is because a claimant simply has to show that he or she honestly believes that the practice in question forms a central part of his or her religion or culture in order for it to be classified as such and to be protected. In these circumstances, it will probably be challenging for most schools or other organisations to justify a decision not to grant a religious exemption. This means that in practice most schools or organisations will grant religious exemptions to all those who apply. In addition, the Court, as O'Regan J pointed out in her dissenting judgment, has ignored the fact that cultural practices are associative and not individualistic,[60] and adopted an extremely individualistic approach to the concept of cultural beliefs and practices.

Furthermore, by protecting both voluntary and mandatory cultural and religious practices, the Court has significantly extended the range of beliefs and practices encompassed by the right not to be unfairly discriminated against. An important consequence of this ruling is that very few claims for

57 Prof Laurence Tribe has also supported this approach and points out that 'the ultimate inquiry must look to the claimant's sincerity in stating that the conflict is indeed with a tenet central for that individual': See LH Tribe *American constitutional law* (1978) 864.

58 Tribe (n 57 above) 864.

59 See O'Brien & Carter (n 35 above) 238-241 where they criticise the decision of the Grand Court of the Cayman Islands in *Grant,* in which it relied on the evidence of an expert witness to conclude that because not all Rastafari wear dreadlocks, the wearing of dreadlocks is not in itself a central or fundamental tenet of their religion, in favour of a subjective standard. They argue that the Court in *Grant,* by treating the expert testimony as conclusive, ignored the more vital question, whether for this particular Rastafari the wearing of dreadlocks was central to the practice of his religious beliefs. Since he was prepared to forego a normal school education for his child rather than shave the child's locks, it seems reasonable to presume that it was central.

60 *Pillay* para 154. See also *Prince* para 39, noting that sec 31(1)(a) emphasises and protects the associational nature of cultural, religious and language rights.

religious exemptions will be excluded at the threshold stage of the enquiry. A fairly good number of claims will, therefore, have to be resolved at the unfairness stage of the enquiry, which means that the threshold stage of the enquiry has been rendered largely redundant and that it will probably not play a principal role in the unfair discrimination enquiry under the Constitution and the Equality Act. Given that most disputes will likely be resolved at the unfairness stage of the enquiry, it is likely that most schools will, whenever faced with an application for religious exemption, have to carry out a proportionality analysis. This is a sophisticated test and, while the courts may be well placed to carry out such a difficult task, it is unlikely that most schools and other organisations are well equipped to engage in such analysis. Practically, this might mean that most schools or organisations will simply grant religious exemptions to all those who apply.

Furthermore, it should be noted that *Pillay* is likely to have an impact on South African (and possibly Southern African) schools that have rules or school codes that prevent the wearing of other religious or cultural expressions, such as dreadlocks[61] or Muslim headscarves.[62] While the Court, in its commitment to the doctrine of avoidance, pointed out that this matter is likely to be different in private schools, in reality the impact of this decision is more likely than not to be similar for both private and public schools. One reason for this is that, unlike many older constitutions, such as that of the United States Constitution, the Constitution is binding on both private and public actors.[63] It is submitted that the impact of this ruling will cause such schools to accommodate learners who wear dreadlocks or headscarves to school, whether for religious or cultural reasons.

4 Conclusion

In *Prince,* Ngcobo J correctly stated that 'the right to freedom of religion is probably one of the most important of all human rights'.[64] In the same case, Sachs J reasoned that 'where there are practices that might fall within a general legal prohibition, but that do not involve any violation of the Bill of Rights, the Constitution obliges the state to walk the extra mile [and not

61 Mhango (n 45 above) 231, discussing the right of Rastafari learners to wear dreadlocks in schools under the Constitution of Malawi.

62 See P Lenta 'Muslim headscarves in the workplace and in schools' (2007) 124 *South African Law Journal* 296, discussing a case where a learner at a Johannesburg school was prevented from attending classes because she wore a headscarf in violation of school rules.

63 *Pillay* para 39. See also Currie & De Waal (n 27 above) 43; compare E Chemerinsky *Constitutional law* (2001) 380 401-447, who discusses the state action doctrine, which holds that the Bill of Rights in the United States Constitution only applies to state action; that private individuals and entities are not required to comply with the Constitution; and also discusses some exceptions to the state action doctrine.

64 Para 48.

subject believers to a choice between their faith and the law]'.[65] In *Prince*, both Ngcobo and Sachs JJ were not in the majority, and the issue was not the wearing of a nose ring in a public school. Rather, the issue was whether or not Rastafari should be accommodated under the general criminal law of South Africa to use marijuana for religious or cultural purposes.

There are several notable differences between *Prince* and *Pillay*. First, in *Pillay*, the practice that was at issue did not fall within the general legal prohibition like in *Prince,* which is why the Court's analysis did not entail the application of the limitation clause in section 36 of the Constitution. Instead, it involved a challenge that a school code violated the Equality Act because it discriminated on the grounds of religion and culture. The grounds upon which the school violated the Equality Act are identical to those in section 9 of the Constitution, and as such the Court's analysis in *Pillay* was similar to a section 9 analysis. In fact, *Pillay*'s analysis informs much of the current South African interpretation of freedom of religion.

Second, in light of the wide-ranging provision of freedom of religion in the Constitution, *Pillay* could have successfully relied directly on sections 15, 31 and 9 of the Constitution. The reason is that section 15 is wide and covers freedom of conscience, religion, thought, belief and opinion.[66] Section 9 is also wide and binds both state and private actors. What is more, section 9 is in many respects identical to the provisions of the Equality Act and the Court has said that to the extent possible it has to be interpreted in line with the Equality Act.[67]

Based on the foregoing, it is clear that South Africa has made significant strides in the recognition and protection of religious freedom under the Constitution. The scope of this protection has recently been widened in *Pillay* to include both voluntary and involuntary religious or cultural practices. While the Court's interpretation has been criticised for its effects of individualising cultural rights and potential to obscure the associational nature of cultural rights, no criticism has been levelled against the Court's interpretation of the scope of religious rights. The dissenting argument in *Pillay* dealt with the interpretive treatment of culture and religion; it held that culture and religion were separate constitutional concepts and should be treated separately.[68] Therefore, there is an agreement between the majority

65 Para 149. See also *Prince v South Africa* Communication 1474/2006, views adopted on 31 October 2007, paras 5.5 and 7.5, where Prince argues that 'if exceptions to the prohibition of the use of cannabis could be made for medical and research purposes and effectively enforced by the state party, similar exceptions could also be made and effectively enforced on religious grounds with no additional burden on the state party; that the failure and unwillingness to exempt the religious use of cannabis from the prohibition of the law negates his freedom to manifest his religion and unlike others he has to choose between adherence to his religion and respect for the laws of the land'.

66 See *Prince* para 112.

67 For some of the differences between sec 9 and the provisions of the Equality Act, see Currie & De Waal (n 6 above) 267-271.

68 *Pillay* para 143.

and dissent in relation to the pronouncements and substance on freedom of religion with which this chapter is particularly concerned.

PART C: SPECIFIC RIGHTS AND THEMES

Socio-economic rights: Health and livelihood

CHAPTER 18

BETWEEN USURPATION AND ABDICATION? THE RIGHT TO HEALTH IN THE COURTS OF BRAZIL AND SOUTH AFRICA[1]

Octavio LM Ferraz

1 Introduction

The debate on the proper role of courts in the enforcement of so-called social and economic rights – that is, rights that protect certain interests such as health, education, housing, food, and water[2] – remains lively and controversial despite the current widespread recognition of these social goods as legal rights in several constitutions and ordinary laws of many countries.[3] For many, the legal enforcement of these rights presents courts with difficulties of two different (although to a great extent interrelated) orders: Legitimacy and institutional competence. Should unelected judges interfere with the conception and implementation of the social and economic policies on which individuals' enjoyment of health, education, housing, etcetera necessarily depend? Is the judicial process institutionally capable of dealing with these complex technical and political issues? These are the twin issues

1 Earlier versions of this paper were presented at the Universities of Edinburgh, Warwick, Pretoria and at the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC). I am indebted to all the participants for invaluable debates and probing questions, in particular to David Bilchitz, Danie Brand, Pierre de Vos, Conrado Mendes, Theunis Roux and Oscar Vilhena. I am also grateful to Victor Tadros, Sammy Adelman and Andrew Williams for discussion and comments on earlier drafts.

2 Hereinafter I use 'socio-economic rights', 'social rights' and 'social and economic rights' interchangeably. It is also important to note that I leave work-related rights aside (often included under the label social rights) because they do not raise the justiciability issues discussed here, at least not as strongly.

3 It is now the norm, rather than the exception, for constitutions to recognise at least some social and economic rights as fundamental rights. In most countries of South America, Eastern Europe and in South Africa, where new constitutions have been adopted in the last 20 years, social rights have been included as enforceable rights. See W Sadursky *Rights before courts: A study of constitutional courts in the post-communist states of Central and Eastern Europe* (2005) for a discussion of Eastern Europe and R Gargarella *et al* (eds) *Courts and social transformation in new democracies: An institutional voice for the poor?* (2006) for papers on Latin American, Eastern European and African countries.

that have been dominating the debate on the justiciability of social and economic rights around the world.[4]

Many would claim that the political decision to recognise social rights as legal rights (as opposed to principles of state policy), particularly when this is done in the constitution, eliminates or at least weakens considerably the concern with legitimacy. If the people decided to give an express mandate to their courts, through their highest law, to enforce social rights, courts should not fear encroaching into the reserved arena of the political powers of the state. In these countries at least, the judicial enforcement of social rights is in principle legitimate; no breach of the principle of separation of powers is at stake. This is to a great extent the position now consolidated in many countries where social rights have been constitutionalised and where, as a consequence, these rights are now judicially demanded as a matter of routine.[5] A passage of a famous case involving the right to health judged by the South African Constitutional Court is a good example of this position: 'Insofar as that [social rights adjudication] constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself'.[6]

How courts should go about discharging their constitutional mandate, however, and whether they are indeed capable of doing it adequately (that is, the so-called institutional competence issue) is still an open and controversial question in most countries. In South Africa itself the debate continues in a heated manner. Frustrating many commentators and activists, courts have so far been very cautious in the enforcement of social rights. They have not yet recognised (at least not expressly) individually-enforceable rights to health, education, housing, etcetera, to a great extent due to concerns of legitimacy and institutional competence. Instead, they have adopted an approach, based on 'reasonableness', which many see as very similar to the traditional and deferential administrative law model of rationality under judicial review.[7] On the other hand, in Brazil, after an initial period of high deference to the political branches similar to the one now seen

4 For recent literature on the justiciability debate, see the special issue of *Discusiones: Derechos Sociales* (2004) 4 available at http://www.cervantesvirtual.com/servlet/SirveObras/01604963236728274102257/index.htm (accessed 6 May 2008); Gargarella *et al* (n 3 above); F Coomans (ed) *Justiciability of economic and social rights: Experiences from domestic systems* (2006), D Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) and S Fredman *Human rights transformed: Positive rights and positive duties* (2008).

5 For a recent review of the burgeoning social rights jurisprudence in no less than 21 different national and international jurisdictions, see M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008).

6 *Minister of Health v Treatment Action Campaign* 2002 (10) BCLR 1033 (CC) para 99.

7 See, for instance, J Dugard & T Roux 'The record of the South African Constitutional Court in providing an institutional voice for the poor, 1995-2004' in Gargarella *et al* (n 3 above) 119-120, 107-125. Others see it as something more than that yet not anywhere near the full recognition of individually enforceable rights. See M Wesson '*Grootboom* and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 *South African Journal on Human Rights* 284; M Kende 'South African Constitutional Court's construction of socio-economic rights: A response to critics' (2003-2004) 19 *Connecticut Journal of International Law* 617.

in South Africa, courts started to interpret the Constitution as giving rise to individually-enforceable social rights. This led to an explosive growth in litigation, in particular in the field of health, which in turn led to a backlash from the political branches, which are now considering legislation that restricts the scope of litigation in that area. This has recently prompted the Supreme Federal Tribunal to call a public meeting involving all branches of the state and representatives from civil society to discuss the problem.[8]

For a long time the justiciability debate had been excessively focused on overly-abstract issues such as the proper role of courts in a democracy, the best interpretation of the principle of separation of powers, and the nature of social and economic rights in comparison with more traditional civil and political rights (the infamous positive/negative rights debate).[9] From the late 1990s onwards, the analysis of decisions coming from the Constitutional Court of South Africa made the debate more concrete and interesting. Yet, the overwhelming focus on the few (although important) cases adjudicated in that Court, partly due to language barriers, has resulted in a very restricted discussion. The older and vaster experience of social rights litigation in other countries, in particular South America, for example, has been largely neglected.[10] This paper tries to redress this to some extent by comparing the well-known social rights jurisprudence of the South African Constitutional Court with the less famous, although older and significantly larger, case law of the Brazilian Supreme Federal Tribunal. The focus is on the right to health.

The comparison between Brazil and South Africa is potentially rich for several reasons. Firstly, both countries have recently adopted new constitutions (Brazil in 1988 and South Africa in 1996) with a strong transformative character and the recognition of social and economic rights as justiciable fundamental rights and not simply as directives of state policy. Secondly, they possess striking similarities in terms of their social and economic profile: Both are upper middle-income countries; both have extremely high levels of socio-economic inequality; both have a sad past of officially-approved discrimination of their black population – though in South Africa a more recent one. Finally, Brazilian and South African courts have so far been adopting models of social rights justiciability which are at (or near) what we might call the two opposite ends of the justiciability spectrum. Whereas in Brazil the right to health and other social rights are regarded by courts as individually-enforceable entitlements to specific benefits (medication, treatment, etcetera in the case of health), in South Africa, as already mentioned above, the Constitutional Court has made it clear that no

8 See Audiencia Publica da Saude, held in April and May 2009. Full transcriptions of the debate are available in Portuguese at http://www.stf.jus.br/portal/cms/verTexto.asp?servico= processoAudienciaPublicaSaude (accessed 24 November 2013).

9 For a comprehensive review of the debate in the early 1990s, see C Scott & P Macklem 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 1.

10 With a few exceptions of chapters that have recently come out in edited collections (n 3 above) and articles in journals.

such individualised entitlements follow from the constitutional provisions recognising social rights.[11] Additionally, and somewhat explanatory of these different approaches, most judges and courts in Brazil are not at all deferential to the decisions of the political branches about social policy and resource allocation in health, whereas South African judges seem much more concerned about and wary of interfering with these decisions. It seems, therefore, that a great deal of light can be shed on the difficult issue of social rights justiciability by comparing these two countries.

The paper proceeds as follows. In section 2, I attempt to define in a more concrete manner the twin problems of legitimacy and institutional competence faced by courts in systems where social rights have been expressly recognised as justiciable in the constitution. Borrowing from an apt formulation of the problem by Michelman, I suggest that we should approach it as a dilemma. Given serious obstacles of legitimacy and institutional competence, courts have two opposite and equally unenviable options: They can either refrain from issuing strong remedies when adjudicating social rights and face the charge of abdication; or they can try to enforce these rights through strong remedies and invite charges of usurpation. In section 3, I try to show that the experience of Brazil and South Africa in this area confirm the seriousness and importance of the dilemma, sometimes underestimated by those supportive of strong forms of judicial enforcement. In section 4, I discuss the recent proposals of the so-called co-operative constitutionalism in its dialogical versions. I conclude that, rather than solve the dilemma, they mostly fall on the abdication side of it. In the final section I briefly discuss whether the dilemma is unsolvable or if there is a way ahead.

2 The justiciability dilemma

When social and economic rights are expressly recognised as justiciable legal rights, especially in a constitutional document, courts are faced with an intractable dilemma. As 'guardians of the constitution', they should in principle be able to provide an effective remedy for individuals who have their rights violated. That is, if the constitution recognises rights to health, education, housing, etcetera, individuals whose entitlements to these social goods are violated should be able to resort to judicial enforcement as a means of protecting their constitutional rights. Otherwise, according to many, one of the main roles of the judicial system in constitutional democracies (rights protection) is importantly undermined. Yet, whenever courts try to enforce these rights through strong judicial remedies, as has been happening to different degrees in many countries, they are promptly

11 See *Soobramoney v Minister of Health (KwaZulu Natal)* 1998 (1) SA 765 (CC); *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Minister of Health v Treatment Action Campaign* 2002 (10) BCLR 1033 (CC); and the discussion on 'South Africa' by S Liebenberg 'Adjudicating social rights under a transformative constitution' in Langford (ed) (n 5 above) 83.

accused of illegitimately and incompetently overstepping the boundaries of judicial power. The problem has been aptly described by Michelman in the following way:

> By constitutionalising social rights, the argument often has run, you force the judiciary to a hapless choice between usurpation and abdication, from which there is no escape without embarrassment or discredit. One way, it is said, lies the judicial choice to issue positive enforcement orders in a pretentious, inexpert, probably vain but nevertheless resented attempt to reshuffle the most basic resource-management priorities of the public household against prevailing political will. The other way lies the judicial choice to debase dangerously the entire currency of rights and the rule of law by openly ceding to executive and parliamentary bodies an unreviewable privilege of indefinite postponement of a declared constitutional right.[12]

It is important to note from the outset that this problem is not exclusive to social and economic rights. Rather, it is a problem that affects the adjudication of any right that gives rise to so-called positive duties – as most, if not all, rights do. It also affects, as I shall try to show below, the adjudication of most negative duties arising from fundamental rights.[13] But this, unlike many supporters of social rights seem to paradoxically conclude, does not strengthen the case for social rights justiciability. It rather emphasises that the important obstacles faced by courts when adjudicating rights apply to rights in general and not simply to social rights.[14] The crucial questions, thus (and ones that have been largely evaded by many supporters of social rights justiciability) are whether the dilemma is a real one and, if so, whether and how it can be solved. In the remainder of this section I discuss the difficulties faced by courts when adjudicating rights in general and social rights in particular to demonstrate that the dilemma is indeed a real and intractable one.

Difficulties for courts when adjudicating rights can emerge in two main interrelated areas: In the definition of the content of the right in question and in the determination that a violation of that content has occurred. The former is often a theoretical issue whereas the latter a practical one, although these two categories can overlap in both areas. Let us take the right not to be tortured, perhaps the most well-established of rights in the legal system,

12 FJ Michelman 'The Constitution, social rights, and liberal political justification' (2003) 1 *International Journal of Constitutional Law* 13.

13 I follow here the now well-established position that most (if not all) rights give rise to positive and negative duties ((H Shue (1996) *Basic rights: Subsistence, affluence and US foreign policy*; J Waldron 'Rights in conflict' (1989) 99 *Ethics* 503 and more recently Fredman (n 4 above)) and therefore cannot be distinguished, as some have proposed in the past, according to the nature of duties they give rise to. Positive duties demand positive action from duty holders, whereas negative duties require abstention, ie inaction.

14 Fredman (n 4 above) 100, has made a similar point when, after dismissing the false dichotomy between positive and negative rights, she says: 'This does not in itself mean that positive duties should be justiciable. It could be argued that coherence and logic are achieved by removing all human rights from the reach of judges rather than adding positive duties'.

internationally and domestically, to illustrate this. To apply the traditional rights adjudication model (we might call it the violation-redress model, *ubi ius*, *ibi remedium*) we need to determine with a reasonable degree of precision the content of the right not to be tortured and, having done that, we need to establish if an instance of torture according to that definition has taken place.[15] The former will raise mostly theoretical issues (although certainly informed by factual elements). It will involve questions such as: What degree of pain infliction is grave enough to be qualified as torture? Are the motives of the torturer important in the qualification of an act as torture? Once these questions are answered and a definition of torture is available, it must be established if torture took place, which involves mostly practical issues of proof.

The important question for our purposes is this: Who, that is, what institution, should determine the precise content of the right not to be tortured?[16] Let us make this more concrete with an example: If a criminal suspect confesses to a crime after a slight threat of violence by a police officer, is this an instance of torture? I think that different reasonable and reflective people would come up with different responses to this question. A democratic society must decide what institution should resolve this 'reasonable disagreement', courts or politicians, or both together, and there are good arguments for all these options.[17]

Other negative rights give rise to equally (or even more) difficult problems. For how long can we detain terrorism suspects without trial? This is just another way of asking what the content of the right to liberty is. In some countries, suspects can be detained legally without trial for as little as 48 hours, whereas in others for as long as 28 days. Is the latter a violation of the right to liberty? It depends on the definition of the content of that right, which is an intractable theoretical (normative) question. In all these difficult cases, responsible judges will have to face the serious question of how much to gainsay the interpretation of other officials (legislature and executive members) as to the content of these rights and the strength of the remedy they might issue. This question has surfaced in recent cases in many countries where the problem of terrorism is more acute, particularly in the United Kingdom and the United States, where judges were called upon to determine if legislation establishing detention without trial breached the right to liberty.

15 To apply the model, we also need to know who violated the right, but I leave this aside for now.

16 It seems much less controversial that courts can legitimately determine if a violation has taken place once the content of the right is clear, so I will focus only on the latter from now on.

17 See, for a good review of this debate and a forceful argument against judicial review, J Waldron 'The core of the case against judicial review' (2006) 115 *Yale Law Journal* 1346.

They have often displayed a great degree of restraint in the exercise of their review powers.[18]

These examples serve to show that even in cases where so-called negative duties are at stake, reasonable disagreement about the precise content of these duties puts courts in a difficult position: Should they substitute their own interpretation of these duties for that of the other institutions of the state (parliament and executive)? When the rights in question are of a more positive nature, and the definition of their content necessitates the implementation of more complex policies and depends on the investment of greater public resources, judges find themselves in an arguably even harder position, though the difference is more of degree than kind (more on this point below). But this, it is worth emphasising again, is not exclusive to social rights. Think of the positive aspects of the rights to physical security and protection of property. It is widely accepted in most democracies that the state has a positive duty to protect individuals against attacks from others to their property and physical integrity. How much protection individuals are owed, however, is an intractable normative issue involving the allocation of limited resources amongst several different areas where the state also has a duty to invest. The British case of *Regina v Chief Constable of Sussex, Ex Parte International Trader's Ferry Limited*[19] provides a clear illustration. It involved a British company that exported livestock and was subject to disruption in its legal activities by a group of animal rights protesters. The police, in compliance with its positive duty to protect the company's property and employees, allocated significant amounts of resources to that effect, in particular to escort the company's lorries to the port from which their goods would be exported. When, however, the chief constable decided that it could only provide comprehensive protection for two days in the week, and not the five days expected by the company, the latter took the case to the courts.

Now, the general question that this type of case involving positive duties raises for the court is identical to the one raised in the cases involving negative duties mentioned above. Given that there is genuine and reasonable disagreement about the content of the right (and the corresponding duty) in question, should the court substitute its own interpretation for that of the elected branches of government? The possible difference, which, it is worth

18 In the UK, the judiciary was called upon to determine whether the indefinite detention of terrorist suspects without trial, established through post-9/11 legislation under sec 21 of the Anti-Terrorism, Crime and Security Act 2001, was a violation of the right to liberty (art 5 of the ECHR). Even though the House of Lords (the apex court in the UK system) had limited remedial powers (under the Human Rights Act 1998 they can only issue a 'declaration of incompatibility' which does not affect the validity of legislation), they did not take their decision to declare the Act of Parliament incompatible with the right to liberty lightly. Moreover, they were substantially aided by the fact that indefinite detention applied only to foreigners, so they were able to declare it incompatible with the non-discrimination clause of art 14 of the ECHR. A similar pattern can be observed in the terrorism cases that came before the Supreme Court of the US.

19 [1999] 2 AC 418.

repeating, is one of degree rather than of kind, is the potentially-stronger polycentric nature of cases involving positive duties. So, while determining how many days' detention without trial is acceptable or whether water boarding constitutes torture might also have effects beyond the parties of the case (that is, more resources might be needed for intelligence activities if terrorist suspects are detained for shorter periods), the determination of the content of positive duties has a clear and direct polycentric impact in many other areas. Any extra day of police protection for the company in the case discussed above necessarily means less police protection for some individuals, groups or companies elsewhere. In some resource-intensive and vital areas, such as health, the problem is similar but often more dramatic. Any extra funding for cancer drugs, for instance, will mean fewer funds for other health measures that are equally vital for sustaining life. These are the so-called tragic choices.[20]

I have argued so far that the adjudication of rights in general, and not just social and economic rights, poses a serious dilemma for courts. This is due to the existence of genuine and reasonable disagreement about the content of most rights and their corresponding duties, irrespective of their nature (that is, positive or negative). In this context of normative uncertainty, I claim that responsible courts are justified in being cautious of substituting their own interpretation of the content of rights for that of the elected branches. If they try and enforce their own views through strong remedies, they will attract justified calls of usurpation. On the other hand, given the widespread expectation that judges should be the guardians of rights in constitutional democracies, this attitude is bound to invite equally strong charges of abdication. In the next section, I illustrate further the justiciability dilemma through the record of right to health litigation in South Africa and Brazil.

3 The justiciability dilemma in action: Right to health litigation in South Africa and Brazil

The record of right to health litigation in South Africa and Brazil provides a perfect illustration of the justiciability dilemma. As we shall see, whereas South African courts, in particular the Constitutional Court, have so far been extremely cautious in the adjudication of the right to health and other social rights, attracting a great deal of criticism from commentators and rights activists, Brazilian courts in general, led by the Supreme Federal Tribunal, have been extremely assertive, frequently issuing injunctions against the state to provide health benefits to individuals beyond what had originally been contemplated in the state's health policy.

Before we look at the cases, it is important to note a few significant differences in the judicial systems compared here which might potentially

20 G Calabresi & P Bobbitt *Tragic choices: The Fels Lectures on Public Policy Analysis* (1978).

have some impact in the way courts approach social rights adjudication. Both apex courts deal with constitutional matters in general and with the constitutional social rights in particular. However, the wording of social rights provisions and the jurisdiction of each court vary significantly. The South African Constitutional Court (SACC) has a greater degree of control over the cases it hears than its Brazilian counterpart, the Brazilian Supreme Federal Tribunal (STF, from the acronym in Portuguese for Supremo Tribunal Federal). This is clearly reflected in the number of cases each deals with. Whereas the SACC has so far, in just over 10 years of the Constitution, judged only a few cases involving social rights, the STF has judged hundreds only in the past few years. Related to that is the fact that decisions of the STF were, until very recently, not binding on lower courts and beyond the parties to the case, save in a few exceptional circumstances, whereas all decisions of the SACC are binding erga omnes. It is plausible to assume, thus, that, once a decision is reached in the SACC, the likelihood of similar cases reaching it again becomes very low, whereas in the STF this is not the case. On the contrary (and in part due to the fact that the STF has been deciding overwhelmingly against the state in right to health cases), hundreds of new cases are started every day. Given that the state will often appeal all the way up to the last instance, the STF continues to adjudicate numerous social rights cases.[21]

These two differences have an obvious impact on the length (and some may say quality) of the work of the two Constitutional Courts. The few decisions in the SACC social rights cases analysed here are much longer, detailed and carefully justified than those in the STF. Moreover, the fact that most individual decisions of the STF do not have effect beyond the parties to the case might also help to explain the more assertive stance of the STF discussed below.

Another important difference to note is the wording of the constitutional provisions recognising social rights in both countries. As we shall see in more detail below, the South African Constitution follows closely the model of the United Nations International Covenant on Economic, Social and Cultural Rights. Like the Covenant, it proceeds in two stages, stating a general right of access to health, housing, etcetera, and in a separate clause clarifying that the duty of the state is subject to 'progressive realisation' and limited 'to the maximum available resources'. The Brazilian Constitution also separates the statement of the right (found in the beginning of the Constitution, chapter III, article 6) from the statement of the state's duty (chapter VII). However, the statement of the duties of the state to guarantee health, education and social security to all is much more detailed than in its South African counterpart. It specifies what institutions the state shall put in place to deliver these rights (for example, the Unified Health System), under what principles they shall

21 This could in principle change if the STF adopted a *Sumula Vinculante*, a device created recently through a new statute giving the STF the power to adopt rulings which are binding on the lower courts.

operate (universality, equality, etcetera) and also where the resources to fund it will come from. It does not, however, make expressly clear that the duty of the state is limited to available resources, giving the false impression to the literal interpreter that these rights are absolute. This, as we shall see below, might have some explanatory power in the significant differences of approach between the jurisprudence of the two countries.

3.1 The South African Constitutional Court: 'Abdication'?

Only two cases involving the right to health have reached the SACC so far: *Soobramoney v Minister of Health (KwaZulu-Natal)*[22] and *Minister of Health v Treatment Action Campaign (TAC)*.[23] In *Soobramoney*, the first case involving any social right that reached the SACC, the Court was called upon to decide whether the right to health care (expressly recognised in the South African Constitution in section 27 (see below)) had been violated by the refusal of a local state hospital in the province of KwaZulu-Natal to provide the plaintiff, Mr Soobramoney, with periodical renal dialysis treatment necessary to sustain his life. The refusal was based on the fact that (i) resources available to the local health authority (who had the duty to allocate them amongst the local population's needs) were not sufficient to treat everyone who needed renal dialysis, and (ii) the plaintiff did not qualify to receive dialysis according to the policy adopted to allocate these scarce resources. The policy established that only those with acute episodes of renal failure and who were eligible for a future renal transplantation should receive renal dialysis. Those like Mr Soobramoney, who had a chronic condition and were not eligible for transplantation, did not qualify.

Here are the relevant constitutional provisions:

3.1.1 Health care, food, water and social security

Section 27 of the Constitution of the Republic of South Africa, 1996 provides:

> (1) Everyone has the right to have access to –
>
> (a) health care services, including reproductive health care;
>
> (b) sufficient food and water; and
>
> (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
>
> (3) No one may be refused emergency medical treatment.

22 n 11 above.
23 n 11 above.

Unlike its Brazilian counterpart, there is express mention in section 27(2) of the South African Constitution of 'available resources' as a relevant consideration to the definition of the state's obligation to provide health care (see the wording of the Brazilian Constitution below). The Court took this into consideration, but refused to delve into the details of the allocative decision of the local health authority to determine whether available resources were sufficient or not to satisfy Mr Soobramoney's need to renal dialysis vis-à-vis the other resource-dependent obligations of the state. Rather, it felt competent only to assess whether the allocative policy adopted was reasonable. The following passage of the decision makes the Court's approach clear:

> The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.[24]

The Court restricted its role, therefore, to an assessment of the rationality and the good faith of the decisions taken at the political and technical branches of the state. This was due to a combination of legitimacy and institutional capacity concerns: The fear to overstep the boundaries imposed by the principle of separation of powers, and 'the danger of making any order that the resources be used for a particular patient, which might have the effect of denying those resources to other patients to whom they might more advantageously be devoted'.[25]

The decision in *Soobramoney* was strongly criticised by social rights supporters as unduly deferential to the political branches of the state.[26] Their criticism, although to a great extent unfair in my opinion,[27] is not difficult to understand. A reasonableness approach, or an 'administrative law model' as put by Sunstein,[28] does indeed allow for a significant margin of discretion to the political branches which, ultimately, deprives social rights of any

24 Para 29.

25 Para 30. I do not agree, on this point, with Scott and Alston's analysis of the Court's position. They argue that the Court's refusal to give Mr Soobramoney priority was grounded on a kind of utilitarian position that sacrifices the individual 'to an amorphous general good'. See C Scott & P Alston 'Adjudicating constitutional priorities in a transnational context: A comment on *Soobramoney*'s legacy and *Grootbroom*'s promise' (2000) 16 *South African Journal on Human Rights* 206 252. I think it is clear from the passage quoted that the Court, out of a concern of institutional capacity, in fact abstained to make any decision *at all* (utilitarian or not) as to the matter of priority. Moreover, to say that resources might be more advantageously devoted to other patients does not necessarily imply a utilitarian position. Indeed, one might well ground such a claim on the principle of equality, in the sense of equal concern we have discussed in this thesis.

26 See, for instance, Bilchitz (n 4 above).

27 See OLM Ferraz 'Poverty and human rights' (2008) 28 *Oxford Journal of Legal Studies* 585.

28 *Designing democracy: What constitutions do* (2001) 234.

meaningful content. Administrative law already imposes rationality (or reasonableness) as a constraint on any administrative decision. If that is all that can be applied in social rights litigation, the recognition of social rights as legal rights would seem to make no difference to the strength of the individual's claim.

Now, it is one thing to understand the frustration of social rights supporters, and another to agree with their criticism of the Court. The latter would imply that the courts could have acted differently and, as a consequence, that the dilemma described above is not a real one. But could the SACC have acted differently? Could it have determined the content of the right to health as critics have urged it to do without being subject to justified charges of usurpation?

I do not believe it could. However, this is neither because they were institutionally incapable of defining what health needs Mr Soobramoney had (his need for dialysis was clear), nor because they were institutionally incapable of determining whether the KwaZulu-Natal Department of Health had enough resources to treat Mr Soobramoney. This latter determination, if it were simply an empirical and technical question as 'needs-based' conceptions of social rights imply,[29] could certainly be made with the help of health economists and public health experts. These experts could have told the courts quite precisely, for instance, how much Mr Soobramoney's dialysis would cost, what percentage of the budget that would represent, where the resources to treat him could be diverted from and who would be likely to lose with the diversion of these resources. The Court would then be left to determine, according to the 'needs-based' conception, whether Mr Soobramoney's *prima facie* right to health prevailed over those standing to lose in the necessary reallocation of resources or not. Yet, as I shall explain in greater detail below, even though all these questions might well be clothed in technical and empirical language, they actually involve a deeply controversial normative question of distributive justice which the 'needs-based' conception masquerades. Should Mr Soobramoney's needs receive priority over the competing needs of other individuals dependent on the same scarce resources? Although health economists and public health experts can provide invaluable information, they cannot provide the answer to this question. Can (and should) the Constitutional Court?

After *Soobramoney*, there were three other relevant cases involving social rights that came before the SACC: *Grootboom, TAC and Khosa*, in chronological order.[30] Only *TAC*, as already indicated above, directly involves the right to health, but it is important to deal with all of them, even if briefly,

29 By needs-based conceptions of social rights I mean conceptions that see these rights as rights to social goods (eg health care, education, housing) at a level which is necessary for the individual satisfaction of basic needs.

30 n 11 above; *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC).

to better grasp the SACC's approach. *Grootboom* involved 900 homeless people living in a sports field in the shanty town in Wallacedene, Cape Town, including more than 500 children, with only plastic sheets to protect themselves from the elements.[31] In the High Court, they managed to secure a positive injunction ordering government to provide them with at least basic shelter grounded on the following constitutional provision that establishes a right to housing.

3.1.2 Housing

Section 26 provides:

> (1) Everyone has the right to have access to adequate housing.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
>
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Consistently with its approach in *Soobramoney*, however, the Constitutional Court, which heard the case on appeal from government, overturned the High Court's decision and replaced the original injunction with a declaratory order recognising that the housing policy of the government was unreasonable (in that it did not give adequate priority to the most urgent needs of the most destitute homeless individuals) and should thus be redrawn. But it did not tell government how and when to act, let alone recognise a self-standing, immediately claimable right to housing of each individual lacking basic accommodation.

Again, despite going a bit further than *Soobramoney* in its decision, it was still received by many, not surprisingly, as not in the least assertive enough to vindicate the inclusion of social rights in the Constitution.[32] Again, the frustration is understandable. If there is a right to housing in South Africa, how could Irene Grootboom have died 'homeless and penniless' in August 2008, more than eight years after the Court's decision?[33] Yet again, however, this is not the fair question to ask, but rather whether the Court should have done anything different which would not, in turn, raise justified charges of usurpation. The fact that so many prominent constitutional scholars have hailed the approach in *Grootboom* as the adequate one for courts to take in

31 *Constitutional Court of South Africa, Government of the Republic of South Africa v Grootboom,* CCT11/00.

32 See, for instance, K Pillay 'Implementing *Grootboom*: Supervision needed' (2002) 3 *ESR Review.*

33 See M Makhanya 'A pity *Grootboom* will not be there to ask about unfulfilled promises' *The Times* 9 August 2008 http://www.thetimes.co.za/Columnists/Article.aspx?id=818987; and P Joubert '*Grootboom* dies homeless and penniless' *Mail & Guardian Online* 8 August 2008 http://www.mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless (both accessed 7 December 2008).

social rights cases gives a strong indication of the reality of the dilemma involved.[34]

In *TAC*, a non-governmental organisation represented hundreds of pregnant HIV-positive mothers claiming from government the free provision of a drug (Nevirapine) proven to minimise significantly the risk of vertical (mother to child) transmission of the HIV virus when given in a single dose at the moment of delivery. All the South African government was prepared to do was to institute a pilot treatment scheme in two research and training hospitals and then, if proven effective after two years, gradually roll it out to the rest of the public health system. Again, the Constitutional Court found the government policy unreasonable and, in this case, went even further than the simple declaratory order issued in *Grootboom*. It also issued a positive injunction ordering government to provide Nevirapine throughout the state health service without delay.

Now, such an order could be seen as a significant departure from the cautious approach of *Grootboom* and *Soobramoney*. Unlike in both cases, despite still not using the language of an immediately-claimable, individual social right to health, the SACC has nonetheless ordered government to provide all plaintiffs with a particular treatment, which has the same practical effect. One could be misled to conclude, thus, that the SACC has actually defined, at least in this case, what the right to health amounts to and shunned all concerns of legitimacy and institutional capacity displayed in the previous cases in relation to the determination of available resources. A very significant fact in this case, however, disallows this conclusion, as most commentators agree: The cost of providing the drug was virtually none, given a pledge by the pharmaceutical suppliers to give it for free. The denial of treatment to the plaintiffs was therefore not based on resource limitations, as in *Soobramoney*, but rather on dubious (not to say completely ungrounded) assertions that the drug in question (Nevirapine) was not scientifically proven to work. The decision is best seen, thus, as another instance of the reasonableness approach consistently applied in *Soobramoney* and *Grootboom*. Further support for this view is the fact that the Court cites those judgments with approval and also feels it necessary to make it clear that its judgment against the government's policy 'does not mean that everyone can immediately claim access to such treatment'.[35]

The last case, *Khosa*,[36] is yet another example of this. It involved destitute Mozambican legal immigrants with the status of permanent residents who were excluded from social benefits such as pensions, child-grants, etcetera provided by the state to South African citizens. The applicants grounded their claim on the same article 27 cited above, which, as

34 See also Sunstein, praising the South African decision *Grootboom* as the correct way of judicial enforcement without usurpation of powers (n 27 above) 235.
35 Para 125.
36 n 30 above.

well as the right to health, establishes that 'everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'. By a majority decision, the SACC concluded that it was unreasonable to exclude permanent residents from those benefits, which had the immediate effect of granting them the benefits from which they had been excluded. Yet again, the cost repercussions of the decisions seem to have played a role in the bolder approach of the Court. The SACC expressly dismisses the government's argument that to include the applicants in the benefit scheme would involve huge costs (paragraph 62). In any case, no self-standing, individual right to social assistance is recognised, but rather a low-cost extension of an already existing benefit to a group excluded with no justified reason. As some have claimed, this might well have been done without the invocation of the social right to social assistance of section 27. Section 9 of the Constitution, which establishes equality before the law, would seem to suffice to ground the applicants' case.[37]

In my view, thus, the SACC has so far consistently applied a reasonableness approach to the adjudication of social rights and resisted the insistent calls of claimants, activists and commentators to 'give them teeth'. It has done so, it seems, out of concerns of legitimacy and institutional competence. As I have already indicated, these concerns seem understandable to me. Faced with the difficult dilemma I discussed in section II above, the Court chose the restrained approach of deference.

But this, it must also be recognised, inevitably invites the indictment of 'abdication'.[38] This deferential approach runs the risk of rendering the highly-acclaimed social rights provisions of the South African Constitution virtually redundant. Indeed, as I have already mentioned above, it is hardly necessary to invoke the right to health care or other social rights at all to demand that governmental decisions be non-discriminatory and reasonable. The reasonableness test is a well-established one in administrative law that puts limits on the discretion of political agents. But it is a very restricted test, for the very reason that it is applied to areas where the political branches are supposed to exert a great degree of discretion. In the apt phrase of Lawrence Sager, it places courts in the position of a 'guard at a door that only a mad or a runaway legislature [and I might add administration] would lurch through'.[39]

37 See Bilchitz (n 4 above) 172.

38 See, for instance, B Lynn 'The Constitutional Court of South Africa and jurisdictional questions: In the interest of justice? (2005) 39 *International Journal of Constitutional Law* 64, claiming that 'social and economic guarantees of the bill of rights are little more than fine-sounding statements of intent. Indeed, there has been little in the Court's jurisprudence that has made a positive difference in the lives of ordinary South Africans …'.

39 'Justice in plain clothes: Reflections on the thinness of constitutional law' (1993) 88 *Northwestern University Law Review* 410 413.

If the right to have access to health care, housing or social assitance is to have any meaning as a self-standing constitutional provision, a court should be able to review, in more depth, the correctness of the very allocative decisions which led to the refusal of treatment to Mr Soobramoney and the denial of housing and social assistance to the applicants involved in the other cases. Ideally, it should be able to establish if the right was violated by the denial in that specific case and, if so, grant the plaintiff injunctive relief against the state to satisfy the right (as it was done, though exceptionally, in *TAC*). But can they do it in a legitimately and competent way? The dilemma bites again.

The other path available, which leads to the other horn of the dilemma, the 'usurpation' charges, so far avoided by the South African Constitutional Court, has been consistently followed by the Brazilian courts, particularly in right to health cases. It provides us with a great opportunity, thus, to test the alternative that many social rights supporters claim is the most adequate one in the judicial enforcement of social rights.

3.2 The Brazilian Supreme Federal Tribunal: 'Usurpation'?

The approach of Brazilian courts in cases involving the right to health[40] is almost the opposite of that of the South African Constitutional Court. Firstly, the courts are much less deferential to the political branches (if at all), rarely expressing concerns of legitimacy or institutional capacity when adjudicating the right to health. Secondly, they pay little regard, in particular, to the scarcity of resource defence usually raised by the state in such cases. Thirdly, the courts have established that the right to health is an individually-enforceable and immediately-claimable right (a 'public subjective right' in Brazilian legal terminology). Finally, courts are prepared to issue strong remedies when they conclude that the right to health has been violated (which they have done in the vast majority of cases).[41] This is usually an injunctive order for the state to provide a certain health service or good to the claimant (mostly medicines) within a very short space of time (often 48 hours), and often under the threat of contempt of court.

However, it is important to note that this has not always been the case. Until the mid-1990s the dominant view in the judiciary was that the constitutional provisions recognising social rights were so-called

40 The approach in cases involving the right to education is similar, but will not be dealt with in this article.

41 The few empirical studies conducted to date have found success rates in right to health litigation varying from 80% to 100%. See V Gauri & D Brinks *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (2008), for an analysis of 48 decisions in the STF, all of them successful for the litigant, see M Barbosa 'O STF e a Política de Fornecimento de Medicamentos para Tratamento de AIDS/HIV' in D Coutinho and A Vojvodic *Jurisprudência Constitucional: Como decide o STF?* (2009); O Vieira and P Zucchi (2006) 'Diferenças de preços entre medicamentos genéricos e de referência no Brasil' (2006) 40 *Revista de Saúde Pública* 444.

'programmatic norms', directed at the legislature to establish a programme of action and not giving rise to individually-enforceable rights. The radical change of approach came in part as a result of the AIDS pandemic. Brazil is internationally recognised as a success story in the fight against AIDS due to its state-funded drugs distribution programme set up by the government with support from the World Bank in the mid 1990s.[42] What is less well-known is that the AIDS crisis also spurred an explosion in right to health litigation in the country. Given that many HIV drugs (especially the newest and most expensive ones) could not be immediately included in the state's programme (which is extensive yet not fully comprehensive due to resource limitations),[43] some HIV-infected individuals turned to the courts to try and force the government to provide them with these new drugs. After the first lower courts' judges started to accept, in 1996, that the right to health included the right to be provided by the state with the most advanced treatment available for HIV-AIDS, an avalanche of lawsuits followed, initially restricted to the treatment of HIV-AIDS, but later spreading to all areas of health, including surgical procedures of all sorts and drugs for diabetes, Parkinson's disease, Alzheimers, hepatitis C and multiple sclerosis, amongst others.[44]

The magnitude of the phenomenon can be appreciated through the growing number of claims and the increasing impact they produce in the states' health budgets. In a pioneering study of 2004, Messeder and others, tracing the evolution of right to health litigation in the state of Rio de Janeiro, found a growth from a single lawsuit in 1991 to 1 144 in 2002.[45] In a later

42 See, for instance, 'A regional success story: Sharing knowledge to tackle HIV and AIDS' in case studies, UK Department for International Development, available at http://www.dfid.gov.uk/casestudies/files/south-america/brazil/brazil-hiv-regional.asp (accessed 13 December 2013) Page cannot be found. For a brief account of the programme and how its success depended on the participation of civil society, see J Galvao 'Brazil and access to HIV/AIDS drugs: A question of human rights and public health' (2005) 95 *American Journal of Public Health* 1110 1112–13.

43 See, for instance, 'Onde esta o melhor programa de AIDS do mundo?' ('Where is the best HIV-AIDS programme in the world?') an NGO campaign launched in 2004 to highlight the deficiencies of the system of provision of HIV drugs in the richest state of Brazil, São Paulo. http://www.forumaidssp.org.br/noticias/noticia.php?codigo=7 (accessed 7 December 2008).

44 For the history of the growth of judicialisation, see 'O Remedio via Justica: Um Estudo sobre o Acesso a Novos Medicamentos e Exames em HIV/AIDS no Brasil por meio de Acoes Judiciais' Ministerio da Saude, Brasilia, 2005. DWL Wang 'Escassez de recursos, custos dos direitos e reserva do possivel na jurisprudencia do Supremo Tribunal Federal' Sociedade Brasileira de Direito Publico, Escola de Formacao, 2006, available at http://repositories.cdlib.org/bple/alacde/050207-16/ (accessed 7 December 2008). It is important to notice, however, that, although the first law suits involved almost exclusively HIV drugs, there were also a few involving treatment for other diseases. As discussed in the text below, the first successful case in the STF, and the one which generated the rationale that would later be used in most HIV and other cases, involved Duchene's muscular dystrophy.

45 AM Messeder *et al* 'Mandados judiciais como ferramenta para garantia do acesso a medicamentos no setor público: A experiência do Estado do Rio de Janeiro, Brasil' ('Can Court Injunctions Guarantee Access to Medicines in the Public Sector? The Experience in the State of Rio de Janeiro, Brazil') (2005) 21 *Cadernos de Saúde Pública* 525 527.

study, Leite Borges found 2 245 cases against the same state in 2005 alone.[46] Hoffman and Bentes studied five states (Rio Grande do Sul, Rio de Janeiro, Goias, Bahia and Pernambuco), finding nothing less than 7 400 cases from 1994 to 2004.[47] According to the Department for Health of the State of São Paulo, the most densely-populated state of Brazil (approximately 40 million people), in 2005 10 000 individuals were receiving drugs ordered by courts through right to health litigation. That resulted in an expenditure of R $86 million (approximately US $43 million), the equivalent of 30 per cent of the budget for high-cost drugs for that year.[48] In 2007, this expenditure grew even further to R$ 300 million (approximately US $150 million) and is expected to reach R $600 million in 2009.[49] Rio Grande do Sul and Minas Gerais, other major states, have spent R $78 million (approximately US $39 million) and R $40 million (approximately US $20 million) respectively.[50]

Given this extraordinary number of cases involving the right to health, it is obviously impossible to analyse them all, or even a significant part of them. However, and despite (until recently) the non-binding effect of judicial decisions beyond the parties to the case in the Brazilian system (which in part explains the large number of cases), it is possible to discern a rather coherent approach to social rights litigation in Brazilian courts, in particular in the field of right to health litigation, where a few cases of the Supreme Federal Tribunal have acquired the status of a kind of de facto binding precedent, being followed and quoted with approval in a significant number of later decisions of the STF itself and lower courts. Indeed, as a recent comprehensive study of cases judged by the STF since 1998 (when the Constitution came into force) shows, out of 146 decisions involving the right to health, no less than 96 (65,75 per cent) cited either one or both of the following two cases, RE 242.859/RS (judged on 29 June 1999) and RE/AgR 271.286-RS (judged on 12 September 2000) as the main justification for granting the health benefit demanded by the claimant (largely drugs).[51] It is worth noting, incidentally, that in all 146 cases the result was favourable for

46 D Borges 'Uma Analise das Acoes Judiciais para o Fornecimento de Medicamentos no Ambito do SUS: O caso do Estado do Rio de Janeiro no ano de 2005' unpublished dissertation, Fiocruz, Rio de Janeiro, 2007available at http://bvssp.icict.fiocruz.br/lildbi/docsonline/3/3/1233-borgesdclm.pdf (accessed 6 May 2009).

47 F Hoffman & F Bentes 'Accountability for social and economic Rights in Brazil' in Gauri & Brinks (n 41 above) 100-145.

48 F Leite 'Estados tentam barrar remédios via Justiça' *Folha de São Paulo* 3 October 2005. See also Remedio via Justica, A Study of the National Programme of Sexually Transmitted Diseases with 400 Cases, available at http://www.aids.gov.br/final/biblioteca/medicamentos_justica/medic-justica01.pdf (accessed 7 December 2008).

49 Interview with Maria Cecilia Correa, Secretaria de Estado da Saude do estado de São Paulo, 22 July 2009.

50 C Collucci 'Triplicam as acoes judiciais para obter medicamentos' *Folha de São Paulo* 9 January 2009.

51 L Ramos 'O Uso dos Precedentes pelo STF em Casos de Fornecimento de Medicamentos' in D Coutinho & A Vojvodic *Jurisprudência Constitucional: Como decide o STF?* (2009) 351-365, 353 n 7.

the claimant, that is, the health benefit sought was granted by the STF.[52] As mentioned above, a similarly high rate of success for claimants, although not as high as the one in the STF, is found in studies of courts of appeal around the country.

Let us focus on these two cases in order to specify in more detail the current approach to right to health adjudication in Brazil.

3.2.1 RE 242.859/RS and RE/AgR 271.286-RS

Both cases involved individual claimants seeking the free provision of medication for HIV not available at the public health services. It is important to note, even if briefly, that the duty to provide public health services in Brazil under the constitutional right to health, including medication, is entrusted jointly to the three political and administrative spheres of the state (the Union – that is, the Federal Government, the 26 states, and the more than 5 600 municipalities)[53] without precise specification of what the exact responsibility of each of these units is. This creates all sorts of administrative problems and, for the purposes of right to health litigation, the problem of identifying against whom to direct a claim (that is, who should be the defendant). In both cases now in discussion, the chosen defendants, the state of Rio Grande do Sul[54] in RE 242.859/RS and its capital, the municipality of Porto Alegre, in RE/AgR 271.286-RS tried to claim, in a preliminary argument that proved unsuccessful, that they were not the right defendants for the case. The courts decided, in what now became established jurisprudence,[55] that the duty was owed jointly by all administrative levels of the Brazilian state and that the claimant can choose against whom to direct her claim. Although the formal legal issue is thus resolved, the administrative problem of co-ordination amongst the three autonomous state units remains, but will not be given any further attention here, despite its importance, for reasons of space. Let us focus, instead, on the substantive issues of the cases.

The HIV drug (Invirase, also known as Saquinavir) wanted by the patients in these two cases was not available in any of the Brazilian states' administrative units, which prompted them to resort to the judiciary. In both

52 After the study was concluded, more cases involving the right to health came to the STF. In only one of them so far, the result was unfavourable for the claimant (STA 91-AL, reported by Min Ellen Gracie, j. 26.2.2007). At first this case was seen as a potential change of tendency in the jurisprudence of the STF. It has become increasingly clear, however, that this case represents an anomaly, since several later cases have confirmed the dominant jurisprudence and the very judge who handed down the dissonant decision has since changed her mind in later cases. For an analysis of the decision and the impact on the jurisprudence, see D Wang & F Terrazas 'Decisões da Ministra Ellen Gracie sobre medicamentos' available at http://www.sbdp.org.br/artigos_ver.php?idConteudo=66 (accessed 10 July 2009).

53 Brazil is a federal state divided into 27 states and more than 5 000 municipalities with some degree of administrative autonomy.

54 One of the most developed in Brazil and with a sizeable population of over 10 million people, 1.5 million living in the capital, Porto Alegre.

55 There is also a proposal for a *Sumula Vinculante* on this point under consideration.

cases, the state's legal counsel raised the expected argument that it was not appropriate for the court to interfere with the decision of how the resources of the health budget should be spent. This, they claimed, was a matter for the political branches, and had already been settled by the yearly budget drawn by the legislature and by the allocations decided within the health department. If the court granted the patient's request, it would be creating expenditure which it had no legitimate power to create according to the constitutional principle and the rules of separation of powers.

The STF gave short shrift to these arguments, and upheld the decisions of the lower courts that had ordered the state to provide the claimants with the HIV drugs. At first sight, these cases might seem rather uncontroversial examples of the judiciary holding the state to the letter of legislation rather than engaging in the definition of the content of the right to health which, as I have argued above, would raise the justiciability dilemma. This is because in 1993, the State Assembly of Rio Grande do Sul had passed specific legislation based on the Constitution to impose on the state a duty to provide drugs to patients: Law 9.908/93, which establishes that the state has a duty to provide 'exceptional medication' for individuals 'unable to afford such medication without jeopardising their subsistence and that of their family'. It defines exceptional medication as medication 'which needs to be used often and permanently, and which is essential to sustain the life of the patient' (article 1).[56]

In RE 242.859/RS, therefore, Justice Ilmar Galvao dismissed the appeal in two pages. The justification to uphold the lower court's decision was summarised in one paragraph:

> As it is easily seen, the decision appealed had as its central justification the provision of a statute [Law 9.808/93] through which the State of Rio Grande do Sul, regulating the norm of article 196 of the Federal Constitution, bound itself to a programme of distribution of medicines to those in need.[57]

For the STF, therefore, this was a simple case of lack of compliance with a legislative provision rather than interference by the court in the public health policy and resource allocation plan of the state. On deeper reflection, however, the decision is rather simplistic. It fails to notice that compliance with the legislative duty depends on resources which are limited and therefore need to be allocated according to some criteria of priority. The duty of the state flowing from Law 9.808/93 is, thus, not (and could never be in the real world) an absolute duty to provide all medication needed by all individuals that cannot afford them. It is rather a duty to use the resources

56 To be eligible to the free provision of medication, the claimant has to produce a medical report and documents that prove his or her income and show his or her 'condition of poverty' (art 2).

57 At 2.

available to the state to provide drugs to as many qualifying individuals as possible according to fair and reasonable criteria of allocation.[58]

In the second decision, this important issue was not completely overlooked by the STF. It at least mentions the problem of limitation of resources, yet only to dismiss it as a secondary interest of the state:

> Between protecting the inviolable rights to life and health, which are subjective inalienable rights guaranteed to everyone by the Constitution itself (article 5, caput and article 196), and the upholding, against this fundamental prerogative, of a financial and secondary interest of the state, I believe that – once this dilemma occurs – ethical-juridical reasons compel the judge to only one possible solution: that which furthers the respect of life and human health …[59]

The focus, unlike in RE 242.859/RS, is not on the statutory programme of drug provision, but rather directly on the right to health recognised in the Constitution. The statutory duty, for Justice Celso de Mello, who wrote the leading opinion in the case, is simply a reinforcement of the paramount duty that flows directly from the Constitution. There is no pretence, therefore, that the STF is simply giving force to a decision already taken by the political branches, but rather an open and assertive statement that it is upholding the right to health against the will of these branches, in particular the Department of Health. This becomes clear in another famous passage of the case:

> The right to health – as well as a fundamental right of all individuals – represents an inextricable constitutional consequence of the right to life … The interpretation of a programmatic norm cannot transform it into a toothless constitutional promise.[60]

58 Law 9.808/93 also establishes that the resources to support this programme will come from the Social Development Fund of the state, instituted by another Act of the Assembly of Rio Grande do Sul of the same year (Law 9.828/93). The main purpose of this fund is to provide subsidised financing for the construction of low-cost social housing for families with incomes below five times the minimum wage (70% of its resources), but it also allocates funds for other areas, including the provision of free medication under the 'exceptional medications' programme (10%). The remainder of its resources goes for public security projects (15%) and for the firearms service (5%).

59 My translation from the original in Portuguese, which reads as follows: 'Entre proteger a inviolabilidade do direito à vida e à saúde, que se qualifica como direito subjetivo inalienável assegurado a todos pela própria Constituição da República (art 5º, caput e art 196), ou fazer prevalecer, contra essa prerrogativa fundamental, um interesse financeiro e secundário do Estado, entendo - uma vez configurado esse dilema - que razões de ordem ético-jurídica impõem ao julgador uma só e possível opção: aquela que privilegia o respeito indeclinável à vida e à saúde humana ...' The decision is available in Portuguese at the Supreme Federal Tribunal webpage http://www.stf.gov.br (accessed 31 December 2013).

60 RE 271.286 AgR-RS, Relator Ministro Celso de Mello, available at the internet page of STF http://www.stf.gov.br/. The original passage in Portuguese is as follows: 'O direito à saúde - além de qualificar-se como direito fundamental que assiste a todas as pessoas - representa conseqüência constitucional indissociável do direito à vida. ... A interpretacao da norma programatica nao pode transforma-la em promessa inconsequente. ... Entre proteger a inviolabilidade do direito à vida, que se qualifica como direito subjetivo inalienável assegurado pela própria Constituição da República (art. 5º, caput), ou fazer prevalecer, contra essa prerrogativa fundamental, um interesse financeiro e secundário do Estado,

It is this rationale that would prove highly influential in thousands of decisions favouring claimants in similar cases across the country becoming, as already mentioned above, a kind of de facto binding precedent. Given that it can be applied independently of the existence of infra-constitutional legislation regulating the right to health (only to be found in Rio Grande do Sul),[61] it has been used in thousands of cases that favour the claimants in several other states. But it remains as problematic and overly simplistic, in my view, as the rationale in RE 242.859/RS. Indeed, it frames the problem as a simple bilateral conflict between two competing interests. On one side, there is an individual's right to life and health care; on the other side, there is a 'secondary financial interest of the state'. The role of the court, according to this view, is simply to decide whose interests should win based on the priority established in the Constitution. Put this way, there is no dilemma. Who would disagree that life and health, protected by the Constitution in its most important section (the chapter on Fundamental Rights and Guarantees)[62], should prevail over 'secondary financial interests' of the state?

However, this is clearly an inadequate, overly simplistic and dangerous formulation of the problem. Again, given that the provision of health services and goods is dependent on limited resources, there is no real conflict between life and the state's financial interest here. Rather, there is an intractable problem of how to allocate limited resources amongst numerous needy individuals. The 'secondary financial interest' of the state is in fact the interest of the whole population, including the individual claimants, who depend on the limited resources of the state for the enjoyment of health services and actions.[63] By ignoring these distributive and polycentric dimensions of their decisions, courts are simply diverting resources from the health programmes chosen by the states' health departments to the satisfaction of the needs of some individuals who manage to reach the courts (necessarily a minority, given that access to courts is also an extremely limited resource).[64]

entendo – uma vez configurado esse dilema – que razões de ordem ético-jurídica impõem ao julgador uma só e possível opção: o respeito indeclinável à vida'.

61 There are another two federal laws determining the provision of drugs in the specific areas of HIV/AIDS and diabetes.

62 By most important I mean most difficult to change. Art 60 of the Brazilian Constitution, which establishes the procedures for its amendments, sets the stringent conditions for proposals and approval of amendments to any part of the Constitution (eg 3/5 of votes in each chamber of the National Congress) but for four areas where no amendment can be even proposed: (i) the federative form of the state; (ii) direct, secret, universal and periodical vote; (iii) separation of powers; and (iv) individual rights and guarantees. These can only be changed if a whole new constitution is adopted.

63 See Ferraz and Vieira 'Direito à saúde, recursos escassos e equidade: os risos da interpretação judicial dominante' (2009) 52 *DADOS – Revista de Ciências Sociais,Rio de Janeiro* 223 225.

64 There is, of course, the potential that individual law suits, which originally benefit the claimant, might be extrapolated to all or many individuals similarly situated who were not originally a party to litigation. Gauri & Brinks (n 40 above). The question of whether this is the fairest and most efficient way of allocating limited resources still remains. Moreover, there is a great risk that this reallocation of resources follows, in many cases, a perverse direction: From the relatively most needy, who are often excluded from access to courts, to

Unlike its South African counterparts in *Soobramoney*, the STF does not engage, or even mention, 'the danger of making any order that the resources be used for a particular patient, which might have the effect of denying those resources to other patients to whom they might more advantageously be devoted'.[65]

Yet again, the relevant question to ask is this: What institution should make these difficult decisions about the precise content of social rights? If the Constitution expressly recognises these rights, politicians and civil servants cannot have the final word on what they actually entail.[66] Especially in developing countries like Brazil and South Africa, where perceptions of corruption are high and the political branches have a dismal reputation for diligently carrying out their constitutional duties, a highly-deferential approach by the courts would strike many as a carte blanche for the total disrespect of social rights by the state.[67] On the other hand, it seems wrong to allow courts to gainsay the allocative decisions of the elected branches and its experts, especially when they do that with no regard to the distributive and polycentric effects of their decisions.

The dilemma bites again! Can courts enforce constitutional social rights beyond the deferential, arguably-abdicative model of reasonableness adopted by the South African Constitutional Court without falling into the inadequate, arguably usurpative model so far adopted by the Brazilian courts?

4 Co-operative constitutionalism and dialogical theories: Solving the dilemma?

There is a body of literature emerging which argues that there is indeed a choice between total judicial abdication and seriously-intrusive judicial remedies. There are now several proponents of this intermediate, 'third way' position on social rights justiciability. Their approaches vary somewhat, but they all seem to be recommending a type of judicial review that encourages a so-called 'co-operative constitutionalism' between courts and the political

the relatively better off, who often possess the resources and opportunities to reach the judiciary. According to a recent study of 170 cases brought against the municipal government of São Paulo in 2005 claiming drugs based on the right to health, 63% of the claimants lived in areas with low social exclusion, most of them relying on the services of private lawyers. This suggests that the intuitive hypothesis that the judicial channel is being 'captured' by the middle-classes is rather plausible. See Vieira and Zucchi (n 40 above). See also OLM Ferraz 'Right to health litigation in Brazil: Worsening health inequalities?' (2009) 11 *Health and Human Rights* 33.

65 Para 30.

66 CB Pulido 'Fundamento, concepto y estructura de los derechos sociales. Una crítica a "¿Existen derechos sociales?" de Fernando Atria' (2004) 4 *Discusiones* 99 120.

67 See eg JA Krell *Direitos sociais e controle judicial no Brasil e na Alemanha: os (des)caminhos de um Direito Constitucional 'comparado'* (2002).

branches.[68] Rather than completely abdicate from the task of protecting social rights, giving carte blanche for the state to implement them as it wishes, or usurp the political branches' power entirely, forcing the state to provide some determinate level of a social good (housing, health, etcetera) to a certain individual or individuals, courts should tread a middle ground between the two and co-operate with the political branches.

Now, so that we can assess whether this co-operative model provides a solution for the justiciability dilemma, we must know in more detail what the appropriate scope of the legislative and judicial roles are. Not surprisingly, not all proponents of this model offer the same response to this question, and there is no space here to analyse the whole of this emerging but already reasonably substantive literature.[69] I will focus, thus, on the works of Dixon and Fredman, which I believe provide a good representative sample of the co-operative model of social rights adjudication.

Let us start by identifying the common features of all proposals to then focus on their differences. As Dixon observes:

> For co-operative constitutionalism, any theoretical account … must begin by acknowledging serious indeterminacy in provisions [recognising social rights] … and, thus, accept that the content and priority to be given to rights-based claims … are bound to be the subject of disagreement among individuals in the societies where these rights are recognised.[70]

Within this context, 'rights-based controversies must be resolved … by more squarely democratic deliberative processes that attempt to give effect to constitutional understandings in the broader "constitutional culture"'. Judicial enforcement that is too strong, under these circumstances, would 'clearly fail to respect principles of equality among citizens in processes of democratic constitutional deliberation'[71] or, as put by Tushnet, the 'right, grounded in democratic theory, for majorities to prevail when, acting through their representatives, they enact statutes that are consistent with reasonable interpretations of the constitution even if those interpretations differ from those the courts offer'.[72]

Most proponents of co-operative constitutionalism, thus, start from the same premise, that the political branches should remain the primary locus of social and economic policy decision making. They also seem to agree,

68 For a good discussion of the debate about the legitimacy of judicial review in general and the so-called institutional dialogue theories, see CH Mendes 'Is it all about the last word? Deliberative separation of powers 1' (2009) 3 *Legisprudence* 69. For the application of dialogical theories to social rights, see M Tushnet *Weak courts, strong rights: Judicial review and social welfare rights in comparative constitutional law* (2008), Fredman (n 4 above) and R Dixon 'Creating dialogue about socio-economic rights: Strong-form v weak-form judicial review revisited' (2007) 5 *International Journal of Constitutional Law* 391.

69 Dixon (n 68 above).

70 Dixon (n 68 above) 399.

71 Dixon (n 68 above) 401-402.

72 Tushnet (n 68 above) 264.

however, that the political process can and often does fail to respect the right of all citizens to equal participation in the process of deliberation. These failures, according to Dixon's persuasive classification, are of two main kinds: Omissions and delays. The political process can be and often is deaf to the voices and rights of some individuals and groups in society. This can happen for several different reasons, including time pressures, lack of insight, pure lack of competence or experience and, something that Dixon fails to mention, straightforward discrimination. She refers to all these types of omissions with the evocative term 'blind spots'.[73] As well as 'blind spots', the political process is also subject of what Dixon calls 'burdens of inertia'. Here, the problem is less one of 'invisibleness' of the interests of some individuals and groups than delay and inertia in the process of implementation of already recognised interests. When the political processes fail in either of these ways, there is some scope, according to the co-operative model, for courts to exercise some role. What exact role, as we shall soon see, is where the differences between proponents of the model start to appear. But they all seem to agree on a further, more general point: Unlike in traditional strong judicial review, courts should not perform a 'countermajoritarian' role but, rather, as put by Fredman, they should 'act as a catalyst for democratic initiatives'; they should perform a 'democracy strengthening' role.[74]

We could summarise the points of convergence among different proponents of the co-operative model of social rights adjudication in the following way: (i) there is legitimate disagreement about the content of social rights; (ii) under such circumstances, deliberative democratic processes should take precedence over courts in determining the content of these rights; (iii) the political processes can and often do fail to be genuinely deliberatively democratic; and (iv) there is a legitimate role for adjudication when this happens, but one that is not 'countermajoritarian'.

What, however, is the precise scope of legitimate judicial intervention when the political process fails? This is where, as mentioned above, the proposals start to differ (and become rather less clear), likely due to the intractability of the question. Indeed, as well observed by Fredman, her own model faces the most difficult challenges at the level of remedies.[75] As she puts it, '[t]here remains the question of whether the court retains a role in ensuring that the outcome reflects not just the deliberative criteria, but the essence of the right itself'.[76] Depending on the nature of the role allowed for courts in the determination of the content of social rights (procedural or substantive) and the strength of the remedies they might issue (strong or weak), courts will still be charged with either abdication or usurpation when following the co-operative constitutionalism approach. In the passage that

73 Dixon (n 68 above) 402.
74 Fredman (n 4 above) 118-119.
75 As above.
76 Fredman (n 4 above) 122.

follows in Fredman's book, one finds a perfect restatement of the dilemma that the co-operative model was supposed to solve:

> On the one hand, the democratic imperative suggests that courts should not impose solutions; but should instead act as a catalyst for democratic initiatives. On the other hand, positive duties would be of no value if they did not make it necessary to take action to fulfil the duty.[77]

As Dixon observes, some co-operative constitutionalism theorists, such as Sunstein, make a very clear choice towards a weaker, and more procedural, role for the courts.[78] Both Fredman and Dixon, however, are eager to avoid this highly deferential (and some would say abdicative) model and allow a stronger, more substantive role for the judiciary. As Fredman observes, deliberation also 'necessitates action on the results of deliberation', and it is to misunderstand 'the nature of deliberative democracy' to claim that courts should never impose a mandatory and substantive order on the political branches. In a similar vein, Dixon remarks that 'something is always lost when judicial intervention is weakened at either a substantive or remedial level'.[79] Yet, in my view, neither ends up offering an adjudicative model which is substantive to any significant degree.

A good example to illustrate this is the famous South African case of *Grootboom* already mentioned above. To briefly recap, it involved a group of homeless people living in intolerable conditions in a squatter settlement near Cape Town. They claimed that their right to housing recognised in the Constitution was being violated and demanded from the Court an order to oblige the state to provide them with adequate accommodation immediately. The Court refused, in line with its social rights jurisprudence, to recognise individually and immediately-enforceable rights to housing, but found the state's housing policy unreasonable. This was due to its focus on long-term permanent housing and the overlooking of the more urgent needs of those in the most desperate and vulnerable conditions. But the Court never told the government precisely how to do this, let alone how much money of the housing budget to allocate to the most vulnerable. Both Fredman and Dixon see *Grootboom* as a good example of the legitimate role of courts to counter the failures of the political process. It gave a voice to 'those who are most disadvantaged and who are most likely to lose out in the politics of interest bargaining'.[80] But they also claim that the correct adjudication model must be stronger, that is, more substantive, than that adopted in *Grootboom*.[81] But how much stronger? They both oppose, as

77 Fredman (n 4 above) 118-9.
78 Fredman (n 4 above) 411 ff.
79 As above.
80 Fredman (n 4 above) 117. Dixon (n 68 above) makes a similar comment at 414. Note, however, that Fredman also believes that *Grootboom* could be improved even in terms of enhancing deliberation, citing *TAC, Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) and the *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (6) SA 417 (SCA) cases as examples where this aspect was better achieved.
81 Dixon (n 68 above) 411 and Fredman (n 4 above) 119.

most proponents of co-operative constitutionalism do, any significant substantive role for the courts in determining the content of social rights, as for instance the minimum core approach defended by some commentators.[82] Where exactly in between this and the reasonableness approach in *Grootboom* they stand is not entirely clear, but it seems that both lean more towards the procedural end of the spectrum rather than the substantive one. Dixon, for instance, is prepared to give courts a reasonably strong substantive role in what she calls the negative dimensions of socio-economic rights (that is, 'allowing courts a relatively broad approach to the definition of rights, and strong remedies').[83] But when the positive dimensions of social rights are at stake, she claims that courts, at least in the South African context, should adopt a 'weak rights-strong remedies' approach, that is, one in which they would not embark on a 'process of rights definition that ignored the scope of existing disagreement [on the content of social rights]', but should 'impose some form of coercive injunctive relief … that at least requires parties to report back to a court on compliance'.[84] In a similar vein, Fredman argues that social rights should not be interpreted by courts as giving the right holder the right to an object (that is, 'a concrete personal benefit'), but rather the right to an action. Courts are therefore not to determine what exactly in terms of healthcare benefits, housing provision etcetera any particular individual is entitled to. Rather, they should assess whether state action can be 'justified as a convincing means of fulfilling the right'.[85]

Despite their impressive attempts to distance themselves from purely procedural models of social rights adjudication, it seems that their models are nonetheless rather procedural. Given their starting premise that courts should not get involved in the definition of the substantive content of social rights, all they can do (and I do not imply by that that this is little or much) is make sure that the voices of those excluded in the political debate have a forum of expression and that the policies of the state to achieve their largely self-imposed social and economic goals are not unreasonable or never implemented. It is not difficult to imagine, thus, how strong supporters of justiciable social rights would likely criticise such approaches as instances of judicial abdication.[86]

82 Bilchitz (n 4 above).

83 Provided that they defer to legislative sequels that reveal clear and considered disagreement with their prior reasoning, at 408.

84 Dixon (n 68 above) 413.

85 At 122.

86 See D Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 119 *South African Law Journal* 484 and D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1; T Roux 'Understanding *Grootboom* - A response to Cass R Sunstein' (2002) 12 *Constitutional Forum* 41; DM Davis 'Socio-economic rights: Do they deliver the goods?' (2008) 6 *International Journal of Constitutional Law* 687; and Scott & Alston (n 25 above) 206, 214, whereas those more concerned with the usurpation horn of the dilemma could hail the decision as the way forward in social rights

My aim in this section, it is worth re-emphasising, was not to criticise the so-called dialogical or deliberative models of social rights adjudication. I actually believe that, despite being largely procedural (and in great part for this precise reason), they are clearly superior to the competing strong-substantive models advocated by many commentators.[87] My point here was simply to show that they do not solve the justiciability dilemma. Because they do not grant courts the power both to determine the content of social rights and issue mandatory orders against the state to guarantee these rights to individuals ('strong rights-strong remedies'), they will certainly face (rightly or wrongly) the same charges of abdication levelled at those who defend the non-justiciability position.

5 Conclusion: What is the way ahead for social rights justiciability?

I have claimed in this paper that the dilemma between usurpation and abdication that courts inevitably face when they are called upon to adjudicate constitutionalised social and economic rights is indeed a real and intractable one. I have tried to substantiate my conclusion with a comparative analysis of the social rights jurisprudence of the South African and Brazilian courts (particularly in the field of the right to health) which currently stand on opposite sides of the 'justiciability spectrum'. Whereas the South African reasonableness approach is seen as too deferential and abdicative of the judiciary's role in protecting rights, the Brazilian individually-enforceable rights approach is deemed too intrusive and usurpative of the prerogative of elected representatives to define how the limited resources of the state should be allocated amongst unlimited social needs. I have argued, finally, that the emerging co-operative constitutionalism theories, which try to apply the institutional dialogue theories of judicial review to social rights adjudication, do not solve the dilemma. They are currently largely procedural, and therefore liable to the same charges of abdication levelled at the reasonableness approach of the South African Constitutional Court. But if they try to become more substantive, they will certainly attract the accusations of usurpation currently levelled at more assertive courts such as the Brazilian STF.

But are we to conclude, thus, that there is no solution for the dilemma? Perhaps we should. As argued persuasively by Michelman in the context of the United States of America, even if, in ideal theory, there is a place for social rights in the American Constitution, in non-ideal theory there is a strong

justiciability. See CR Sunstein 'Social and economic rights? Lessons from South Africa' (2000) 11 *Constitutional Forum* 123. CR Sunstein *Designing democracy: What constitutions do* (2001).

87 I have no space to discuss this any further here, but have analysed in more detail one of the models (n 27 above).

argument for not including them.[88] Two features of the American real world point towards this direction: The extremely contested nature of distributive justice questions in American society, and the ingrained place of strong judicial review in the American constitutional system. As he puts it, given the 'deep and obdurate division within American opinion regarding government policy in the socio-economic field' and 'currently entrenched reliance on judicial review as an indispensable guarantor of the rule of constitutional law',[89] one 'can see how a respectable, moral case for the exclusion of socio-economic assurances from US constitutional law might possibly trump an ideal-theoretic case for their inclusion'.[90] As a consequence, he claims:

> In a country like the United States, given both our embrace of popular government and the irreducible uncertainty, contestability, and contingency affecting choices in the field of socio-economic policy, any constitutionalised socio-economic commitment inevitably must be couched in abstract, best-efforts terms, South African style. But the American culture and practice of judicial review do not fit comfortably with the seemingly boundless, practical indeterminacy of a commitment thus abstractly couched. By constitutionalising socio-economic rights in such a form, the standard worry runs, you would force the American judiciary, and especially the Supreme Court, into a hapless choice between usurpation and abdication, from which there would be no escape without either embarrassment or discreditation.[91]

Where Michelman seems to go wrong is when he speculates that 'the situation may be, to some degree, special to the United States'. It seems to me that both real world conditions that might justify Americans (even those supportive of social rights) not to support their inclusion in their constitution, apply more or less everywhere in the Western world, albeit, admittedly, in different degrees. Indeed, there is significant controversy everywhere about the scope of states' duties to provide individuals with health, education, housing, etcetera. There is also an expectation in most constitutional democracies, as the charges against the South African Court demonstrate, that courts should use strong remedies in the protection of all rights, including social rights. If Michelman's argument about America (and mine about the Western world) are correct, then the justiciability dilemma that justifies not including social rights in the American Constitution applies more broadly, and not just to the United States.

88 The distinction between ideal (strict compliance) and non-ideal theory comes from J Rawls *Justice as fairness: a restatement* (2003) 13. Rawls writes: 'Strict compliance' … 'means that (nearly) everyone strictly complies with … the principles of justice. We ask in effect what a perfectly just, or nearly just, constitutional regime might be like, and whether it may come about and be made stable … under realistic, though reasonably favorable, conditions. In this way, justice as fairness … probes the limits of the realistically practicable, that is, how far in our world (given its laws and tendencies) a democratic regime can attain complete realization of its appropriate political values — democratic perfection, if you like.'

89 F Michelman 'Socioeconomic rights in constitutional law: Explaining America away' (2008) 6 *International Journal of Constitutional Law* 663 682, available at http://icon.oxfordjournals.org/cgi/content/full/6/3-4/663 (accessed 13 December 2013).

90 Michelman (n 89 above) 685.

91 As above.

The problem, of course, is that in many countries, such as Brazil and South Africa, the decision to constitutionalise social and economic rights has already been made and, most likely, will not be reversed in the foreseeable future. All we can hope, therefore, is that either a more stable consensus on what these rights entail emerges, or that the expectation that rights necessarily imply strong judicial remedies gradually wanes, or a combination of both. Until then, however, courts will keep facing the intractable justiciability dilemma discussed in this paper. I believe that, at this juncture, it is better to be somewhat discredited in the eyes of impatient rights activists and commentators (the South African Constitutional Court's predicament) than embarrassed (the Brazilian STF situation).

CHAPTER 19 REALISING THE RIGHT TO HEALTH THROUGH CO-OPERATIVE JUDICIAL REVIEW: AN ANALYSIS OF THE ROLE OF THE INDIAN SUPREME COURT

Amita Dhanda

1 Introduction

Octavio Ferraz has examined the role of the courts in the realm of socio-economic rights and more particularly the right to health on the two poles of abdication and usurpation. On the basis of such conceptual categorisation, he opines that, whilst the reasonableness prompted decisions of the South African Constitutional Court could be perceived as abdicating, the Brazilian Supreme Court, with its stress on individual relief, could be viewed as usurping. Courts, according to Ferraz, cannot escape this duality in the realm of socio-economic rights. Considering the allocation of resources between competing claims is at the heart of the adjudication on socio-economic rights. Ferraz expresses his preference for the abdicating posture of the South African Constitutional Court. I am in this accompanying piece using the conceptual apparatus provided by Ferraz to delineate and analyse the role played by the Indian Supreme Court in the legal realisation of the right to health.

The Constitution of India when adopted in 1950 incorporated civil political rights as fundamental rights and included them in Part III of the Constitution. The social economic rights were designated as Directive Principles of State Policy (DPSP) and included in Part IV of the Constitution. Article 13 of the Constitution forbade the state from making any laws which took away or abridged the fundamental rights and any laws made in contravention of the fundamental rights were to the extent of contravention void. This embargo was given teeth by guaranteeing the right to directly move the Supreme Court of India by appropriate proceedings for the enforcement of the fundamental rights. In contrast, the social economic rights included in Part IV of the Constitution could not be enforced by any court, even as the principles included in the part were declared to be fundamental in the governance of the country and a duty was reposed on the state to make laws to apply these principles.

In the early years, this prohibition of justiciability was strictly interpreted by the Supreme Court. Thus, the Court ruled that legislation was required for the implementation of the Directives. The DPSPs without more did not create a justiciable right in favour of individuals. Consequently, courts could not compel the state to carry out any of the DPSPs. Further, due to the prohibition on justiciability, no law could be declared void on the ground that it infringed the DPSP. Even though the DPSP were declared to be fundamental in the governance of the country, the state could not use them to trump any of the other limitations placed on legislative and executive power. Thus, in *State of Madras v Champakam*,[1] the reservations by the state for weaker sections were nullified on the reasoning that Part IV was subsidiary to Part III. To nullify the impact of this judgment, article 15 of the Constitution was amended to allow for the making of the special provisions for socially and educationally-backward classes. Even as the Court began by privileging fundamental rights, in subsequent decisions in case of conflict between Part III and Part IV of the Constitution, the Court opted for harmonious construction. The need for harmony was also dictated by the 25th Amendment to the Constitution which, by adding article 31C, provided that any laws made for redistribution of resources and prevention of monopolies as required by articles 39(b) and (c) could not be questioned in any court of law on the ground that it infringed the right to equality or property. A subsequent government effort to accord primacy to all the DPSPs over the fundamental rights by the 42nd Amendment did not obtain the approval of the Court, though the primacy to articles 39(b) and (c) remained.

It is significant to note that the process of according primacy to the DPSPs by the legislature necessarily reduces the ambit of the fundamental rights. However, a process by which the Court draws upon the Directive Principles to settle the meaning of fundamental rights both expands the ambit of the rights and reduces the dichotomy between fundamental rights and DPSPs. This development is of special significance to the theme of this article, since it is by the expanded reading of fundamental rights that the Court started to pronounce upon matters of health which were by the text of the Constitution included in the DPSPs. The Court obtained a say in settling the contours of the right to health by expanding the ambit of article 21.

The Indian Supreme Court started with a very formal and legalistic interpretation of Article 21 whereby it ruled that the deprivation of life and liberty was permissible provided it was done by a duly enacted parliamentary legislation. Executive orders could not be the basis of denying life and liberty. And life was primarily seen as survival. This interpretation was progressively altered whereby at first the Court started to enhance the fairness requirements of the life and liberty depriving procedure and subsequently by pronouncing upon the quality of life guaranteed by the Constitution. This life the Court ruled was not a right to bare physical existence but a right to a full

1 AIR 1951 SC 226.

and meaningful life. And a full and meaningful life includes the right to health within its purview.

The above narration outlined how the Indian Supreme Court through a circuitous route accorded justiciability to the right to health. The paving of this circuitous route could itself be categorised as usurpation by institutional essentialists. However that debate would be only of academic significance for the central inquiry of this article which is what the role of Courts can be to implement the right to health? How does the Indian Supreme Court fare on the Ferraz scale of abdication and usurpation? The following analysis will show that the Indian Supreme Court cannot be encapsulated under any one label since it has in realising the right to health played both activist and restraintist and whilst exercising restraint has also played the role of advisor, facilitator and promoter of health rights.

The difficulty to categorise the role of the Court also emanates from the fact the Court has intervened in a wide range of issues in the realm of health. Thus whilst you have the Court dealing with the drug policy at one end of the spectrum it is concerned with the prompt administration of medical treatment to accident victims at the other end. Evidently, this wide range required varied strategies and the response of the Court has differed from issue to issue. It is this varied response that shall be elaborated upon in the rest of this article.

2 In the realm of policy

Vincent Panikurlangara v Union of India (1987) 2 SCC 165, amongst the early cases which reached the Supreme Court sought a rationalisation of the drug policy. The petitioner in public interest sought a ban on the import, manufacture, sale and distribution of such drugs whose ban had been recommended by the Drugs Consultative Committee. The petitioner also asked the Court to direct the Central Government to constitute a high powered authority to go into the hazards suffered by people of the country by reason of such drugs being in circulation and to suggest remedial measures including the award of compensation.

The Supreme Court admitted the petition and issued notice to the Medical Council of India, the Indian Medical Association and the Drug Control Authorities of the states to assist the Court in the matter. However, except for the state of Karnataka, the notice did not evoke a response from any of the state authorities. The Court stressed the importance of the matter for the country and rebuked the statutory authorities for not responding to the summons of the Court. These bodies, the Court pointed out, were not litigants and did not have the choice of keeping away like private parties in ordinary litigation. Even as the Court stressed the importance of widespread participation and ordered the induction of consumer representatives on to the Drugs Technical Advisory Board, it refrained from pronouncing on the

main petition by stating that '[h]aving regard to the magnitude, complexity and technical nature of the enquiry … a judicial proceeding is not appropriate … for [the] determination of such matters'. The Court thus took the matter on board to stress its importance, expanded the number of stake holders involved in the process of deliberation, and advised the government to examine the issues raised by the petitioner, but refrained from taking any action in the matter.

3 Medical treatment for accident victims

The issue of medical treatment for accident victims was brought to the Court by a human rights activist when a scooter rider bled to death because medical treatment was provided only after the completion of legal formalities. The Court issued notice to the Ministry of Health, allowed the Medical Council and the Indian Medical Association to be sued ('impleaded') in the matter, in order to determine the appropriate procedure for providing medical treatment to an accident victim. It is significant to note that each of the 'impleaded' authorities conceded that the medical needs of the victim should prevail over forensic considerations. Consequent to this concession and, more importantly, because considerations of life should prevail over law enforcement, the Supreme Court directed that the treatment of accident victims should not be delayed in order to investigate the cause of the accident. The Court also required that the treatment should be provided by the first medical establishment, whether public or private, to which the victim is brought since administrative considerations of zoning could not prevail over the accident victim's right to treatment.

Significantly, the Court also recognised the limitations of making law through judgments and therefore it directed that the decision should be published in all journals reporting the decision of the Supreme Court whilst adequate publicity should be given by the print and electronic national media. It further required that adequate copies of the judgment be sent to every High Court who could then forward them to every session judge within their respective jurisdictions and the session judges in turn were required to give due publicity to the decision in their jurisdictions. The Court also required the Medical Council of India to forward copies of the judgment to every medical college affiliated to it. Judgment copies were also to be sent to state governments with a direction to provide wide publicity in order to ensure that every practising doctor would become familiar with the requirements of the law. This direction of the Court demonstrated that the Court was attempting to lessen some of the institutional constraints surrounding judge-made law.

4 In an emergency

An oft-quoted constraint on the realisation of socio-economic rights is the resources required to enforce them. The right to medical care is perceived as an integral component of the right to health even as controversy surrounds the extent of the right. Is the right unlimited in its purview? Do all people have the right to access all manners of treatment for all kinds of ailments or do resources place a constraint on the extent of the right? Ferraz deliberates on how the South African Constitutional Court upheld restrictions placed by the South African Government on dialysis. The Indian Supreme Court has not been required to address a similar kind of question. The Court has, however, refused to entertain the constraint of resources in the context of emergency treatment. In *Paschim Banga Kheth Mazdoor Samiti v State of West Bengal*,[2] the Court was required to address the health entitlements of an agricultural labourer who suffered head injuries and brain hemorrhage after falling of a train. Subsequent to the accident, the petitioner was taken to several government hospitals for treatment but failed to obtain admission as there were no vacant beds. The petitioner ultimately received treatment as an in-door patient at a private hospital and moved the Court for appropriate orders to vindicate the infringement of his right to health.

The Supreme Court used the situation to pronounce upon the health entitlements of persons in a medical emergency. To that end, the Court made the following directions:

> 1 Adequate facilities are available at primary health centres where the patient can be given immediate primary treatment so as to stabilise his condition.
>
> 2 Hospitals at the district level and sub-division level are upgraded so that serious cases can be treated there.
>
> 3 Facilities for giving specialist treatment are increased and are available at the hospitals at district level and sub-division level having regard to the growing needs.
>
> 4 In order to ensure the availability of a bed in an emergency at state level hospitals, there is a centralised communication system so that the patient can be sent immediately to the hospital where a bed is available in respect of the treatment which is required.
>
> 5 Proper arrangement of an ambulance is made for transport of a patient from the primary health centre to the district hospital or sub-division hospital and from the district hospital or sub-division hospital to the state hospital.
>
> 6 The ambulance is adequately provided with necessary equipment and medical personnel.
>
> 7 The health centres and the hospitals and the medical personnel attached to these centres and hospitals are geared to deal with larger number of patients

2 (1996) 4 SCC 37.

> needing emergency treatment on account of the higher risk of accidents on certain occasions and in certain seasons.

The Court admitted that financial resources would be required to provide these facilities, but was quick to point out that it was the constitutional obligation of the state to provide adequate medical services to the people. The Court recalled how in the context of legal aid it had ruled that the state cannot avoid its obligations on account of financial constraints. The said observations, the Court emphasised, 'would apply with equal, if not greater force in the matter of discharge of constitutional obligation of the state to provide medical aid to preserve human life'.

5 Health entitlements of government servants

In *Paschim Banga*, the Supreme Court was deliberating upon the emergency health entitlements of the populace generally. In a series of cases, the Court has been required to pronounce upon the health claims of government servants. In *Surjit Singh v State of Punjab*,[3] the Court allowed a government employee to undergo open heart surgery at a specialised hospital in London, England. In filing his medical claims, he did not seek reimbursement of the actual expenses incurred, but instead asked the state to reimburse that quantum of the cost as would have been incurred had he undergone the surgery at a private hospital in India. The state government allowed government employees to seek treatment in private hospitals after a medical board certified that such treatment was not available in government hospitals. The petitioner proceeded to seek treatment abroad without presenting himself to a medical board and obtaining an opinion that treatment for his condition was not available in the government hospitals in the state.

The state refused the petitioner's claim for reimbursement on the ground that he had failed to follow this mandatory procedure before proceeding to seek treatment abroad. The High Court only allowed such of the expenses that the petitioner had incurred towards his treatment in India. In his appeal to the Supreme Court, the Court changed the terms of discourse and described the act of the government servant as an act of self-preservation. And 'self-preservation of one's life', the Court ruled, 'is the necessary concomitant of the right to life enshrined in article 21 of the Constitution of India fundamental in nature, sacred, precious and inviolable'.

Thus, in *State of Punjab v Mohinder Singh Chawla*,[4] the Court included within the constitutional obligation to provide health facilities the obligation to reimburse expenses incurred to access these facilities. Thus, in the aforementioned case, the respondent had a heart ailment which required the

3 (1996) 2 SCC 336.
4 (1997) 2 SCC 83.

replacement of two valves. Since the specialised treatment was not available in the state of Punjab, he was permitted to obtain the treatment at a specialised health facility outside the state. The controversy was whether the respondent was entitled to claim reimbursement of the room rent paid whilst obtaining the medical treatment. The state refused the reimbursement, but was ordered to make the necessary payment by the Punjab and Haryana High Court. In an appeal from the order of the High Court in the Supreme Court, the state contended that such expenses would be a needlessly heavy burden which would prevent the state from providing assistance to general patients. The Court appreciated the need for greater allocation of resources for general patients, but deflected the contention of prioritisation by berating the government on improper maintenance and mismanagement of government hospitals. It evoked the constitutional obligation of the state to bear the expenses for government servants while in service or retirement and insisted that it was asking the state to do no more than fulfil its constitutional obligation. That such performance of the constitutional obligation would require incurring of expenses, the Court perceived as an inevitable consequence which did not merit its concern and consideration.

The issue of prioritisation of interests was confronted by the Court only in *State of Punjab v Ramu Lubhaya Bagga*.[5] In this case, the Supreme Court was required to consider whether the state government had the authority to alter its medical reimbursement policy and whether such modification was constitutionally permissible. The government of Punjab in its 1991 policy allowed the reimbursement of medical expenses whether incurred in a government or private hospital. In 1995, this policy was altered to provide that, whilst treatment could be obtained in a government or private hospital, the reimbursements were limited to the rate applicable in the government hospital.

The Supreme Court upheld the right of the state to change its policy from time to time according to changing circumstances. The government, the Court informed, forms its policy based on a number of circumstances on facts, law including constraints based on resources. It is also based on expert opinion, hence it would not be wise for the Court to evaluate the beneficial effect of the policy. The Court did not permit the state to totally deny its obligation to provide medical treatment. It, however, considered the actual provision of treatment a matter which resided within the jurisdiction of the state. Thus, a reduction in the reimbursement of medical expenses due to financial constraints was viewed as perfectly permissible by the Indian Supreme Court. Even as the change in policy was upheld by the Court in individual cases, the Court was inclined to make a liberal reading and allow for the maximum reimbursement possible in the particular case.[6]

5 (1998) 4 SCC 117.
6 Facts of cases on file with author

6 Treatment facilities at mental hospitals

This batch of cases drew the attention of the Indian Supreme Court to the living conditions and treatment facilities available at different mental hospitals in the country. In its first interaction with the issue of treatment facilities in mental hospitals, the Supreme Court drew out detailed guidelines on minimum treatment facilities and acceptable living conditions in hospitals. In order to ensure that the drawn guidelines resulted in a change of living conditions, the Court has issued a continuing mandamus and tried to ensure that the guidelines provided by it were in fact implemented by the state authorities. Subsequent to a long sojourn of trying to enforce standards, the Court appointed the Human Rights Commission to perform this job on its behalf.

The Court had its second encounter with mental hospitals when it was faced with the maltreatment of persons living with mental illness in places other than mental hospitals. This time round, the Court was intent on creating an infrastructure of mental hospitals in all parts of the country, in order to ensure that no person living with mental illness was obtaining treatment at any place other than a mental hospital. In this round of orders, the Court was less concerned with laying down the minimum treatment conditions operable in mental hospitals and more concerned with ensuring that there was a sufficient number of hospitals in the country. The Ministry of Health in its affidavit tried to impress upon the Court that mental hospitals were not commensurate with mental health treatment. Even as the Court in its rulings did not accede to this argument of the Ministry and insisted that a psychiatric hospital should be established in every state of the country. Consequent to the order of the Court, the Ministry has enhanced the financial allocations of existing mental hospitals and has also redoubled the resources allocated to the District Mental Health Programme, but has not, due to the Court's directive, reversed its policy on the establishment of psychiatric hospitals. The Ministry had decided not to establish any mental hospitals after 1960, and the Court's orders have not caused this policy to change. At the same time, it is significant to note that the intervention of the Indian Supreme Court has increased governmental attention to the health care entitlements of persons living with mental illness.

7 Health entitlements of prisoners

The health entitlements of prisoners, like the health entitlements of persons living with mental illness, have reached the Court in crisis situations. The Court has been required to pronounce upon the health rights when a person in custody has lost his life due to neglect and the absence of health care facilities. The Court has been careful to pronounce that persons are sent to prisons as punishment and not for punishment. Since the Court has at all

times stressed that there is a basic entitlement of all persons to medical care, it has extended the same right to prisoners.

8 Conclusion

What does this analysis of the Indian Supreme Court add to Ferraz's analysis? The analysis shows that if the slippery nature of socio-economic rights is kept in view, then it may not be desirable to box courts into either the abdicators' or the usurpers' corner. Courts can and should play both roles as demanded by the situation. Such indeterminate functioning by courts could allow them to be greater guarantors of social economic rights than if they are exclusively cast in activists or restraintist roles.

The analysis also shows that the Court needs to more deeply reflect on the category of citizen for whom they should intervene. For example, the Court's activism for accident and emergency care victims is unexceptionable, but its zealousness in ensuring the highest threshold of rights for government servants requires more consideration. At the same time, the concern of the Court has brought the healthcare entitlements of mental hospital inmates and prisoners on the radar of public policy, a consequence which could not have ensued without active monitoring by the Court.

The role of the Indian Supreme Court in the realm of health cannot be understood on a dichotomy of activism and restraint. The complex nature of the Court's intervention can be better understood when placed on a continuum of activism and restraint. Such a continuum allows room for restrained activism and activist restraint. The Court may succeed in obtaining actual relief in individual cases and also nudge public policy in a more constitutionally consonant direction by asking the rights question. The Indian Supreme Court shows the merit of reflecting on the role of the Court outside the ambit of institutional essentialism and in the category of constitutional co-operation. Co-operative constitutionalism allows courts to give a voice to those issues and interests which have been marginalised in the political system. If it is recognised that the articulation of a right in the juridical system does not necessarily mean that the realisation of the right has also to occur within the same system, then such articulation could be the first vital step in rendering social economic rights visible, and such visibility is necessary for the realisation of these rights. To this process of visibility pending its structural actualisation the Indian Supreme Court has been a significant contributor and to the individual aggrieved person in a particular case it has been a powerful guarantor.

CHAPTER 20

THE SOUTH AFRICAN CONSTITUTIONAL COURT AND LIVELIHOOD RIGHTS

Danie Brand

1 Introduction

Even the most cursory look at current socio-economic conditions in South Africa will show that Mahmood Mamdani was right when he lamented the absence of social reconciliation – redressing of the systemic socio-economic effects of apartheid inflicted upon the majority of its victims – as opposed to political reconciliation – redressing of specific instances of political injustice such as torture, detention and murder – in post-Apartheid South Africa.[1] Perhaps the most debilitating and tragic legacy of the 300 years of oppression, exclusion and discrimination along racial lines in South Africa that culminated in 43 years of apartheid rule in the 20th century[2] is the devastating impoverishment and social and economic inequality left in its wake.[3]

It makes sense, therefore, that South Africa's 1996 Constitution[4] – explicitly conceived as a legal framework for the overcoming of the injustices of the past and since theorised as a continuously 'transformative' document[5]

1 M Mamdani *When does reconciliation turn into a denial of justice?* (1998).

2 For an excellent, politically aware economic history of South Africa, post-colonisation in 1652, see S Terreblanche *A history of inequality in South Africa 1652-2002* (2002).

3 South Africa currently ranks 123 on the United Nations Development Index' Human Development Index: UNDP *International Human Development Indicators: South Africa* hdrstats.undp.org/en/countries/profiles/ZAF.html (accessed 29 November 2012), despite being ranked 29th in terms of GDP. Estimates of people living below the poverty line continue to hover around the 50% mark. Unemployment nationally stands at around 25% and in some areas is as high as 58%. Life expectancy is a little more than 57 years. South Africa also has the largest number of people living with HIV/AIDS (5.5 million). Finally, South Africa is one of the most unequal countries in the world, with a Gini coefficient of 0.68. Although since liberation in 1990 poverty levels have steadily, if slightly declined, inequality has steadily worsened.

4 Constitution of the Republic of South Africa, 1996, often referred to as the 'final' Constitution, to distinguish it from the other post-liberation constitution that was in force from 1994 to 1996 while the 'final' Constitution was drafted (Constitution of the Republic of South Africa, Act 200 of 1993, referred to as the 'interim Constitution').

5 See eg K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

– shows a marked focus on achieving not only political, but also social justice. The best indication of this is the extent to and manner in which it provides for livelihood rights or redistributive rights – rights to the conditions or resources required for material survival and well-being. Entrenched explicitly in its Bill of Rights[6] amongst more common and garden variety civil and political rights are affirmative rights of everyone to a clean and healthy environment, land, housing, health care, food, water, social security and assistance and education;[7] negative labour guarantees;[8] affirmative rights of children to family, parental or alternative care, basic nutrition, shelter, health care and social services;[9] and affirmative rights of detained persons to adequate accommodation, medical treatment, reading material and nutrition.[10] These rights form part of a supreme constitution;[11] the state is explicitly enjoined to 'respect, protect, promote and fulfil'[12] them and to take 'legislative and other measures' to give effect to them;[13] and both the state and, under certain circumstances, private entities are explicitly declared bound by them.[14] Finally, these rights are justiciable: Courts may determine and pronounce authoritatively on whether or not state or private conduct breaches them[15] and, if that is so, may issue 'appropriate relief' of various sorts to vindicate them.[16]

My purpose in this chapter is to review the body of work of the South African Constitutional Court in adjudicating claims based upon these livelihood and redistributive rights. I approach this review by tracing the development in the jurisprudence of three themes, themes that, so I believe, have animated and shaped the approach of the South African Court to deciding livelihood rights cases and that at the same time are present also in the jurisprudence of other apex courts in their dealings with livelihood rights. In this way I hope to throw some light on the Court's understanding of its role

6 Chap 2 of the Constitution.
7 See secs 24, 25, 26, 27 and 29 respectively.
8 See sec 23.
9 See sec 28.
10 See sec 35.
11 Sec 2 of the Constitution declares the Constitution the 'supreme law of the republic' and determines that 'law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.
12 See sec 7(2).
13 See secs 26(2) and 27(2), and also, in slightly different terms, secs 24(b), 25(5) and 29(1)(b).
14 See, with respect to the state, sec 8(1) and, with respect to private entities, secs 8(2) and (3) and 39(2).
15 Sec 38(1) declares that anyone has the right to approach a 'competent court alleging that a right in the Bill of Rights has been infringed or threatened', upon which a court may grant a remedy; and sec 165 declares that the courts are subject only to the Constitution and the law and that '[a]n order or decision issued by a court binds all persons to whom and organs of state to which it applies'.
16 Sec 38(1) mandates courts when deciding claims of infringement of constitutional rights to provide 'appropriate relief' and sec 172 requires courts when deciding constitutional matters to declare any law or conduct inconsistent with the constitution invalid and further to issue any orders that are just and equitable. The justiciability of livelihood rights is further emphasised in sec 38, which provides for standing to bring alleged breaches of constitutional rights before a court for persons acting in their own interest, on behalf of those who cannot act for themselves, on behalf of a group or class of persons and in the public interest.

in enforcing livelihood rights and to point out some of the ambiguities and tensions in that understanding, while placing it in a broader comparative perspective.

The themes I am interested in are the following: First, I highlight the role of a set of institutional concerns (concerns about the Court's institutional capacity, legitimacy and for its institutional integrity and security) in shaping the Court's approach to deciding livelihood rights cases. Second, I trace the manner in which the Court has engaged the problem of tension between individual or particular interests and more systemic or collective concerns that arises in socio-economic rights cases. Third, I describe the manner in which the Court has in its livelihood rights decisions related its work to democracy.

I start, in section 2 below, with a brief description of the major livelihood rights decisions of the Court thus far, as a basis for the remainder of the chapter. In sections 3, 4 and 5, I then trace each of the three themes in the case law in turn. In section 6, by way of conclusion, I relate the three themes to each other, attempting in the process to surface some of the tensions and ambiguities of the Court's livelihood rights jurisprudence.

2 The cases

South Africa's Constitutional Court has to date[17] decided a total of 24 livelihood rights cases of different shapes and sizes. The variety in this body of case law makes it difficult to describe the cases in a structured fashion – the decisions have dealt with a range of different rights (livelihood rights cases have been decided on the basis of rights to health care, housing, social security and assistance, water, education, an un-enumerated right to municipal service delivery and even the principle of rule of law and right of access to court); there have been challenges to legislation, broad policy programmes, discrete policy decisions and discrete administrative decisions; there have been challenges to both public and private conduct threatening livelihood rights; and there have been cases dealing with both 'positive' and 'negative' breaches of livelihood rights.[18] In the face of this diversity, a useful typology for purposes of this chapter is to distinguish between decisions that have had a systemic focus and those with an individualised or particular focus – as will appear below the three themes that I trace through the cases play out somewhat differently in these two groups of cases.

17 This chapter reflects the law up to 1 November 2012.

18 In broad terms breaches that amount to a failure in giving effect to a right (positive breaches) as opposed to breaches that amount to an interference with the existing exercise of a right (negative breaches). This distinction is based on the problematic and now to a large extent debunked distinction between positive and negative duties imposed by rights. See in this respect S Liebenberg '*Grootboom* and the seduction of the negative/positive duties dichotomy' (2011) 26 *SA Public Law* 37.

In nine of the livelihood rights cases the Court considered the constitutional soundness of broad sweep policy positions or programmes of the state, or of legislation, rather than only discrete, individual livelihood rights claims – let's call these the 'generalised' cases. Five representative examples will suffice. In its very first livelihood rights case, *Soobramoney v Department of Health, KwaZulu-Natal*[19] the Court, in deciding a claim brought by an ailing man in the final stages of chronic renal failure that the state was constitutionally obliged to provide him with renal dialysis for free, evaluated the policy guideline according to which such treatment was rationed. The Court rejected the particular patient's claim to treatment and upheld the rationing guidelines as rational and fair and so consistent with the right of access to health care. In the next case – *Government of the Republic of South Africa v Grootboom*[20] – the Court, reacting to a claim brought by a group of evicted squatters that the state was constitutionally obliged to provide them at its expense with temporary shelter, evaluated the state's entire housing policy and found it to be inconsistent with the right to have access to housing in the Constitution to the extent that it made no provision for the plight of those in the position of the claimants before it. In *Minister of Health v Treatment Action Campaign (No 2)*[21] in turn, the Court upheld a challenge to a policy of the national Department of Health not to make available an anti-retroviral medicine at public health facilities to prevent the transmission at birth from mother to child of the HI virus, holding that it was in breach of the right of access to health care, and ordered the Department forthwith to make the medicine available. In *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*[22] the Court evaluated the constitutional soundness of a statutory exclusion from access to social assistance grants of non-citizen permanent residents. It held that the provision in question offended the right to have access to social assistance and the constitutional equality guarantee and read words into the statute to render it consistent with the Constitution. Finally, in *Mazibuko v City of Johannesburg*[23] the Court considered and rejected a challenge to the water provisioning policy of the City of Johannesburg brought, amongst other things, on the basis of the right to have access to sufficient water. In particular, the Court upheld the policy of providing only 25 litres per person per day of free water and the policy of charging for water on a pre-paid rather than an on-credit for consumption basis, with credit control through pre-payment meters that terminated water supply as soon as credit ran out.[24]

19 1998 (1) SA 765 (CC).
20 2001 (1) SA 46 (CC).
21 2002 (5) SA 721 (CC).
22 2004 (6) SA 505 (CC).
23 2010 (4) SA 1 (CC).
24 Other generalised cases that won't be directly addressed in this chapter are *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC): A housing rights challenge to legislation regulating the debt recovery process in the lower courts upheld by the Court reading words into the legislation to the effect that a home could not be sold in execution of debt without an order of court, granted after consideration of all relevant circumstances (the legislation had allowed an order for the sale in execution of property to issue from the

In the remaining 15 cases the Court focussed only on the predicament of a particular, discrete group of people, without directly addressing broader state policy, programmes or legislation. These I will call 'individualised' cases. Most of these cases can be described as eviction cases, albeit of different kinds and raising different issues. Again, some representative examples will suffice. In *Port Elizabeth Municipality v Various Occupiers*[25] the Court, on the basis of constitutionally mandated eviction legislation interpreted in terms of the constitutional right to housing, denied an application by a local authority for an eviction order intended to remove a group of long term squatters from privately owned land, because the local authority was unable to offer the squatters suitable alternative accommodation. In *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*[26] the Court simultaneously upheld a claim brought by a farm-property owner that the state was obliged at its cost to vindicate his property right by enforcing an eviction order he had obtained against a large group of squatters occupying his land and a claim of the squatters that, should they be evicted, alternative accommodation must be provided to them by the state. The Court achieved this result by relying not on livelihood rights, but the principle of rule of law and the right of access to courts. It ordered the state to allow the squatters to remain where they were until alternative accommodation could be found for them and to pay constitutional damages to the property owner for the burden this would place on his property right. In *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg*[27] the Court resolved an eviction dispute between a local authority and a group of occupiers of a building declared unhealthy and unsafe for human habitation by ordering the parties to engage with each other to reach a mutually acceptable solution. In the result the occupiers were allowed to remain in the building in question (which was upgraded in the interim) until the local authority had found and provided them with suitable alternative accommodation. The Court also set aside legislation mandating the removal of occupants of condemned buildings at pain of criminal sanction, absent any judicial intercession. In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*[28] the Court granted an application for an eviction order

2‹ erk of the Magistrate's Court, rather than the Court itself); *Gundwana v Steko Development CC* 2011 (3) SA 608 (CC): Decision in *Jaftha*, requiring judicial intervention before a home may be sold in execution to satisfy a judgment debt extended also to the debt recovery process in the High Court; *Abahlali Basemjondolo Movement SA v Premier of the Province of KwaZulu-Natal* 2010 (2) BCLR 99 (CC): Housing rights challenge to 'slum-clearing' legislation of the KwaZulu-Natal province, upheld and rejected in part; and *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC): Regulations prescribing particular tariff at which hospital and other medical treatment for road accident victims can be paid for from the state run Road Accident Fund held to be in breach of constitutional right to health care services in that the prescribed tariff was so low that it prevented road accident victims from accessing private health care in a context where the public health care system did not offer all of the forms of specialised care that many such victims required.

25 2005 (1) SA 217 (CC).

26 2005 (5) SA 3 (CC).

27 2008 (3) SA 208 (CC).

28 2010 (3) SA 454 (CC) (*Joe Slovo I*).

relating to a large group of people unlawfully occupying a new low cost housing development, subject to the condition that the time and manner of their removal would be negotiated with them and the agreement that a certain percentage of the low cost housing in question would be allocated to them once the development had been completed. This decision was rescinded by the Court four years later, when the provincial government that had originally sought and obtained the eviction order requested the Court to do so, as it proved impossible for logistic reasons to implement the eviction order.[29] In *Joseph v City of Johannesburg*[30] the Court held to be procedurally unfair and set aside a decision of a local authority to disconnect electricity supply to an apartment block housing mainly impoverished people due to non-payment – the Court reached this conclusion on the basis that the applicants' unenumerated right to municipal service delivery was affected by the decision to disconnect their electricity. In *Nokotyana v Ekhuruleni Metropolitan Municipality*[31] the Court rejected an application brought on the basis of the right to housing by a group of residents of an informal settlement, that the local authority and provincial government provide them with adequate street lighting and toilets. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*[32] the Court granted an eviction order against a group of people living in a disused factory building earmarked for development, but required the City of Johannesburg to provide suitable alternative accommodation to them and the private property developer to bear further occupation of the building until that had occurred. Finally, in *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* overturned an order of the High Court countenancing the unlawful removal of residents of two apartment blocks in the course of a police action to quell a localised political protest and replaced it with an order of its own that required the residents to be returned to the buildings after they had been repaired and renovated at the cost of the state.[33]

29 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 (7) BCLR 723 (CC) (*Joe Slovo II*).

30 2010 (4) SA 55 (CC).

31 2010 (4) SA 312 (CC).

32 2012 (2) SA 104 (CC). See also *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality* 2012 (9) BCLR 951 (CC) for the Court's rejection of a subsequent attempt to enforce the order in *Blue Moonlight* through the Constitutional Court.

33 2013 (1) SA 323 (CC). Other individualised cases that won't be addressed directly in this chapter are *Machele v Mailula* 2009 (8) BCLR 767 (CC): Interim enforcement order of an eviction order against 300 impoverished occupants of a building, granted by the High Court pending an appeal against the eviction order to the Supreme Court of Appeal overturned; *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC): Series of decisions of a provincial education department prescribing a language policy and therefore an admissions policy to a public school overturned on administrative law grounds and school in question ordered to review its language policy to address access concerns and make adequate provision for the right of children to be taught in a national language of their choice; *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC): (eviction order sought by a private trust against a primary school that it had allowed to operate from its Property granted after the Court had determined that the relevant provincial department of education had made adequate arrangements for the children in the school in question to be placed at other schools in the area; *Pheko v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC): Eviction of a

How have the three themes I identified above operated in this body of case law?

3 Institutional concerns

I think it fair to say that *the* driving or shaping force in the South African Constitutional Court's livelihood rights jurisprudence throughout the last decade and a half has been a set of concerns related to the institutional nature and institutional position of the Court. In the livelihood rights cases the Court has variously expressed explicit concern about its *capacity* to evaluate and decide the often complex and broad ranging issues of social and economic policy it was confronted with (citing a lack of technical expertise with respect to the subject matter, or a lack of capacity to process information, for example; or pointing out that it was institutionally incapable of engaging with the issues before it in the sustained manner that their solution requires, having instead only a 'snapshot' view of these issues); its institutional *legitimacy* to evaluate policy, legislation and programmes conceptualised and adopted by the democratically accountable branches of government; the threat to its institutional *integrity* that would result from it issuing orders for wide-ranging socio-economic rearrangement that could prove to be non-enforceable due to a lack of resources or capacity on the side of the state; and the institutional *comity* – in classical separation of powers terms – of it extending its powers to include the evaluation and formulation of socio-economic policy. Finally, although for obvious reasons never expressed explicitly, concerns about the Court's institutional *security* vis-a-vis

33 roup of people ostensibly for emergency purposes (to avert the danger of sinkholes) held to be unlawful and local government institution concerned ordered to identify and provide suitable alternative land in the vicinity, with the requisite amenities to ameliorate the unlawful eviction, in consultation with those evicted; *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd* 2012 (2) SA 337 (CC): Eviction order against a group of people occupying private land set aside and remitted to the High Court for reconsideration in light of information that the Court ordered the local government institution involved in the case to place before that Court regarding amongts other things the impact that an eviction would have on the occupiers, its plans for providing alternative accommodation and the impact that an eviction would have on people occupying surrounding land; *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd* 2012 (4) BCLR 382 (CC): Eviction order granted to a private property owner against a group of people occupying its land, but implementation of the order made subject to the relevant local government institution gathering information about the occupiers and the impact the eviction would have on them and making available suitable alternative accommodation to them; and *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC): Landlord that had sought to evict occupiers of its property with the sole purpose to renegotiate a rent that was contractually fixed, held not to be entitled to an eviction order from the Court while a complaint to the relevant Housing Tribunal against this practice was still pending.

the other branches of government have also loomed large in its livelihood rights decisions.[34]

3.1 The role of institutional concerns

The determining influence these institutional concerns have had on the development of the Court's doctrine in livelihood rights cases is clear. In the context of the set of 'generalised' decisions described above, institutional concerns first explain the nature and structure of the Court's reasonableness review standard applied to evaluate the constitutional consistency with various livelihood rights of legislation or policy measures.

In pseudo-administrative law terms, the Court has consistently described this review standard as designed only to evaluate against a set of mostly structural requirements such as coherence, flexibility, inclusivity and comprehensiveness whether or not a measure falls within the bounds of reasonableness, without in the process prescribing to the state any one solution to the problem at hand. In the words of the Court in *Grootboom*[35] (in a passage cited with almost monotonous regularity in later similar cases):[36]

> In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.

This 'dialectic' understanding of the reasonableness[37] standard has been justified by the Court with reference to a range of the institutional concerns referred to above. In *Grootboom* itself the Court seems to justify this aspect of its review standard in institutional capacity terms – as it had done in earlier (*Soobramoney*)[38] and has since done in later cases (eg *Treatment Action*

34 For a comprehensive analyses of the role that institutional security concerns have played more broadly than only socio-economic rights in the Court's jurisprudence, see T Roux 'Legitimating transformation: Political resource allocation in the South African Constitutional Court' (2003) 10 *Democratization* 92 and 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106.

35 Para 41.

36 See eg *Treatment Action Campaign (No 2)* para 36.

37 A description given to reasonableness as review standard in administrative law by L Baxter *Administrative law* (1984) 484. Baxter posited that administrative law requires decisions not to be substantively but only dialectically or procedurally reasonable – that is, a view would be reasonable if, in an argument over it, the party opposing it would be able to accept its cogency, even though not agreeing with it.

38 Para 59.

Campaign (No 2)[39] and *Mazibuko*)[40] – but the Court has in this context also referred to institutional legitimacy[41] and institutional comity[42] concerns.

Still with the generalised cases, the Court's preoccupation with institutional concerns has also shaped its approach to remedies in livelihood rights cases. The Court's approach to remedies in the generalised livelihood rights cases can be described as flowing from its approach to review in these cases. Just as in conceptualising its review standard the Court has been careful to avoid prescribing particular courses of action to the state because it feels itself incapable of prescribing, or the inappropriate institution to prescribe anything specific, the Court has in conceiving remedies shied away from prescription. In general it has preferred broad declaratory rather than directory relief. *Grootboom* is a case in point – having found the state's housing policy unreasonable, the Court simply declared it as such to the extent that it 'failed to make ... provision ... for people ... with no access to land, no roof over their heads, and ... living in intolerable conditions or crisis situations'.[43]

In addition, even in those cases, such as *Treatment Action Campaign*, where the issues were such that it could not avoid directory relief – the Court's holding in that case that the state's refusal to make antiretroviral medicine generally available at public health facilities to prevent transmission at birth of HIV from mother to child was unreasonable had the inevitable implication that the state had to make such medicine generally available for that purpose – the Court showed awareness of institutional concerns in designing such directory relief. In *Treatment Action Campaign (No 2)*, the Court, although directing the state to make the drug in question available at all public health facilities in the first place softened this directory order by adding that the drug may be provided for the mandated purpose only where the attending physician in consultation with the relevant hospital supervisor deemed it appropriate.[44]

Also, in spite of being explicitly invited to do so, the Court decided not to retain jurisdiction over the implementation of its directory order through imposition of a structural interdict. The Court argued that there was no reason to do so, as there was no reason for it to believe the Department of Health would not fully implement its order.[45] In other cases than *Treatment*

39 Para 38.
40 Para 61.
41 As above.
42 As above.
43 Para 99.
44 Para 45.
45 In saying this, the Court came the closest it has ever come to acknowledging also its concern with its institutional security. The *Treatment Action Campaign (No 2)* case played out in an atmosphere of acute political controversy and contestation. A measure of the tension at the time is the fact that the Minister of Health, shortly before the Court handed down judgment, said on national television that, should the Court hold against her, she would not comply with the Courts orders. Although this statement was retracted

Action Campaign (No 2) the Court has also shown itself to be wary of imposing structural relief.[46] Again, the Court's seeming aversion to structural relief can be explained with reference to institutional concerns – in this case probably most directly concerns about institutional security, with the Court wary of pitting itself in a drawn-out battle against state institutions in the process of ensuring compliance with its orders; and concern for institutional integrity, with the Court careful not to get bogged down in the detail of enforcement of substantive directory orders, with the danger that failure in this process would then be attributed to the Court.

Apart from the generalised cases, institutional concerns also explain some of the idiosyncrasies of the Court's decisions in individualised matters. The Court has shown itself willing in eviction cases both to evaluate state decisions more robustly than in the generalised cases, and to impose far more substantive and intrusive orders than it has been willing to do in generalised cases. This more 'activist' approach of the Court in individualised matters – the smaller measure of respect or deference it has shown the other branches in these cases – can, somewhat counter-intuitively also be attributed to the Court's preoccupation with institutional concerns. One example will suffice. In *Port Elizabeth Municipality*, the Court was willing to act so robustly as to reject an offer of alternative accommodation for evictees made by the Municipality – deciding in effect what would be suitable alternative accommodation and impliedly prescribing that to the Municipality.[47] The willingness of the Court to do so can certainly in large part be explained by the fact that the case was decided not directly on the basis of the Constitution but on the basis of national legislation, so that the Court could more or less pretend that it was simply imposing on the state duties that it had taken upon itself by enacting the legislation in question, rather than that it was interpreting duties into a broadly phrased constitutional right.

In sum therefore, it is clear that institutional concerns in all shapes have centrally determined the Court's approach to deciding livelihood rights cases. This fact in itself should of course come as no surprise. Institutional concerns have always loomed large everywhere where judicial enforcement of livelihood rights has been an issue. This is true about debates about justification for the inclusion of justiciable livelihood rights in constitutions and debates about the manner in which courts should deal with these rights there where they are included in constitutions – in short, as Frank Michelman

subsequently, the Department of Health in fact proved very hesitant, indeed positively obstructionist, in its eventual implementation of the order. It is very tempting, therefore, to see the Court's acknowledgement of the department's good faith in its judgment, as an effort to soothe institutional tensions.

46 See eg *Grootboom*; but *contra* see *Joe Slovo I*.

47 The alternative accommodation offered was rejected because it was overcrowded and unsafe and not close enough to schools for the children of the occupiers – para 54.

has put it, judicial work with respect to livelihood rights is everywhere most often seen as 'simply a matter of separation of powers'.[48]

Nevertheless, three features of the South African Court's engagement with institutional concerns are noteworthy: First, the Court has responded to its institutional concerns through employing a particular 'binary' understanding of judicial deference; second, that judicial deference has most clearly manifested, at least in the generalised cases, in a 'proceduralisation' of the Court's decision of livelihood rights cases; and, third, the Court has moved in livelihood rights cases from employing a proper 'theory of deference'[49] – gauging the level and intensity of its engagement with issues where institutional concerns arise so as to exploit the actual extent of its capacity, legitimacy etcetera as much as each case allows – to employing these institutional concerns as blunt instruments, warranting there where they are thought to apply complete disengagement with the issues.

3.2 Binary deference

South Africa's Constitutional Court has in the first two decades of its operation accounted for the institutional problems it faces in livelihood rights cases in binary[50] institutional relations terms.

First, the Court habitually describes its institutional limitations not as limitations in themselves, but limitations it suffers from relative to the other branches of government. In *Soobramoney*, for example the court does not simply describe the resource allocation-decisions at issue in that case as difficult decisions that it is incapable of making – it describes them as difficult decisions that others (such as the provincial legislature and health care authorities) are 'better equipped' than it to make.[51]

Second, having described its institutional limitations in binary institutional relations terms, the court then also deals with them in such terms. So, for example, when Yacoob J in *Grootboom* declines to develop and present his own solution to the problem of emergency shelter provision because he feels incapable of doing so, he does not simply decline giving a solution, but defers explicitly to the legislature and executive the determination of the 'precise contours and content of the measures to be adopted'.[52] When O'Regan J in *Mazibuko* resolves not to decide what the particular substantive content of the right to have access to sufficient water

48 FJ Michelman 'The constitution, social rights, and liberal political justification' (2003) 1 *International Journal of Constitutional Law* 13.

49 C Hoexter 'The future of judicial review in South African administrative law' (2000) 117 *South African Law Journal* 484 and *Administrative law in South Africa* (2007) 138-147.

50 'Binary' here in the sense of 'dual, of or involving pairs'; or as it is used in astronomy: 'two stars revolving round common centre or each other' (HW Fowler & FG Fowler (eds) *The concise Oxford dictionary of current English* 4th ed (1959) 116).

51 Para 59.

52 Para 41.

in the context of that case entails, she does not simply leave this question alone, but explicitly defers it to the 'two other arms of government'.[53] The solution then to problems of institutional incapacity, illegitimacy or inappropriateness seems for the South African Court always to be not simply to leave difficult questions alone or engage with them only to a certain degree or in a different way, but rather to defer those questions for decision *to the other branches of government*. Deference – certainly an appropriate strategy for a court when confronted with problems of its institutional limitations – is in other words never only deference to the intricacy or complexity of an issue. It is deference to the other branches of government, *binary institutional* deference.[54]

The contrast with the Indian and Brazilian courts in this respect is clear. In livelihood rights cases there, where the inevitable complex, policy – and interest-laden questions have arisen that confront the courts with their institutional limitations, the courts have to some extent developed innovative approaches to dealing with those questions that do not involve simply leaving them for decision to the other branches of government. In India, for example, one thinks here of the right to food-case – *People's Union for Civil Liberties v Union of India*,[55] where the Indian Court was confronted with a challenge eventually directed at the Indian Government at all levels to the failure to prevent hunger and starvation in the face of continually improving national and state-level food stocks. The challenge was initially directed at two programmes – drought relief measures and the Public Distribution system – but has since extended to all aspects of the Indian government's food policy. The case has not yet been decided finally but has proceeded by way of a range of interim orders through which the Court has sought to deal with specific aspects of the general problem of hunger and starvation. One aspect of these interim orders has been the appointment of two national Commissioners, supported by assistants and further staff in the various states, who, although funded by government are servants of the Court who must monitor the implementation of the Courts orders, deal with complaints and report to the Court on the position in the various states and with respects to the various food-related programmes. The Commissioners have in addition been authorised to appoint from civil society advisors whose role is 'essentially [to] serve as a bridge between the Commissioners, the

53 Para 65.

54 For a comprehensive discussion of the operation of deference in constitutional socio-economic rights adjudication in South Africa see K McLean *Constitutional deference, courts and socio-economic rights in South Africa* (2009) and 'Towards a framework for understanding constitutional deference' (2010) 25 *SA Public Law* 445. For my own more extended critique of deference in socio-economic rights cases see D Brand 'Judicial deference and democracy in socio-economic rights cases in South Africa' (2011) 22 *Stellenbosch Law Review* 614.

55 (2003) 4 SCC 399 available at http://www.righttofoodindia.org/mdm/mdm_scorders.html (accessed 3-08-2011).

state Government, and various citizens' groups'[56] by amongst other things doing research and reporting to the Commissioners on food related problems, identifying problems and bringing them to the attention of the Commissioners and liaising with state governments on behalf of the Commissioners. In essence the Court, confronted with an extremely wide-ranging set of technically complex and politically sensitive issues has created a mechanism through which both to retain engagement with the issues rather than simply leave them for decision elsewhere and expose those issues for their resolution to a forum involving certainly the government, but also independent officers of the Court and civil society.

Similarly, the Argentinian Supreme Court in *Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/dãnos y perjuicios (danã derivados de la contaminatión ambiental del Río Matanza-Riachuelo)*, a case dealing with the large-scale pollution of a river, created a forum – a series of public hearings – in which a range of stakeholders, experts and civil society organisations could participate in a process of determining the causes of and attributing responsibility for the pollution to eventually assist the Court in deciding the case. In addition, having finally decided the case and ordered the clean-up of the river, the Court further ordered the National Ombudsman to create a monitoring body, consisting amongst others of the NGO's who had brought the case to court, to monitor the implementation of its order.[57]

Although both these cases certainly have shown up the significant logistical and other problems associated with these participative approaches to judicial decision-making, they do represent, in contrast to the South African Court's binary approach, an approach to dealing with judicial institutional limitations that both retains engagement with the issues instead of simply deferring to their complexity and throwing resolution of those issues open to a broader range of institutions and people than simply the other branches of government.[58]

3.3 Proceduralism as response to institutional limitations

A further characteristic of the Court's reasonableness review standard applied in the generalised cases can also be explained with reference to the

56 Y Jaishankar & J Drèze *Supreme Court orders on the right to food: A tool for action* (2005) available at http://www.righttofoodindia.org/case/case.html (accessed 29 November 2013) 9.

57 For an English-language description of the case see Fundación Ambiente Y Recursos Naturales (FARN) 'The Matanza-Riachuelo river basin case' available at http://www.internationalwaterlaw.org/cases/Argentina_Matanza-Riachuelo-River_Case/FARN_Summary.pdf (accessed 29 November 2013).

58 Another example of such approaches is the Colombian Constitutional Court decision T-760/2008: A decision requiring dramatic restructuring of the health care system, which has to be effected in part through a participatory process involving a range of stake-holders. For a discussion and evaluation of this decision see A Ely Yamin & O Parra-Vera 'How do courts set health policy? The case of the Colombian Constitutional Court' (2009) 6 *PLoS Medicine* 1.

institutional concerns outlined above. An initial criticism of the Court's reasonableness review approach that was voiced by a number of commentators was that the standard, as it was articulated and applied for the first time in *Grootboom* had the potential to devolve into a purely procedural or structural review standard, rather than a substantive one.[59] In concrete terms, it was pointed out that the Court had mostly in applying this standard utilised its merely structural, rather than its potentially substantive aspects. So, for example, in *Grootboom* the housing policy of the state was held inconsistent with the right to housing simply because it left out of account a particular wide-spread and acute housing problem – temporary homelessness following an eviction. The holding was based, in other words on a structural requirement of comprehensiveness – it failed to make provision (of whatever kind) for the problem of temporary, emergency homelessness. In *Soobramoney* the Court also clearly evaluated the provincial government's health care rationing guidelines against a structural requirement of rationality.[60] Equally, in *Treatment Action Campaign (No 2)*, the Court's rejection of the Department of Health's policy position was based on a structural inconsistency in the Department's logic – the fact that the Department, although resisting the provision of the anti-retroviral medicine in question generally at public health facilities to prevent the transmission at birth of HIV from mother to child in large part on the basis that the medicine was unsafe, had no qualms to provide it to real women and their real new-born babies at a few selected 'pilot sites'.[61] At the time, the criticism was that, although in the cases the Court had faced by then there were such structural inconsistencies or flaws in the state's measures, so that they could easily be dealt with without recourse to more substantive standards, the Court would probably in the future face cases where the measures under consideration were structurally/procedurally sound, but showed substantive, redistributive flaws. Were the manner in which the reasonableness standard was applied in the early cases to become definitive of the Court's approach, so the criticism concluded, the Court would be left without the doctrinal tools to decide such a future 'difficult' case.[62]

This was, unhappily, indeed the result in the most prominent of the Court's more recent 'generalised' livelihood rights decisions, Mazibuko. One aspect of the dispute at issue in this case was a challenge brought by a group of residents of the City of Johannesburg to the City's policy with respect to the gratis provision of a basic amount of water per person per day. The City had adopted the nationally prescribed minimum amount of 25 litres of free water per person per day as its measure. The applicants in the case argued that,

59 See D Bilchitz 'Towards a reasonable approach to the minimum core: Laying a foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1; D Brand 'The proceduralisation of South African socio-economic rights jurisprudence, or "What are socio-economic rights for?"' in H Botha *et al* (eds) *Rights and democracy in a transformative constitution* (2003).

60 Para 29.

61 Para 62.

62 Brand (n 59 above).

given the particular context in the parts of Johannesburg where they resided, this amount did not constitute sufficient water as required by the constitutional right to have access to sufficient water. To adjudicate this claim, the Court was in other words required in some way substantively to decide whether or not the amount of water offered the city's residents for free per day, was sufficient. Perhaps not surprisingly, it elected not to engage in this enquiry at all, holding that it was the kind of evaluation that it was not equipped and not entitled to make. Explaining this move, O'Regan J for the Court provided the following description of the nature of the Court's reasonableness review standard:[63]

> [T]he positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom,* it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions, as in *Treatment Action Campaign No* 2, the Court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.

One can hardly ask for a more proceduralist/structural description of the reasonableness review standard than this – and much can be and has been said to criticise it.[64] But of interest for purposes of this chapter is in the first place the basis upon which O'Regan J justifies this radical proceduralisation. The explicit narrowing in the Court's review approach is justified exclusively with reference to institutional concerns – O'Regan J variously refers to the Court's perceived institutional incapacity to evaluate substantively the City's policy; the Court's 'democracy deficit' in doing so; and the institutional comity of the Court's 'transgressing' on the spheres of power 'properly' reserved for the executive. All this is neatly captured in the following excerpt from the judgment:[65]

> [O]rdinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.

63 Para 67
64 See eg S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 480.
65 Para 61.

3.5 An either/or approach

Much work has been done in administrative law circles in South Africa to develop what is referred to as a 'theory of deference' for courts to account for their institutional limitations on review.[66] The starting point of these efforts is a recognition that institutional limitations on review are real and should be taken seriously, but that institutional concerns such as technical incapacity, constitutional comity and democratic illegitimacy should not operate as a 'judicial can't',[67] justifying complete disengagement with issues in some cases. Instead, courts, faced with technically complex, interest-laden or politically vexed issues should in every case determine the actual extent and nature of the institutional limits applicable and engage with the issues to the extent and in the manner that is possible. In administrative law this has led to an approach to review in terms of which courts interpret their review jurisdiction as broadly as possible, but once such review jurisdiction has been asserted determining the nature and intensity of review in each case according to its circumstances – a 'flexible' approach to review, as it has come to be called.[68]

In livelihood rights cases the South African Constitutional Court's employment of deference has been a mixed bag.[69] In some cases the Court has indeed employed something approaching the flexible approach to review described above, asserting review jurisdiction but then calibrating the intensity of review according to the requirements of particular issues.

The best example of such a case is probably *Treatment Action Campaign*. In the face of intense political contestation and political challenges to its authority and in the context of a series of technically complex issues the Court first made a point of asserting its review jurisdiction. It explicitly stated that it, as a court, is able to 'cut through the overlay of contention' and then acknowledged that 'issues pertaining to the separation of powers' are relevant to the case, but immediately asserted that these issues relate to the degree of deference to afford the other branches of government in the process of review and in the fashioning of relief only, and have nothing to do with 'justiciability', that is, that they don't exclude the Court's authority to review.[70]

The Court then proceeded to engage with each of the issues raised only to the extent that and in the manner in which the circumstances allowed. With the respect to the technically complex question whether or not provision of the antiretroviral drug Nevirapine to prevent mother-to-child

66 C Hoexter (n 49 above) (2000) 499-503 and (2007)138-147.
67 RM Cover *Justice accused: Anti-slavery and the judiciary process* (1975) 119-120.
68 Hoexter (n 49 above) (2000) 499-503 and (2007) 142-147.
69 For a comprehensive review of the operation of deference in livelihood rights cases in South Africa see McLean (n 54 above) (2009) and (2010).
70 Para 20-22.

transmission of HIV at birth was safe and effective the Court was willing to engage quite robustly, rejecting the state's position that the drug was unsafe, caused resistance and was not effective. The Court was able to do so because of the wealth of expert evidence before it that made nonsense of the state's position and also because of a peculiarity in the state's position – the anomaly that it was willing at selected pilot sites to provide the very drug to women and babies that it asserted was safe an ineffective.[71] On this basis the Court then held that Nevirapine must be made available at public health facilities for use in preventing mother-to-child transmission. However, in fashioning a remedy to give effect to this holding, the Court took account of the extent and nature of its institutional limitations anew and then acted accordingly: It ordered only that Nevirapine be made available at public health facilities, but explicitly left the question whether it should in particular cases be provided to specific women and their babies to the health professionals on the ground that are clearly better qualified and more appropriately situated than the Court to make these decisions.[72] Equally, when the Court turned to the question whether the state is duty bound to provide formula milk to HIV positive women who gave birth at public health facilities to prevent transmission of HIV to their babies after birth through breast-feeding, the court determines the level of its scrutiny anew, here deciding that it cannot decide this question as there is not enough consensus in the scientific community about this technical issue to give it appropriate direction.[73]

The picture that emerges is of a Court determined to assert its authority to review state measures related to livelihood rights, but equally determined to exercise that authority with respect to specific issues only in the manner and to the extent that its institutional limitations allow.

By contrast, in later cases such as *Olivia Road*[74] and in particular *Mazibuko* the Court displays an either/or approach to institutional limitations, asserting its technical incapacity or democratic illegitimacy to justify not exercising its review power at all and using these concerns as what Lucy Williams has called 'place-holders'[75] for the judgment to what extent and in which manner it could in fact engage with the issues that was displayed in *Treatment Action Campaign (No 2)* and other cases. *Mazibuko* is emblematic here. O'Regan J there simply decided that the question of what amount of water is an adequate basic amount per person per day is a question that a court is incapable of deciding and that she therefore won't consider at all[76] – this despite the fact that the two sets of experts for the

71 Para 62.
72 Para (b) of the Court's order.
73 Para 38.
74 In *Olivia Road* the Constitutional Court by implication confirmed the decision of the Supreme Court of Appeal that it was incapable at all to consider the adequacy of the City of Johannesburg's plan through which to deal with the problem of occupied condemned buildings in downtown Johannesburg by electing not to decide that question.
75 LA Williams 'The role of courts in the quantitative-implementation of social and economic rights: A comparative study' (2010) 3 *Constitutional Court Review* 141.
76 Para 61-68.

claimants and the state had by the time the case was argued in Court in effect agreed on the amount of water that would be appropriate.

4 The particular and the systemic

Courts deciding livelihood rights cases, particularly in contexts of significant poverty and inequality as pertain in South Africa, are inevitably confronted with a central tension: The apparent friction that often – in fact almost invariably – arises between the interests of the individual people or the specific group of people who bring a case to court (in the first place of course to alleviate their own plight) on the one hand, and broader collective interests and systemic issues that arise in the course of deciding the case on the other. Described in slightly different terms, courts are in their work with respect to livelihood rights confronted with the need to account for both the plight of the particular people before them and the structural causes of the broader social problem that the case before it is only one example of.[77]

This has certainly been true for the South African Constitutional Court. One of the main features of its early livelihood rights jurisprudence, at least up to its decision in *Olivia Road*[78] is the extent to which its decisions at least on their face move on a general/systemic rather than a particular or specific plane. Although this approach was already evident in *Soobramoney* (where the potential for conflict between individual and collective interests was of course illustrated very starkly),[79] it was first clearly articulated in *Grootboom*. Here the Court was faced with a claim of a specific group of impoverished people that the state was constitutionally bound to provide them with temporary shelter to tide them over after an eviction, until such time as they could find their own permanent accommodation. The Court, instead of deciding the claim as presented to it – a claim of a particular group of people for a specific form of concrete relief – decided it as a challenge to the state's housing policy in its entirety. The relief it provided was also general – a declarator that the policy was unconstitutional to the extent that it failed to make provision for the interests of the completely homeless. Stated

77 For accounts of this problem in the South African context, see LA Williams 'Issues and challenges in addressing poverty and legal rights: a comparative United States/South African analysis' (2005) 21 *South African Journal on Human Rights* 436 and S Liebenberg 'Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of "meaningful engagement" ' (2012) 12 *African Human Rights Law Journal* 1. Octavio Ferraz has analysed this tension from a slightly different angle with respect to health rights litigation in Brazil, pointing out how the interpretation of health care rights by Brazilian courts as individual rights to the provision of curative care irrespective of costs, coupled with a high rate of success in litigation, has worsened systemic problems of inequality and under-resourcing in public health care generally, so working to the detriment of the poor (OLM Ferraz (2009) '*The right to health in the courts of Brazil: Worsening health inequities?*' (2009) 11 *Health and Human Rights* 33).

78 *Olivia Rd*.

79 The Court took great care to indicate that Mr Soobramoney's claim should be judged in the light of the health care needs of the broader society and the scarcity of resources to meet those more general needs. See in particular Sachs J's concurring judgment in *Soobramoney* paras 53-54.

differently, in *Grootboom* the Court seems to enunciate a conception of its purpose in livelihood rights cases as to review policy, rather than (only) resolve particular disputes – if one were to take some license in reading the Court's approach, a view of review as a process to determine an issue of the public good, in the broader public interest, rather than simply a process of deciding a discrete dispute between specific parties to vindicate their particular interests.

For this 'generalisation' of its approach to deciding livelihood rights cases the Court was roundly criticised. Essentially the objection was that the Court had converted what are rights of real people to real things into rights of everyone (but of no one in particular) to reasonable policies – in other words, that the Court has over-emphasised the collective/systemic issues raised in these cases at the expense of the individual/particular.[80] This criticism has been implicit and at times explicit in academic writing urging the Court to adopt the 'minimum core content' approach to deciding socio-economic rights cases.[81] It has also directly played a role in litigation subsequent to *Grootboom*. In *Treatment Action Campaign (No 2)* the first and second *amici curiae* (the Institute for Democracy in South Africa (IDASA) and the Community Law Centre of the University of the Western Cape) urged the Court to depart from the generalised review method established in *Grootboom* and to adopt an interpretation of section 27(1) of the constitution (the right to health care) in terms of which that section 'establishes an individual right vested in everyone'.[82] This individual right, so it was argued, would entitle impoverished people to be provided with at least the most basic levels of access to health care (and presumably other basic resources implicated by section 27(1) and the similar section 26(1)). This entitlement would not be subject to the qualifications of resource constraint and time and the reasonableness standard contained in section 27(2) and section 26(2). On this interpretation sections 27(2) and 26(2) (and the generalised standard of review the Court derived from section 26(2) in *Grootboom*) would apply only to cases where the most basic levels of access to resources (the minimum core content) was not at issue.[83] In the event the Court rejected this

80 It is necessary at the outset to distinguish this particular strain of criticism from another – a critique of the effectiveness of the Court's orders in socio-economic rights cases. The critique I am concerned with here focuses on the need to generate through socio-economic rights litigation concrete relief for specific impoverished people. The critique of the effectiveness of the Court's orders is not necessarily linked to the idea that socio-economic rights should in the first place be seen as individual rights generating concrete individual benefit for impoverished people and to the accusation that the Court has too broadly generalised its approach to deciding socio-economic rights cases. Rather, it focuses on finding ways in which the relief in such cases, whether of a generalised or a specific nature, can be effectively implemented. For a representative example of this 'effectiveness' critique (which, it has to be said, poses its own problems, ones that I won't engage with here), see M Swart 'Left out in the cold? Crafting constitutional remedies for the poorest of the poor' (2005) 21 *South African Journal on Human Rights* 215.

81 See as a representative example of this kind of criticism S Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: an effective tool in challenging poverty?' (2002) 6 *Law, Democracy and Development* 159 176.

82 Para 26.

83 Paras 28-29.

interpretation, holding that the positive duty described in section 27(2) clearly refers to and describes the content of the right established in section 27(1); that this right and duty were qualified in the manner described in section 27(2); and that claims based on this right are to be decided on the basis of the reasonableness review standard enunciated in *Grootboom*.[84]

The criticism that the South African Court has over-emphasised collective interests or systemic issues to the detriment of the urgent, concrete individual needs of particular impoverished people is, I believe, misplaced, or has at least been overstated. As said at the outset, broader collective/ systemic and specific individual interests are inevitably both at play in socio-economic rights cases. The predicament facing a specific impoverished litigant who approaches a court for relief, in a country such as South Africa where there continues to exist wide-spread impoverishment, with limited resources to deal with it, is inevitably only one example of the predicament faced by many, many other people – one manifestation of a systemic problem. Just as a court neglecting the individual interests of the litigants who appear before it would be shirking its duty, a court that does not take account of the broader systemic problems raised by a case in some way would do the same. Courts deciding these cases, whatever their nature, inevitably have to take account of both the collective and the individual interests at issue, trying to find a way best to address both.

To my mind the Constitutional Court in its early livelihood rights jurisprudence by and large managed, whether by design or accident, to maintain a proper balance between the individual and collective interests, the particular and the systemic at play in the socio-economic rights cases it has decided. This is most obvious in *Grootboom*, where the parties' settlement of the particular claims of the Grootboom community before the case was argued dealt with the individual interests at stake,[85] so leaving the Court free to deal in its judgment with the collective, systemic issues that arose. In the other early generalised cases in which the reasonableness test played a role – *Treatment Action Campaign* and *Khosa* – the issue did not arise in the acute manner that it did in *Grootboom.*

Treatment Action Campaign (No 2) was never a case only about the interests of a specific group of people. The Treatment Action Campaign brought the case not on behalf of a specific group of indigent, HIV-positive women about to give birth at a specific public health facility, but on behalf of all such women, with respect to all public health facilities.[86] At the same time, the Court's judgment and order in that case also, whilst applying generally to

84 Paras 30-39.

85 I am for the moment not concerned here with the question whether or not the terms of the settlement order were indeed complied with and whether the Grootboom community indeed received the shelter they required. Clearly, there were problems with the implementation of the settlement order, such that the community's predicament was never satisfactorily resolved.

all indigent HIV-positive women giving birth at any public health facility, once the problems with its enforcement were sorted out, generated concrete individual benefit for particular such women, precisely because it was aimed at all of them.

Khosa, which was indeed brought by a particular group of people, also could never be only about their interests. In *Khosa* the challenge was of course to statutory provisions that excluded the claimants and others like them from access to social assistance benefits. The Court's judgment that these provisions were inconsistent with the constitution and its reading in of words to remedy that inconsistency inevitably generated concrete benefit for the group of people who brought the case and at the same time for everyone else in their position. Indeed, it was to ensure that the case also had this more general impact that Mokgoro J rejected an offer by the state to settle the matter *inter partes*, holding that '[t]he impact of the settlement would have been too limited and would not resolve the unconstitutionality of the impugned provisions *and the impact that they have on the broader group of permanent residents who qualify in all other respects for social grants*.'[87]

In the early individualised cases – *Modderklip* and *PE Municipality* – the interplay between individual and collective or systemic interests played out in a slightly different fashion. Of course, these cases were always first and foremost about the specific interests of the squatters that the property owner in *Modderklip* and the property owner in concert with the state in *PE Municipality* sought to evict. The decision in *Modderklip* to allow the squatters to remain on the disputed land until the state presented them with suitable alternative accommodation and to pay constitutional damages to the property owner to compensate him for the breach of his property right clearly benefited those particular parties in the first place. Equally, in *PE Municipality*, the Constitutional Court's decision to confirm the denial of the eviction order, in spite of the offer of alternative accommodation by the state, clearly and concretely benefited the specific group of squatters that the state sought to evict. Nevertheless, despite the centrality of individual interests in these cases, broader collective, systemic issues were not left aside. In both cases the broader, collective or systemic context was taken into account through the creation of law, which would apply in similar cases in the future. In *Modderklip* the most important such principle was the idea, first, that an eviction dispute between a property owner and impoverished people unlawfully inhabiting her land is a public rather than a private matter that, second, the state was duty-bound to resolve.[88] In *PE Municipality* this point was also emphasised,[89] and further important conclusions were reached

86 Unlike in *Khosa*, where the state challenged the standing in the public interest of the specific group of impoverished permanent residents who brought the case to court (para 36), standing was in *Treatment Action Campaign* never an issue – in fact, it is unclear in what capacity, in formal terms, the Treatment Action Campaign acted there. The best guess would be that they acted on behalf of a group or class of persons (sec 38(c)) and/or that they acted in the public interest (sec 38(d)).

87 Para 35 (my emphasis).

about the manner in which to interpret the PIE Act,[90] and about factors that play a role in determining whether or not a court should grant an eviction order in circumstances where impoverished people inhabit private property.[91]

However, the apparent negotiation that the South African Court by hook or by crook seems to have managed in its livelihood rights work between individual interests and collective/systemic issues was turned on its head in *Olivia Road* and the cases that have followed it. Readers will recall that *Olivia Road* dealt with an attempt by the City of Johannesburg to evict a group of impoverished people living in two condemned apartment buildings. Two aspects of the Constitutional Court's resolution of the case bear mention in this context.

First, the practical dispute in the case (whether the occupiers were to be evicted and what would happen to them if they were) was resolved not by decision of the Court, but through a court-ordered negotiated settlement between the parties. That is, before the case was decided by the Court, it ordered the parties to 'engage' with each other to find a solution to their dispute. This they did, agreeing that two buildings in the vicinity would be temporarily renovated so that the occupiers of the two bad buildings could move there while the two bad buildings were permanently renovated to allow them to move back at a later date. The Court then accepted the agreement, providing as its reason for doing so no more than the assertion that it would show bad faith not to accept it given that the parties had negotiated with each other in good faith to reach a solution.[92] The agreement was made an order of court. The decision of the Court to resolve the eviction dispute in this manner, through effectively a court-ordered settlement

88 See AJ van der Walt 'The state's duty to protect property owners v the state's duty to provide housing: Thoughts on the *Modderklip* case: Notes and comments' (2005) 21 *South African Journal on Human Rights* 144 147-150, but in particular 148. In *Modderklip* in the Supreme Court of Appeal this conclusion was reached on the basis of the state's duty to promote and fulfil the right to have access to adequate housing and the state's duty to protect the right to property; in *Modderklip* (CC) the Court reached the same conclusions on the basis of the principle of rule of law and the right of access to court.

89 *PE Municipality* paras 16-19, referring with respect to this point to *First National Bank of South Africa Limited t/a Westbank v Commissioner for the South African Revenue Services; First National Bank of South Africa Limited t/a Westbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 50-52. See in this respect, in general, also AJ van der Walt 'Exclusivity of ownership, security of tenure and eviction orders: A critical evaluation of recent case law' (2002) 18 *South African Journal on Human Rights* 372, cited with respect to this point by Sachs J in *PE Municipality* (paras 20 & 23).

90 The Court, per Sachs J, emphasised the importance of the historical and current socio-political context in interpreting provisions of legislation regulating eviction (*PE Municipality* (n 32 above) paras 8-23, but in particular para 11). See in this respect also AJ van der Walt 'Exclusivity of ownership, security of tenure, and eviction orders: A model to evaluate South African land-reform legislation' 2002 *Tydskrif vir die Suid-Afrikaanse Reg* 254 259-263, cited in this respect by Sachs J in *PE Municipality* (para 10).

91 The Court held that an eviction order should not be granted under relevant legislation unless the state could show that it had seriously attempted to resolve the dispute through discussion and mediation (paras 39-47).

92 Para 29.

represents a significant departure from the concern exhibited in its earlier livelihood rights decisions to deal also with the systemic issues raised by specific cases. By resolving the central dispute in the case in this manner, the court avoided creating any form of precedent with respect to the important legal issues that the eviction application had raised (not the least of which was the question of the nature and extent of the state's duty upon eviction to provide alternative accommodation). In complete contrast to Mokgoro J's explicit refusal to do so in *Khosa*, the Court limited the effect of the resolution of the case only to the parties before the Court.

The second manner in which the Court in *Olivia Road* effectively particularised its judgment has to do with the second part of the claim of the occupiers of buildings before Court. From the outset in the High Court the occupiers had coupled their resistance to their eviction with an application for an order that the City of Johannesburg devise a general plan properly to deal with the broader problem of inner city homelessness in Johannesburg and the issue of bad buildings. That is, apart from seeking to protect their own, individual interests against encroachment, they showed an explicit concern also for the systemic aspects of their problem and the 80 000 odd other people in downtown Johannesburg who also lived in condemned buildings and faced their predicament. The High Court granted their counter-application in this respect, ordering the City to devise such a plan. In the Supreme Court of Appeal, the City had already adopted a plan in response to the High Court order and the occupiers' challenge had changed to impugning the adequacy of that plan. The SCA declined to decide this issue, citing institutional incapacity as its reason. The Constitutional Court, when this issue, unresolved through the settlement reached between the parties, landed before it, explicitly declined to decide it. The reason provided up-front by the Court for this was that the question was not properly before it as it had not been ventilated in the High Court or the SCA: The High Court had not decided the adequacy of the plan as no plan yet existed at that time; and the SCA, although confronted with the question of the adequacy of the plan, elected not to entertain it.[93] In this light it would not be good judicial policy for the Constitutional Court as an appellate court to deal with the issue. However, the following passage from the judgment, also given in justification of the decision to let the question of the adequacy of the housing plan be, reveals a different line of reasoning:

> [T]he desperate situation of the [Olivia Road] occupiers has been alleviated by the reasonable response of the City to the engagement process … The City has undertaken to negotiate permanent housing solutions for the occupiers in consultation with them. It is not unreasonable to expect that the City will, in the ordinary course, adopt a similar approach in respect of other people who are affected in the future ... A case can always be brought in the High Court in relation to particular occupiers with specific allegations as to the respects in

93 Paras 33-35.

> which the housing obligations imposed by the Constitution have not been complied with.[94]

In contrast to earlier decisions where the Court consciously emphasised the collective/systemic issues raised and insisted that they be addressed, in *Olivia Road* the Court, by deciding not to consider the City's inner city housing plan, seems in this light consciously to have decided to focus only on the specific, concrete, individual interests at stake in the case. Indeed, Yacoob J's remarks justifying his decision not to deal with the housing plan present a picture of socio-economic rights litigation as purely an instrument through which individuals or specific groups of people can engage the state to advance their particular interests and of court-driven transformation as something that must occur on an incremental, case-by-case basis only – very little remains of the vision of constitutional review as a forum within which issues of general concern could be ventilated and where questions of the public good may be deliberated.

5 Democracy

Democracy has always loomed large in debates about adjudication of livelihood rights claims, whether in objection to the idea of rendering livelihood rights justiciable (counter-majoritarian dilemma-speak)[95] or in justification of it, on the argument that livelihood rights enforced through courts are constitutive of democracy in that they enable access to the basic material goods required to participate in political and democratic life.[96]

Oddly, the South African Constitutional Court, despite democracy-related arguments having been prominent on both sides in the debate about whether justiciable socio-economic rights have a place in the South African Constitution, has paid democracy scant explicit attention in its livelihood rights judgments. Apart from one or two oblique references to democracy to justify its deference to the other branches of government, democracy has been absent in the livelihood rights work of the South African Court. That is, until its decision in *Mazibuko*. Towards the end of her judgment in that case and in response to an accusation made by the claimants in argument that her refusal to engage with the substantive issues that arose in the case would render litigation on the basis of livelihood rights in South Africa 'meaningless', O'Regan J said the following:[97]

94 Para 35.
95 See eg M Pieterse 'Coming to terms with the judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383 390-392.
96 See eg N Haysom 'Constitutionalism, majoritarian democracy and socio-economic rights' (1992) 8 *South African Journal on Human Rights* 451; FI Michelman 'Welfare rights in a constitutional democracy' (1979) 3 *Washington University Law Review* 659.
97 Para 160.

> The purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing, litigation of this sort fosters a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy.

Despite its progeny as a sort of placebo – participatory democracy is what the claimants in the case got instead of O'Regan J substantively deciding in their favour – this passage is significant. Describing as it does the process of litigation as participatory democracy in action and the courtroom as a democratic forum, one more place where democratic accountability can be enacted, it resonates with theories of dialogic constitutionalism that have become prominent of late, also in relation to livelihood rights adjudication.[98] It deserves to be taken seriously as the first explicit statement of the Court's vision of the relationship between its work in livelihood rights cases and democracy.

The problem is that what the Court actually does – its practice – is at odds with what O'Regan J here said that it does: In many respects the Court's practice in livelihood rights cases either reflects a particularly weak and empty version of participatory democracy (a procedural version of participatory democracy) or in fact runs counter to participatory democracy.

This is so first if one has regard to the quality of accountability that the Court has engendered in its livelihood rights judgments. O'Regan J's vision of livelihood rights litigation as participatory democracy in action is one of democracy as accountability: Through such litigation the state is called to account for its efforts to give effect to livelihood rights in court, where its accounting is scrutinised and its performance is evaluated. The crucial part of this process is the scrutiny – this is where the participatory aspect of participatory democracy comes in, where the claimants in a livelihood rights case get to participate. However, the quality of scrutiny that operates in the Court's livelihood cases, particularly of late, and so the quality of participation that these cases enable, is very poor.

This is so first because of the standards employed by the Court against which to assess the state's accounting. Readers will recall that in the discussion of the Court's response to concerns about its institutional limits above, I outlined how the Court has progressively proceduralised its review standard in the generalised livelihood rights cases, opting to review policy against structural standards of good governance rather than substantive standards of quality and outcome. This 'process' of proceduralisation culminated in the Court's decision in *Mazibuko*, where O'Regan J held that in livelihood rights cases the state's accounting for its efforts to give effect to

98 See eg OH Gerstenberg 'The role of the ECJ in the protection of fundemental and social rights: Economic constitutionalism or deliberative constitutionalism?' in Callies *et al* (eds) *Soziologische Jurisprudenz, Festschrift fur Gunther Teubner (2009)* 459-474.

rights would succeed as long as it is able to show that it has indeed taken measures to give effect to the rights; that those measures are comprehensive in the sense that they do not exclude any particularly vulnerable members of society; that those measures do not suffer from unreasonable limitations or exclusions; and that the measures are continually reviewed to adapt to changing circumstances.[99] In effect this means that the participation that happens in O'Regan J's courtroom – on her vision of litigation as participatory democracy in action – is procedural participation only: The state's version can be challenged only with respect to its contours and the manner in which it was adopted and adapted, with no place for challenge to the content, quality or outcomes of its measures.

The empty procedural vision of participatory democracy that this implies is confirmed if one has regard to the manner in which O'Regan J in her judgment dealt with the actual mechanics of participation that were at issue in the case. One of the issues in *Mazibuko* was whether the residents of Phiri township (from where the claimants in the case hailed) were sufficiently consulted when the policy of charging them for water on a prepaid basis rather than for consumption on credit or on a flat rate and of regulating payment through installing pre-payment meters that would terminate water supply as soon as credit ran out was fashioned and adopted by the City. The argument was raised on administrative law procedural fairness grounds. O'Regan J rejected the accusation that there had not been sufficient consultation by holding that the fashioning and adoption of the policy was not administrative action subject to administrative law review (that the claimants were not entitled to be consulted with respect to it).[100] In addition she held that, even had it been administrative action so that there rested a duty to consult on the City, this duty would have been met by the City's efforts after the policy had been adopted to inform the residents of Phiri Township of its implications for them and a customer satisfaction survey that it conducted several months after the policy had been implemented.[101]

Again, the vision of participatory democracy that emerges from this is an entirely procedural rather than a substantive one: Participation in this light entails for the Court only being kept informed of decisions that have already been taken – certainly not participation in the conceptualisation of measures or their implementation.

The Court's vision of livelihood rights litigation enabling participatory democracy expressed by O'Regan J in *Mazibuko* is further directly at odds with a central feature of its approach to deciding livelihood rights cases – the kind of deference it employs to deal with its institutional limitations discussed above. In the section on institutional limitations above I detailed how the South African Court's approach to managing institutional limitations

99 Para 67.
100 Para 131.
101 Para 134.

concerns is characterised in the first place by a binary conception of deference – in short, to manage its concern about its institutional limitations the Court as a rule does not simply leaves issues alone or limit its engagement with them, but leaves those issues for decision to the other branches of government. This deference in favour of the other branches of government is of course in part motivated by a concern for democracy – the court as unaccountable institution defers to the democratically accountable branches of government. But the conception of democracy at play here is a far cry from that espoused by O'Regan J on behalf of the Court in *Mazibuko*. The Court's deference to the other branches both excludes participation in the courtroom and sends the message that democratic discussion of such issuers occurs only in the other branches of government. This evinces a peculiarly limited institutional, representative conception of democracy, in which democratic participation is limited to periodic election of representative institutions, which institutions are then until the next election seen as the embodiment of democracy to which the courts must defer.[102]

6 Conclusion

In this chapter I sought to provide an overview of the livelihood rights jurisprudence of the South African Constitutional Court by tracing the operation in its jurisprudence of three themes or problems that to my mind face all courts that decide livelihood rights cases. I identified and described features of the Court's response to these themes that to my mind characterise its record.

The picture that emerges is of a court that has certainly made great strides in developing an approach to deciding livelihood rights cases, consciously building such an approach through the course of a large number of decisions. However, if viewed through the lens of the three themes I focus on it becomes clear that the approach is incoherent. Not only is the Court's approach to some of these themes viewed individually internally contradictory (such as its practice with respect to democracy being at odds with its professed approach) but the Court has also failed to settle on a clear approach in some cases (the relationship between the individual and the systemic). The approaches to the three different themes also contradict each other in important respects (the courts binary approach to deference, for example being at odds with its approach to the relationship between its livelihood rights work and democracy).

Against this background the Court's record in livelihood rights cases can best be described as adequately responsive to the practical problems it has faced in specific cases, but lacking in a unifying, overarching substantive

102 I develop this point more fully in Brand (n 54 above).

vision of the nature of livelihood rights and the purpose of the Court's involvement with them.

PART C: SPECIFIC RIGHTS AND THEMES

Land

CHAPTER 21 FINDING COMMON GROUND: RIGHTS ARISING FROM LAND REFORM IN SOUTH AFRICA, INDIA AND BRAZIL

Vinodh Jaichand [1]

Introduction

One of the objectives of this research was to attempt to conceptualise whether there is an analogous approach of developing countries to the issue of land, land reform and housing. Inevitably, there are links between housing and land because the security of one depends on the tenure system of the other. In comparisons between the countries of South Africa, India and Brazil, an attempt is made to reflect on the development of the right to redistribution of land by analysing the historical background of all three countries, the development of constitutional rights and human rights in each, mainly through a scrutiny of the case law of the apex courts and then to try and find parallels that might be apparent in legal arguments and jurisprudence.

The historical approach reveals that, while South Africa and India are both former British colonies, the effect of the colonial law in India is more enduring. The constitutional drafters in South Africa were mindful of the pitfalls of emulating the British legal approach and opted for a constitutional state. South Africa, Brazil and India have encountered delays in implementing land reform through the courts because of the juridical nature of land acquisition for land reform. Brazil, while not a common law country, continues to be hampered in implementing land reform as the current landowner resists attempts at expropriation in the public interest or for public purposes, usually for land reform, which are also features of South Africa and India in different degrees. The way in which each country deals with these matters reflects the constitutional and political priorities and values of that state.

1 I am grateful to Hillary Waldron, Alexandre Sampaio and Jayshree Satpute for their valuable assistance with this research. However, all errors and omissions are attributed to me.

In all three countries the role of civil society groups has been instrumental in politicising the land shortage, exposing political lethargy in delivering the rights and informing the courts of the plight of their constituency. At the same time, a common law-type result has occurred in the Brazilian Supreme Federal Court (*Supremo Tribunal Federal*) in that its decisions are now binding on all the lower courts as a result of the build-up of many cases, some of which were similar to the ones they had already ruled on.

What follows is largely explanatory of the law in all three jurisdictions on land redistribution and reform. My own preference for the articulation of this derives not from the right to property, for which all of private law exists, but in article 11 of the International Covenant on Economic, Social and Cultural Rights,[2] which states that everyone has the right to an adequate standard of living and which covers family, food, clothing and housing under that umbrella. Land is a key component in the delivery of an adequate standard of living and constitutes a central demand of those who do not own property in many parts of the world. In the end, this research does not examine the full role that the Covenant plays in what unravels in all three countries and the research necessitates us to look at policies on land reform and implementation through the highest courts in each country. The legal discourse reveals the need for political empathy from courts to deliver decisions that are cognisant of the needs of the contesting parties.

There are a few questions on the compelling forces and future direction that land redistribution and reform laws take in the three countries and which end in a few modest conclusions. There is, however, no equal weight apportioned to the treatment of the issues in each country, with the common law countries of South Africa and India receiving more attention due to the availability of the decisions of the courts.

1 South Africa

1.1 Historical background

As a manifesto, the South African Constitution of 1996 represents a definite break from the past to a new democratic society based on the three values that provide the bedrock of the new social order, namely, human dignity, equality and freedom.[3] These values are addressed in the context of the right to land and the constitutional priorities or imperatives of the new non-racial society. A little digression into the constitutional history does clarify the genesis of the right to restitution of property by persons dispossessed under

2 Opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 1966 and entered into force on 3 January 1976.

3 Sec 7(1) of the Constitution of the Republic of South Africa, 1996.

apartheid laws: In the interim Constitution it was originally located in the equality clause.[4] The Constitution of 1996[5] situated the land restitution principle in the property clause,[6] without removing the quest for achieving equality through ameliorating the harms of the past. All of this illustrates that the negotiations for the changed order reflected its new priorities in which the implementation of land restoration was seen as a right of equal treatment to restore the dignity of those dispossessed.

The principles surrounding the deprivation of property in the Constitution are located in section 25, which reads as follows:

> (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
>
> (2) Property may be expropriated only in terms of law of general application –
>
> (a) for a public purpose or in the public interest; and
>
> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
>
> (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having due regard to all relevant circumstances, including –
>
> (a) the current use of the property;
>
> (b) the history of the acquisition and use of the property;
>
> (c) the market value of the property;
>
> (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
>
> (e) the purpose of the expropriation.
>
> (4) For the purposes of this section –
>
> (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
>
> (b) property is not limited to land.
>
> (5) The state must take reasonable legislative and other measures within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

4 Sec 8(3)(b) of the interim Constitution of the Republic of South Africa, 1993, which reads: 'Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) [the general prohibition against unfair discrimination under 12 listed criteria with "race" being one of them] had that subsection been in operation at the time of dispossession shall be entitled to claim restitution of such rights …'

5 V Jaichand *Restitution of land rights* (1997) 32.

6 Sec 25(7) of the final Constitution.

> (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to the extent provided by an Act of Parliament, either to tenure which is legally secure or comparable redress.
>
> (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
>
> (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).
>
> (9) Parliament must enact legislation referred to in subsection (6).

Section 25 has been referred to by the Constitutional Court of South Africa as necessary to redress 'one of the most enduring legacies of racial discrimination in the past'.[7] Although the cases dealt with first are not related to land restitution per se*,* they do link to the social justice principles associated with land. Housing is inextricably linked to the land issues and, in some cases discussed here, relate to eviction. Some land restitution cases are dealt with later which complete the picture of South Africa's land reform policies and implementation for our purposes.

The result of the implementation of the new constitutional principles was a major shift in the near-absolute common law right of property owners to do with their land as they pleased, especially with regard to other occupiers, to providing rights for *all* occupiers of property, however legally tenuous their rights under apartheid were. To achieve this, it was necessary to attend to the legacy of Roman-Dutch law which corroborated this juridical approach into the right to property.[8] The South African Constitutional Court responded to these deficits by referring to new constitutional imperatives or priorities that were not previously part of the jurisprudence. This is best illustrated in *Port Elizabeth Municipality v Various Occupiers*,[9] where Justice Sachs stated that the Prevention of Illegal Eviction and Unlawful Occupation of Land Act (PIE), one example of the new legislation that dealt with property rights, 'requires the court to infuse elements of grace and compassion into the formal structures of the law' by reminding us that the spirit of *ubuntu* 'combines individual rights with a communitarian philosophy' as a feature of the new society.[10]

7 *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Services; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), cited in *Mphela v Haakdoornbult Boerdery CC* 2008 (4) SA 488 (CC) para 29.

8 Justice Sachs said: 'The principles of ownership in the Roman-Dutch law then gave legitimation in an apparently neutral and impartial way to the consequences of manifestly racist and partial laws and policies' (para 10).

9 2004 (12) BCLR 1268 (CC).

10 *Port Elizabeth Municipality* para 37.

The South African system of apartheid land distribution illustrated at least two unvarnished human qualities: that of greed and fear which was evident when 87 per cent of the best land was reserved for the white group who then made up less than 10 per cent of the population. As racism is based on fear with a desire to dominate, the whites preferred a large divide between themselves and those they believed threatened their future existence.[11] Indeed, the various divisions of race groups into this spatial arrangement were both convenient and essential for a successful system of apartheid. In the democratic South Africa, the priorities changed and an unravelling of this inequality would be a vital component to redress the harms of the past.

1.2 The South African Constitutional Court's response

Remnants of old fears featured in the case of *Minister of Public Works v Kyalami Ridge Environmental Association*[12] brought by a residents' association, made up of largely the white population for whom this area was originally designated in the days of apartheid. The Kyalami Ridge residents complained that a transit camp that was being built was so close that it might have an effect on the character of the neighbourhood and the value of their property, especially if the temporariness of the transit camp was indefinite. They wished to halt the establishment of this camp on state-owned land for black people from the nearby Alexandra Township who were displaced by severe floods. The South African High Court granted the Kyalami Ridge residents an interdict halting the building of a transit camp.

The Minister of Public Works then appealed the decision of the South African High Court to the South African Constitutional Court directly. The Kyalami Ridge residents' association alleged that in the absence of legislation authorising the government to act in such circumstances, such an act would be unlawful. The act of establishing a transit camp would also be unlawful because the requirements of a number of regulations pertaining to town planning, land and environment were not adhered to. In addition, the Kyalami Ridge residents were not afforded a hearing, under their right to a just administrative hearing, before the decision had been taken.[13]

11 P Walshe *The rise of African nationalism in South Africa* (1970) 44.

12 2001 (7) BCLR 652 (CC).

13 Sec 24 of the Interim Constitution of South Africa provides: 'Every person has the right to – (a) lawful administrative action where any of their rights or interests is affected or threatened; (b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened; (c) be furnished with reasons in writing for administrative action which affect any of their rights or interests unless the reasons for that action have been made public; and (d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.'
Sec 33 of the Constitution of South Africa provides: '(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. (3) National legislation must be enacted to give effect to these rights, and

After making a finding that the government had acted lawfully in respect of the legislation, the then President of the South African Constitutional Court, Justice Chaskalson, observed that the allegation of a reduction of the value of their properties was based upon evidence that was 'skimpy'.[14] Justice Chaskalson noted that the state owned the property on which a prison was built and pointed out that under the common law, the 'general rule is that the reasonable use of property by an owner is not subject to restrictions, even if such user causes prejudice to others'.[15] The state had an obligation under the Constitution to the right to housing of all people, especially those who have been displaced by flooding for more than two years. He observed that property values may be affected by low-cost housing development on neighbouring land as a factor relevant to the housing policies, but not one that could 'stand in the way of the constitutional obligation that government has to address the needs of homeless people, and its decision to use its own property for that purpose'.[16]

Justice Chaskalson clarified the constitutional right of the flood victims that also needed to be taken into account in this case. Section 26(2) required the state to take reasonable legislative and other measures, within its available resources, to achieve the realisation of the right of everyone to have access to housing. Justice Chaskalson applied the relevant common law of property on use, but juxtaposed the accepted property law against the constitutional principles as part of the inherent powers of the Court[17] to develop the common law according to the interests of justice. Thus, the South African Constitutional Court balanced the new constitutional imperatives and values against the accepted understandings of the common law of property which previously almost always placed owners in a dominant legal position. The appeal was upheld.

The best illustration of the transformational nature of the South African Constitution is found in the *Port Elizabeth Municipality* case,[18] where Justice Sachs addressed this directly:

> The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a

must – (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote an efficient administration.'

14 *Kyalami Ridge* para 93.
15 *Kyalami Ridge* para 95.
16 *Kyalami Ridge* para 107.
17 Sec 173 provides: 'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'
18 Para 23.

> manner as possible taking account of all of the interests involved and the specific factors relevant in each particular case.

In this case, the Municipality of Port Elizabeth appealed to the South African Constitutional Court on a decision of the Supreme Court of Appeal. Some 68 people, including 23 children, occupied 29 shacks they erected on privately-owned land within the Municipality from which the Municipality sought to evict them in response to a petition signed by the owners of the property and 1 600 people in the neighbourhood. The occupiers were willing to leave the property if they were given reasonable notice and provided with suitable alternative land to which to move. When they were offered alternative land in Walmer, they refused it as they were fearful that they would have no security of occupation.

The South African Constitutional Court, in a unanimous decision, denied the appeal as it was not just and equitable to evict the occupiers because they had lived on the land for a lengthy time and because no mediation had taken place before attempted eviction from this private land. The fact that the land was not being put into other productive use[19] by the owners or the Municipality was taken into consideration. In addition, there were no significant attempts by the Municipality to listen to and consider the problems of this group. This principle of negotiation between the parties in good faith and treating each other on equal terms was earlier developed in the decision of *Government of the Republic of South Africa v Grootboom*[20] and later in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg*[21] which is discussed later.

Justice Sachs explained that in the Prevention of Illegal Squatting Act 52 of 1951 (PISA), the main issue in the apartheid state was whether the occupation was lawful or not. If it was not, the occupiers would be summarily evicted and liable for criminal prosecution. PIE[22] replaced PISA and 'inverted' its effects on the dignity of black persons who were poor and the most affected people.[23] It decriminalised occupation which resulted from less than full ownership and subjected the eviction to due process under the Constitution. The role of the Court was 'to hold the balance between illegal eviction and unlawful occupation', keeping in mind the dignity of the affected person. While the objective of PIE might well have been to get rid of the racist and authoritarian effects which took into account the dignity of dispossessed people through compassion,[24] it was mandated by section 25 of the

19 Art 185 of the Brazilian Constitution also provides that the 'law shall guarantee special treatment for the productive property and shall establish rules for the fulfilment of the requirements regarding its social function'.
20 2001 (1) SA 46 (CC).
21 2008 (3) SA 208 (CC).
22 Act 19 of 1998.
23 *Port Elizabeth Municipality* para 12.
24 *Port Elizabeth Municipality* paras 14 and 15.

Constitution, which formed the package of constitutional rights designed to ameliorate the right to dignity of the majority in the free South Africa.

Justice Sachs evaluated the role and effect of the right to dignity when he stated:

> 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. The integrity of the rights-based vision of the Constitution is punctured when governmental action augments rather than reduces denial of the claims of the desperately poor to the basic elements of a decent existence. Hence the need for special judicial control of a process that is socially stressful and potentially conflictual.[25]

In *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*,[26] a number of residents from a nearby township unlawfully occupied municipal land nearby which later became known as the Chris Hani informal settlement (The facts of this case have features which are similar to Brazilian land occupations discussed later). When they were evicted from the Chris Hani settlement, about 400 of this group settled on adjacent land which they believed was owned by the municipality. It was in fact owned by a company called Modderklip Boerdery. This settlement quickly grew to some 4 000 dwellings. The land owners were successful in an application for the eviction of the unlawful occupiers in terms of PIE. However, Modderklip Boerdery could not enforce the evictions without the assistance of the sheriff, who insisted on a deposit of ZAR 1,8 million (which exceeded the value of the land) to engage a private security firm, as the number of persons then living on the land had grown to around 40 000. The police refused to assist in the eviction because it felt that this was a private civil dispute between the land owners and the occupiers. The police were also of the view that this was a matter of land reform because if the evictions were successfully executed, there would be no place to relocate them and most were likely to return there.

The North Gauteng High Court held that Modderklip Boerdery's property right had been violated by the illegal occupation and by the failure of the illegal occupiers to comply with the eviction order under section 25(1) which contained the principle of legality[27] in that 'no law may permit arbitrary deprivation of property'. As the state had failed to take reasonable steps within its available resources to address the occupiers' access to adequate

25 *Port Elizabeth Municipality* para 18.
26 2005 (5) SA 3 (CC).
27 It reads: 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

housing and land, the state breached the right to have access to adequate housing in section 26 of the Constitution.[28]

In addition, section 25(5) was applicable where the state has to take steps to create conditions which enable citizens to acquire land on an equitable basis.[29]

Modderklip Boerdery's right to equality[30] was breached under sections 9(1) and (2) of the Constitution when it appeared to be burdened with the task of providing housing rather than the state.[31]

The North Gauteng High Court held that the failure on the part of the state to provide land or accommodation led to a breach of the eviction order. It also held that the police had failed in its duty to prosecute the occupiers and protect Modderklip Boerdery's property rights. The Court imposed a structural interdict in which the state was required to present a comprehensive plan to the parties and the Court, indicating the steps it would take to implement the order.[32] On appeal to the Supreme Court of Appeal, the Court found against the state and agreed with the North Gauteng High Court in general. The Supreme Court of Appeal imposed 'constitutional' damages against the state which were due as a result of the breach of a constitutionally entrenched right.

The state then appealed this to the South African Constitutional Court on the basis that the primary responsibility was on Modderklip Boerdery to take reasonable steps to protect their property. The Constitutional Court was critical of the state's attitude in this matter, especially on whether the responsibility for the implementation of the evictions lay solely with Modderklip Boerdery. It pointed out that if Modderklip Boerdery declined to act, the municipality could itself have instituted eviction proceedings.[33] The reason given by state officials for this inaction was to deter 'queue jumping' because they had to heed 'the existing priorities and obligation to accommodate people according to their ranking on the waiting list',[34] which was also alleged by the municipality in the *Port Elizabeth Municipality* case.

28 Sec 26(1): 'Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.'

29 Sec 25(5): 'The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain land on an equitable basis.'

30 Sec 8(4) states: 'A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.'

31 Sec 9(1): 'Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.'

32 *Modderklip* para 16.

33 *Modderklip* paras 31 and 32.

34 *Modderklip* para 34.

Indeed, this would have been justification in certain Brazilian cases where Movimiento Sem Terra (MST) occupied land. However, those who invade land in Brazil are never the direct beneficiaries of the invasion.[35]

Acting Chief Justice Langa, at paragraph 35, then addressed the deficits of apartheid land ownership in relation to the new priorities:

> The problem of homelessness is particularly acute in our society. It is a direct consequence of apartheid urban planning which sought to exclude African people from urban areas, and enforced this vision through policies regulating access to land and housing which meant that far too little and too few houses were supplied to African people. The painful consequences of these policies are still with us eleven years into our new democracy, despite government's attempts to remedy them. The frustration and helplessness suffered by many who still struggle against heavy odds to meet the challenge merely to survive and to have shelter can never be underestimated. The fact that poverty and homelessness still plague many South Africans is a painful reminder of the chasm that still needs to be bridged before the constitutional ideal to establish a society based on social justice and improved quality of life for all citizens is fully achieved.

Acting Chief Justice Langa, in referring to the supremacy of the Constitution and the rule of law provisions, found that it was unreasonable for the state to be a bystander to the attempts by Modderklip to evict the unlawful occupiers. He cited the *dicta* by Justice Mokgoro in *Chief Lesapo v North West Agricultural Bank and Another*[36] with approval, where she stated:

> [T]he right of access to court is indeed 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. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.[37]

He went on to state that the constitutional promise of access to adequate housing required careful planning and fair procedures which are made known to those most affected. A key component of this was 'orderly and predictable processes'[38] and that land invasions should always be discouraged. He therefore found the relief that was ordered in the Supreme Court of Appeal the most applicable: That Modderklip Boerdery was entitled to payment of compensation in respect of the land occupied by the Gabon settlement and that the occupiers were entitled to remain on the land until alternative land

35 The occupation of such land may result in it being designated as land 'not performing its social function' by a court which would make it eligible for redistribution to the next person on the waiting list. More is said about this later.
36 2000 (1) SA 409 (CC) para 22.
37 As cited in *Modderklip* para 40.
38 *Modderklip* para 49.

was made available to them by the state.[39] This provided a serious incentive for the state to roll out its plan for occupiers of the Gabon settlement, to provide financial compensation or expropriate the land in the public interest.

In *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg*[40] more than 400 occupiers applied to the Constitutional Court of South Africa to appeal a decision of the Supreme Court of Appeal which ordered the occupiers to vacate an inner city building in Johannesburg which was alleged to be unsafe and unhealthy and the city was to provide them with alternative shelter. Justice Yacoob, on behalf of the Court, ordered the parties to enter into meaningful negotiations so that an agreement could be reached to alleviate the plight of the tenants, who were placed in this position as a result of an inner city regeneration scheme, in such a way that the city may be allowed to complete their scheduled work. Justice Yacoob referred to the *Grootboom* case[41] to illustrate the constitutional value of human dignity in practice:

> The proposition that rights are interrelated and are equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of State action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if reasonableness of state action concerned with housing is determined without the fundamental constitutional value of human dignity … In short, I emphasise that human beings are required to be treated as human beings.

Justice Yacoob had also referred to the expectation of a municipality to engage with affected persons through mediation as soon as they became aware of their plight in *Grootboom*.[42] In the *Port Elizabeth Municipality* case, Justice Sachs also required the municipality to mediate, that is to engage meaningfully, with a view to finding mutually beneficial solutions.

Justice Yacoob found that the City of Johannesburg did not engage meaningfully as the process was not managed by sympathetic persons sensitive to the needs of both sides. He laid down a few markers in this process, including the need for transparency as the South African Constitution contained the value of 'openness'. He also stated that the alternative accommodation and health and safety issues should be treated by the city in a holistic way and not bureaucratically by assigning the main responsibility to individual departments. When the parties concluded their negotiations, the Constitutional Court approved the settlement agreement, which included the city making the existing buildings cleaner, safer and more habitable. The city agreed to provide security against eviction, access to

39 *Modderklip* paras 66 and 68.
40 n 21 above.
41 Para 10; see *Grootboom* paras 82-83.
42 *Grootboom* para 10.

sanitation, access to potable water and access to electricity for heating lighting and cooking. It also agreed to cap the rents at 25 per cent of the occupants' monthly income and to consult with the residents on more permanent housing solutions for the future. The Court set out the practical implications of the right to dignity in the procedure and treatment of vulnerable persons and provided a relevant framework of operation between contesting sides in such matters.

In *Machele v Mailula*[43] the South African Constitutional Court was approached by a number of persons from 69 families who were to be evicted from a building due to be sold by the owner as a result of the mounting debts he had to attend to. The tenants approached the Court directly after the High Court had ordered their eviction, as they were due to be homeless imminently. Justice Skweyiya suspended the High Court order until the Supreme Court of Appeal determined the appeal because no alternative housing was provided. Justice Skweyiya reiterated that the application of PIE 'is not discretionary. Courts must apply PIE in eviction cases'. This case underscored the complete departure in modern law from unlawful occupation to illegal eviction.

What are the innovations which register a departure from the Euro-American models of constitutionalism? Had the South African Constitutional Court not signalled a new hierarchy when it knocked off the right of property owners from the common law perch and accommodated the rights of the previously propertyless? Indeed, it had when it applied the new constitutional imperatives and legislation that supported the right to freedom, equality and dignity. While the right to property comprises more than the right to land and housing, the notion of constitutional property was clarified. In all the cases discussed above, the rights of the vulnerable, that is, the rights of the occupiers, appear to be of paramount importance to the state, especially where evictions were attempted with no provision for alternative accommodation: in *Kyalami Ridge*, the victims of flooding; in *Port Elizabeth Municipality*, the rights of the occupiers; in *Modderklip*, the rights of the occupiers and the land owners; and in both *Olivia Road* and *Machele*, the rights of those evicted.

Can the rights of certain categories of the propertyless be referred to as the 'compelling state interest' of the developing states, where they seek to balance the rights of other occupiers of land against the owners? Stated in another way, has the right to property shifted from the protection of the sole rights of private owners to the rights of non-owners, who occupy property in previously legally tenuous ways as a matter of public interest? While the South African Constitutional Court has consistently maintained that it had to balance the competing interests in terms of the new imperatives or priorities, it clarified the nature and procedure of the engagement between contesting

43 2010 (2) SA 257 (CC).

sides to achieve results through meaningful negotiations. This approach might assist India and Brazil before challenges are brought to the court.

What is the relative value of *ubuntu* as a means to address this issue? It infers that the rights of the community are relevant in determining the right of the individual to land, where evictions take place with no provision for alternative accommodation. This appears to run counter to the individual ownership approach of Western liberal thinking to land. In *Kyalami Ridge*, there was a clash between individual owners' rights, through a residents' association, against the community of persons displaced by flooding. Similarly, in both *Olivia Road* and *Machele*, the rights of the community of evicted persons triumphed over a municipality and an individual owner. Also, there is some similarity with the *Port Elizabeth Municipality* case, in that the persons who signed the petition for the removal of the occupiers of the land did so as concerned individuals. However, there is joint victory for the rights of the individual and community in *Modderklip*. So do the new priorities demand a less individualistic perspective to land?

From the cases presented, can we conclude that the rights of occupiers would 'trump' the right of the state or private owner? The requirements of examining the circumstances of the occupation under PIE guide the Court in these circumstances. Both *Olivia Road* and *Machelle* illustrate this best. In two of the cases, the length of time the occupiers spent as a settled community[44] appear to be influential, while the other is based on urgency to assist flood victims. In the three cases of *Port Elizabeth Municipality*, *Kyalami* and *Modderklip*, the land appears not to be put to productive use, although one had an existing building, a prison, on it. In two of the cases, the rights of the owners were affirmed (*Kyalami* and *Modderklip*). So can we conclude from these cases that the rights of the occupiers 'trump' the rights of the owners? The notion of 'trump' is ill-fitting where a purposive approach is taken, as it relates to the 'casting of an obstruction' in these types of cases. The South African Constitutional Court uses the word 'balance', which is more about giving equal weight or power to both sides of the argument.

Does the South African judiciary consider social accountability and the justification for activist practices? Do the cases illustrate that the court will reward those who break the law through the alleged creation of preferential treatment for 'queue-jumpers' (or those who occupy land in the hope that their plight might be attended to as a matter of priority) in the state plans for allocation of housing or land? This conclusion cannot be applied to *Olivia Road* and *Machele*, which threatened to evict persons who might originally have lawfully occupied their building. Also, this conclusion does not apply in the *Kyalami Ridge* case, but may be present in *Port Elizabeth Municipality* and *Modderklip*. Again, in terms of the legislation, the longer the unlawful

44 The Indian Supreme Court in *Olga Tellis v Municipal Corporation of Bombay* 1985 (2) SCALE 5 declared that those who had lived in the slums for more than 20 years were not to be removed. See the section on India below.

occupiers are on a site, the more established as a community they are likely to be and therefore integrated in that society. Indeed, these come to the fore in the *Modderklip* case, where the eviction of illegal occupiers was both impossible and inhumane. Was this perhaps not an underlying reason for the rule of law consideration by Justice Langa, to show the South African Constitutional Court's impatience with the state's inaction in that particular case? If the state did not enforce court orders, land invasions would occur. Or was it a predictable outcome of the new priorities of the state: That the new-found freedom would result in more testing of the boundaries of social behaviour? If it is, then the state will have to manage that outcome and the courts will feature prominently again under the rule of law principle. The Indian cases of *Olga Tellis v Municipal Corporation of Bombay*[45] and *Sudama Singh v Government of Delhi*[46] illustrate the contrasting fortunes of people living in informal housing in India.

While the approach of the South African Constitutional Court to property addressed the democratic values of human dignity, equality and freedom directly,[47] there was also realignment and jettisoning of some of the previously-accepted legal concepts of common law property through the Constitution and enactment of new laws on the right to restitution of land, the rights of evicted persons, the rights of persons with insecure tenure, the right to housing and the rule of law. This in turn created more predictability and certainty in the law. At the same time, it created 'tensions between constitutional provisions and existing private law', as one commentator observed.[48]

The greatest value of *ubuntu* appears to lie in the right to dignity. The South African Constitutional Court has given content to that right by ordering parties to negotiate in good faith for a meaningful result, as in *Olivia Road*. This also signals the need for a different type of public servant or city officials, one with genuine empathy for the plight of the indigent, marginalised and vulnerable. Indeed, it may be said that legal education needs to accommodate this demand for a less adversarial lawyer by including legal negotiation skills, as one example, in the legal education curriculum. Without that, the black-letter property lawyer can only pay lip service to the new property law in South Africa. In India, it led to a continuous constitutional battle in the courts with little progress on land reform. One commentator stated that the elite in Brazil sent their sons to Portugal to study law so that "they learned how to complicate the legal system to their advantage." [49] In India, it led to a continuous constitutional battle in the courts with little

45 As above.
46 MANU/DE/0353/2010.
47 Sec 7(1) of the Constitution of South Africa.
48 AJ van der Walt 'The state's duty to protect property owners v the state's duty to provide housing: Thoughts on the *Modderklip* case: Notes and comments' (2005) 21 *South African Journal on Human Rights* 144.
49 J Holsten 'The misrule of law: Land and usurpation' (1991) 33 *Comparative Studies in Society and History* 695 712.

progress on land reform. In Brazil, it legitimated and legally protected the actions of MST the civil society organisation, which reduced the tensions surrounding land reform or the lack of it.

1.3 Restitution of land rights cases before the South African Constitutional Court

South Africa has an elaborate land restitution process with an independent Land Claims Commission and a Land Claims Court which determines claims under the Constitution in section 25(7) specifically and in the Restitution of Land Rights Act.[50] A person or a direct descendant of such a person, or a deceased estate or a community or a part of a community which was dispossessed of land under racially discriminatory laws or practices would qualify as a claimant. The Land Claims Commission receives all claims and has the power to investigate, mediate and make recommendations in these matters.

In *Mphela*[51] the Mphela family entered into a forced sale of their land because it was deemed to be part of a 'black spot' that meant that it was targeted for exclusive use and ownership by white persons only. In an appeal from the Supreme Court of Appeal, the South African Constitutional Court had to consider what constituted fair compensation as the family had been paid a price that was about 50 per cent higher than the market value. It agreed with the Supreme Court of Appeal that the compensation was not fair because the Court had to consider a number of factors. The South African Constitutional Court approved of the Supreme Court of Appeal's assertions on fair assessment:

> Fair compensation is not always the same as market value of the property taken; it is but one of the items which must be taken into account when determining what would be fair compensation. Because of important structural and politico-cultural reasons, indigenous people suffer disproportionately when displaced and Western concepts of expropriation and compensation are not always suitable when dealing with community-held tribal land. A wide range of socially relevant factors should consequently be taken into account, such as the settlement costs and, in appropriate circumstances, solace for emotional distress.[52]

In *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Limited*[53] the issue was whether labour tenants were eligible to claim land as an affected community under the Restitution of Land Rights Act of 1994. The individual applicants alleged that their families had enjoyed undisturbed

50 Act 22 of 1994 which had been amended several times to permit the Minister of Land Affairs to reach the main objective. Further amendments have been proposed in 2013.
51 [2008] ZACC 5.
52 Para 13.
53 2007 (6) SA 199 (CC).

indigenous rights to the land from the1850s before the dispossession took place when the white settlers arrived in the 1870s and appropriated the land. Some of the applicants remained on the farm as labour tenants when they lost the land. In citing *Alexcor Limited v Richtersveld Community*[54] with approval, Moseneke DCJ found that the indigenous law (also known as customary law) ownership of the applicants had not been effectively ended prior to 19 June 1913, with the result that it survived beyond that constitutional cut-off date. He also held that the survivors of the Popela community were eligible for land restitution because the legislation set a low threshold to determine what constituted a 'community'. There was no need to look for indicators such as tribal identity as the surviving group now took the name of their one-time leader, Popela Maake. However, labour tenancy was essentially an individual contractual relationship and not a communal one. As this was the causal connection to apartheid laws, a purposive interpretation made the Popela community eligible claimants because 'racist practices and policies cannot mean a single decisive cause but a concurrence of events conducted over time'.[55] In interpreting the phrase 'as a result of' past racially discriminatory laws, Moseneke DCJ preferred 'as a consequence of' rather than 'solely as a consequence of'.[56]

In *Richtersveld Community v Alexkor Limited*[57] the Supreme Court of Appeal in a unanimous decision held that the Richterveld community's right to land amounted to a customary law interest because the people continued to exercise and enjoy exclusive beneficial occupation of Richtersveld until their dispossession in 1920. It found that when diamonds were discovered on the claimed land, the state dispossessed the community of its rights to land through practices which were racially discriminatory. It held that the Land Claims Court erred in its conclusion that the dispossession of the community was not aimed at furthering 'spatial apartheid' and therefore did not constitute dispossession as a result of racial practice.

On appeal before the South African Constitutional Court,[58] it was argued that the Richtersveld community's land rights had not survived annexation by the British Crown in 1847, that the same community had no rights in the land in 1913 and that the dispossession had not occurred through racially discriminatory practices. The Constitutional Court held that the rights in land were determined by indigenous law, that is, customary law, and not by common law. In terms of section 211(3) of the Constitution, courts were obliged to apply customary law in keeping with the constitutional values.[59] The South African Constitutional Court concurred with the decision of the

54 2003 (12) BCLR 1301 (CC) para 81.
55 Para 66.
56 Para 69.
57 2003 (6) SA 104 (SCA).
58 *Alexcor Limited and the Government of the Republic of South Africa v The Richtersveld Community* [2003] JOL.
59 'The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.'

Supreme Court of Appeal. It ordered that the Richtersveld community was entitled to restitution of the claimed land, including its minerals and precious stones.

In *Transvaal Agricultural Union v Minister of Land Affairs*,[60] the President of the Constitutional Court, Justice Chaskalson, said that the registration of a claim in the Deeds Register constituted notice to the world at large that the land in question was subject to a claim under the Act and did not detract from the rights of the landowner. The Constitutional Court put to rest the notion that the right to acquire, hold and dispose of rights in property would trump the right to land restitution when it said that under sections 121 and 123 of the interim Constitution 'the existing rights of ownership did not have precedence over claims for restitution'.

The jurisprudence in restitution cases has been largely developed by the Land Claims Court and the role of the South African Constitutional Court, as the apex court, has been to review cases. The constitutional value of restoring dispossessed land to eligible claimants is asserted as an imperative. The cases discussed here range from determining the meaning of 'fair compensation', the feasibility of restitution, the determination of what constitutes a 'community', the rights of indigenous persons under the customary law and the cause of dispossession in South Africa. They indicate that the approach of the South African Constitutional Court has been to interpret legal norms like 'causation' more broadly than the accepted common law 'nexus'.

The South African Constitutional Court has interpreted the effects of apartheid on dispossessed communities as a cumulative experience of laws, practices and policies on a group of people rather than a single decisive cause. While it has commented on what constitutes 'fair compensation' to a dispossessed person, it has not been presented with a case on the valuation of property of the current owners, who were usually white farmers. One area in which there is a likelihood of a constitutional challenge will be on the interpretation of any new expropriation laws with market value no longer as the sole measure of land value, but one which includes the current use of the property; the history of the acquisition and the extent of state assistance granted to acquire and improve the land. As the cost of acquiring land for restitution rises, the state may be compelled to introduce this law. The decision not to utilise the original draft expropriation law was a political one which built further pressure on the exchequer as white farmers continue to demand higher self-assessed values for their land.[61] In 2013 the Expropriation Bill was published which signals an intent by the government to push ahead with its land reform policies. While section 25(3) of the

60 1996 (12) BCLR 1573 (CC).

61 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Miloon Kothari', United Nations General Assembly A/HRC/7/16/Add.2 29 February 2008, where the South African Human Rights Commission's 6th Economic, Social and Cultural Rights Report of August 2006 is cited.

Constitution does provide that '[t]he amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected', it does clearly list criteria to be used in order to find that balance.

The common law principle of restitution in South Africa is based on the Roman law maxim of *restitutio in integrum* which requires that the injured party be restored to the situation which would have prevailed had no injury been sustained. It is clear that in most land restitution cases in South Africa the injured party is usually not the white landowner. There is little doubt today that apartheid was unjust and is regarded as a crime against humanity. Therefore the laws that were contrived to provide a privileged opportunity to a white person to acquire land under apartheid should not provide undisturbed possession in law, even if the transaction was undertaken in good faith. Today, the perpetrators or beneficiaries of the original unjust act claim they are victims because they are not offered market value on the expropriation of their land. That is a distortion of the legislation and the principle of *restitutio in integrum* as the 'injurer' appears to makes a more vocal claim, sometimes regarded as more valid, than the injured. One justification for the market value compensation is that it then will allow the white farmer to buy a comparable farm on the open market. Surely the 'injurer' cannot be expected to be restored to the situation which would have prevailed had no injury been sustained because that is the right of the injured.

The government's recent response to these setbacks in the last year has been to propose a policy framework for the establishment of the Office of Valuer General and a Draft Property Evaluation Bill.

2 India

2.1 Historical background

It is not possible to give a complete account of the history surrounding land and the rights of individuals,[62] except to begin with the role of British colonisation which left the country with one of the major constitutional battles in the Indian Supreme Court to achieve a fairer distribution of land for all. One commentator summarised it as follows:

> Land and those who hold it and farm it loom large in Indian affairs. Politically, landholders remain one of the most influential groups in India when four-fifths of the people still live in the villages. The defensive claims of the relatively privileged who control a significant parcel of land, as against the demands of

62 See R Bandyopadhyay 'Land system in India: A historical review' (1993) 28 *Economic and Political Weekly* A149, for a concise account of social inequality and land relations in rural India.

> those who want to share this privilege, provide one of the central themes of the political contention.[63]

Under British control, the princes, zamindars, jagirdas and talukdars, in a plan similar to the feudal system, found their position entrenched in the Government of India Act of 1935. The colonial power sought to maintain its hold on India through many strategies and section 299 of that Act reflected this in the following words:

> 1 No person shall be deprived of his property in British India save by authority of law.
>
> 2 Neither the Federal nor a Provincial Legislature shall have the power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which it is to be determined.
>
> 3 No Bill or amendments making provision for the transference to the public ownership of any land or for the extinguishment or modification of rights therein, including rights or privileges in respect of land revenue, shall be introduced or moved in either Chamber of the Federal Legislature without the sanction of the Governor-General in his discretion, or in a Chamber of Provincial Legislature without the previous sanction of the Governor in his discretion.
>
> 4 Nothing in this section shall affect the provision of any law in force at the date of the passing of the Act.
>
> 5 In this section 'land' includes immovable property of every kind and any rights in or over such property, and 'undertaking' includes part of an undertaking.

Other sections of the Government of India Act of 1935 were concerned mainly with the protection of British subjects, British companies and other businesses from future adverse discrimination on matters of taxation, continuing business in India, practising professions, the receipts of subsidies and shipping.

It is clear that this Act passed by the British Parliament, together with the constitutions of Western liberal states, had a great influence on the drafting of the Indian Independence Constitution a few years later. Despite the vigorous debate at the Constituent Assembly, in which several speakers warned Pandit Nehru of the danger in the draft article 31(2), it was accepted anyway. Like the discussions in South Africa, the Constituent Assemblies of both countries reached a compromise on land reform which was contained in article 31 of the Constitution of India:

> (1) No person shall be deprived of his property save by authority of law.

63 HCL Merrillat *Land and the Constitution in India* (1970) 9.

> (2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which it is to be determined.

In the Indian government's attempts to implement the land reform plans, the tenacity of article 31 ensured that the matter would be revisited in the Indian Supreme Court on many occasions in various guises.[64] The various amendments sought to mitigate the influence of the 1894 Land Acquisitions Act, which permitted the state to acquire land for public purposes, provided that compensation was paid at market value. As 'public purpose' is undefined, the courts were not empowered to determine the purpose behind the taking of property. One commentator summarised the position as the language leaving the role of the judiciary as unclear.[65]

Unrest due to land matters as early as 1860 was reactive to the difficulty they faced such as the Indigo cultivators' strike. They were in the main isolated and spasmodic until the emergence of Gandhi, when the non-co-operation and civil disobedience movement galvanised groups against the unjust land allocations. More recently, there have been struggles with the Naxalite movement which is a militant political grouping arising from links with the Communist Party India. They advocated for land reform for some 80 million landless people although they are seen as a subversive group by the government of India.

At the time of independence, India inherited a system of land ownership with vast tracts of land in the hands of absentee landlords and mostly smallholdings which were too small to provide a livelihood as the land continued to be subdivided with each generation claiming a share. At the same time, there was a large landless labour force with no protection for labour tenants. The migration to the cities, as in South Africa and Brazil, created large slums and additional social issues. The government had to deal with this matter politically also, as this was a threat to the socialist pattern of Indian society which became the new imperative for the fledgling democracy under the Congress Party.

2.2 The Indian constitutional cases

The history of constitutional amendments in India dealing with land reform began with articles 31-A and 31–B which were introduced in 1951 to assist

64 Gandhi was reported to have said that if compensation was to be paid, then there would be a need to borrow from Peter to pay Paul, see PK Agrawal *Land reforms in India: Constitutional and legal approach* (1993) 42.

65 Merrillat (n 63 above) 9.

the process of legislation to speed up agrarian reforms. It was also intended to prevent challenges on the ground that the fundamental rights of citizens were curtailed, or that the state made laws which took away or diminished the fundamental rights of citizens under Part III.[66] The Amendment abolished *zamindari* and other laws, which were used to delay land reform, and not in keeping with the social programme of the state. Those with property sought to protect their vested rights in court which were threatened by these amendments. The validity of the First Constitutional Amendment was upheld in *Sri Sankari Prasad Singh Deo v Union of India and State of Bihar*,[67] in that a law which seeks to deprive a person of his property must be a valid law enacted by the legislature and consistent with the guarantee of fundamental rights found in Part III of the Constitution. The Court held that the First Constitutional Amendment was made under the constituent power of Parliament[68] and was therefore valid.

The Fourth Amendment to the Constitution was passed in 1955 where the Statement of Objects and Reasons for the Bill declared that as the *zamindari* abolition laws had been before the Indian courts the amendment was necessary 'in order to put an end to the dilatory and wasteful litigation and place these laws above challenge in the courts'. The adequacy of compensation was still not legislated, for in *State of West Bengal v Bela Banerji*[69] the Supreme Court held that 'compensation' meant the market value of the property on the date of acquisition together with compensation for the deprivation of property. Keeping in mind the limited resources, this was a larger financial burden for the acquisition of land in the public interest.

66 Constitution (First Amendment) Act 1951: Insertion of new article 31A. 'After article 31 of the Constitution, the following article shall be inserted, and shall be deemed always to have been inserted, namely:- 31A Saving of laws providing for acquisition of estates, etc. (1) Notwithstanding anything in the foregoing provisions of this part, no law providing for the acquisition by the state of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this part: Provided that where such law is a law made by the legislature of a state, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent. (2) In this article - (a) the expression 'estate' shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any *jagir, inam* or *muafi* or other similar grant; (b) the expression 'rights', in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure holder or other intermediary and any rights or privileges in respect of land revenue.' Insertion of new article 31B. 'After article 31A of the Constitution as inserted by section 4, the following article shall be inserted, namely: 31B Validation of certain Acts and Regulations. Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent legislature to repeal or amend it, continue in force.'

67 (1952) SCR 89.

68 Indeed, the Constitution (24th Amendment) Act of 1971 confirmed that Parliament was acting 'in exercise of its constituent powers'.

69 (1954) SCR 558.

In *IC Golak Nathv State of Punjab*,[70] the case arose from a protest against a ceiling on the amount of land an individual could continue to legally hold. Henry Golak Nath tried to divide his land amongst his family members in order not to run foul of the ceiling requirements. Unfortunately he failed to conclude the distribution in time. Henry and his brother held 500 standard acres. Under the Punjab Security of Tenure Act, the collector held that each was entitled to 30 acres while 20 acres were distributed to old tenants. The remaining 420 acres were declared surplus and were made available for redistribution. Henry died and his son and daughter and the son's four daughters inherited Henry's property and petitioned the Supreme Court. This case resulted in a setback for agrarian law reform as, by a majority of six to five, the Supreme Court ruled that the amendment which, if it takes away or diminishes the fundamental rights, that is, the right to property, is void. In response to this decision, the 24th Constitutional Amendment was enacted to provide expressly that Parliament had the power to amend any provision of the Constitution.

Kesavananda Bharati v State of Kerala[71] overruled the *Golak Nath* case in that it held that Parliament had limited power to amend the Constitution as it pleased to alter the basic framework of the Constitution, that is, under the Basic Structure Doctrine.[72] The 25th Constitutional Amendment Act provided that in cases of compensation for acquisition of properties for public purposes, only the amount fixed by law needed to be paid and that this amount could not be challenged in court because it was inadequate or not in cash.[73] One of the issues before the Court was: Was this amendment constitutional as it took away the ability of the courts to scrutinise such cases? This amendment pertaining to the legal challenge was overruled by a seven to six majority in *Kesavananda* and a six to five majority of the justices held that the amount for compensation may not be illusory but must be determined in relevance to the acquisition of the property.

70 (1967) SCR (2) 762.

71 AIR 1973 SC 1461.

72 The following features may constitute the basic structure of the Indian Constitution and any attempts to modify them would merit judicial review: (a) supremacy of the Constitution; (b) rule of law; (c) the principle of separation of powers; (d) the objectives specified in the Preamble to the Constitution; (e) judicial review; (f) federalism; (g) secularism; (h) the sovereign, democratic, republican structure; (i) freedom and dignity of the individual; (j) unity and integrity of the nation; (k) the principle of equality; (l) the 'essence' of other fundamental rights in Part III; (m) the concept of social and economic justice in Part IV; (n) the balance between fundamental rights and Directive Principles; (o) the parliamentary system of government; (p) the principle of free and fair elections; (q) limitations upon the amending power conferred by art 368; (r) independence of the judiciary; (s) effective access to justice; (t) powers of the Supreme Court under arts 32, 136, 141 and 142; and (u) legislation seeking to nullify the awards made in the exercise of judicial power of the state by arbitration tribunals constituted under an Act.

73 Amendment of art 31: '(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash.'

Frustrated by the slowed process of land reform, Congress responded with yet another strategy. The 44th Constitutional Amendment Act of 1978 deleted the right to property from the list of fundamental rights. A new article, article 300-A, was added to the Constitution which provided that 'no person shall be deprived of his property save by authority of law'. This article took away the arbitrariness of expropriation. Thus, if the legislature makes a law depriving a person of his property, there would be no obligation on the part of the state to pay anything as compensation. The aggrieved person would have no right to petition the court as a fundamental right under article 32. The right to property is, however, still a constitutional right. If the government appeared to have acted unfairly, the action can be challenged in a court of law by citizens under the inherent powers of the court.

In the case of *IR Coelho (deceased) By LRs v State of Tamil Nadu*,[74] dealing with land reform legislation, the doctrine of the Basic Structure of the Constitution[75] was again addressed as the Constitution of India was amended to deal with land reform. The main issue was whether it was permissible for Parliament under article 31B to protect legislation from the fundamental rights by including them into the Ninth Schedule and, if so, what was the effect on the power of judicial review of the Court. The Supreme Court held that the power to amend the Constitution was not unlimited; if it destroyed the identity of the Constitution, the amendments would be void. In defining the basic structures it said:

> Equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts are *(sic)* intimately connected. There can be no rule of law, if there is no equality before the law. These would be meaningless if the violation was not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore the duty to decide whether the limits have been transgressed has been placed on the judiciary.

It held that a law which abridged fundamental rights may violate the Basic Structures Doctrine which will be determined in judicial review by the Supreme Court 'tested on the touchstone of the basic or essential features of the Constitution'. The courts, by virtue of their inherent powers, were best placed to adjudicate in these matters and it held:

> [E]ven though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away abrogated pertains or pertain to the basic structure.

74 AIR 2007 SC 861.

75 As pronounced in *His Holiness Kesavananda Bharati, Sripadagalvaru v State of Kerala and Another* AIR 1973 SC 1461. If an amendment to the Constitution damages or destroys the basic structure of the Constitution, that amendment can be struck down.

Had the Indian Supreme Court not, in effect, upheld the two-tiered nature of human rights because the fundamental rights appear to be beyond reach yet the rights of the poor, whose lot were part of the new prerogatives of the independent state cast in the Directive Principles? Justice Sunil Ambwani believed that this was not so and that the protection of fundamental rights 'is the best way to promote a just and tolerant society and the right of the judiciary to protect constitutionalism'.[76] Despite the best efforts of the legislators to amend the effects of the right to property as originally devised in the Constitution, it failed to take it away from judicial scrutiny. Therefore, any land taken for public purposes required the state to pay the owners with fair compensation which must be realistic and market related. That is the very point at which the South African land reform measures have been stalled currently.

2.3 Other Indian land rights cases

The protection of certain marginalised and vulnerable groups to their right to land and housing in the Indian courts has been clarified. In *Manorey Manohar v Board of Revenue (UP*),[77] the appellant, a landless labourer belonging to a scheduled caste, had been cultivating 2,45 acres for about 14 to 15 years. That same land was leased out to others in 1990 by the local authority which treated it as fallow lands and the appellant was evicted. An inquiry by the sub-divisional officer in charge of such land matters held that the petitioner was continuously in possession prior to 30 June 1995 and continued to be so even on the date of allotment of the land to a third party. Therefore the name of the appellant ought to have been recorded as *bhumidhar*,[78] with a non-transferable right by deleting the name of local authority in the records. The procedure for eviction of a person unlawfully occupying or damaging or misappropriating the property vested in a local authority was clear, the Supreme Court held. Whenever any agricultural labourer belonging to a scheduled caste or tribe was in occupation of any land before 30 June 1985 that did not exceed 3,125 acres, no action under this section should be taken by the land management committee against such labourer. The Court maintained that

> [i]t would be travesty of justice to deny relief to the appellant who is a scheduled caste agricultural labourer and relegate him to an unfortunate situation of being left without remedy though he has a statutory right to continue in possession and enjoyment of the land.

The appeal was allowed and the order of the board of revenue and the High Court was set aside and the sub- divisional officer's order was restored.

76 '*IR Coelho (deceased) by LRs v State of Tamil Nadu and Others*: A Case Study' lecture delivered by Justice Sunil Ambwani at the Advocates Association on 9 February 2007 http://districtcourtallahabad.up.nic.in/articles/9th%20schedule.pdf.

77 2003 (5) SCC 521.

78 The formalisation of tenuous title by a person occupying land to which there was no title.

In *Chinde Godwa v Puttamma,*[79] government land, as part of the programme of granting access to land to the scheduled castes and scheduled tribes and indigent persons, was sold at a nominal cost on condition that it was not to be alienated for a period of 15 years. In violation of this condition, the land was sold to Manche Gowda whose children, in turn, sold it to the appellant. The appellant maintained that the original transaction was a lease and not a sale, in which case the restrictive condition would not apply. The Karnataka High Court disagreed and stated that the prohibition regarding alienation was a restrictive covenant which was essentially for the benefit of the designated persons who needed to be protected from property speculators, and did not constitute an unreasonable restriction.

In *Chameli Singh v State of UP*,[80] the appellants were the owners of land in villages which were subject to expropriation under the Land Acquisition Act of 1894. It was contended that on account of the acquisition, the appellants would be deprived of their lands, which was the only source of their livelihood, violating article 21 of the Constitution. The question was whether the taking of this property did not take away the right to life of the appellants.

The Indian Supreme Court held that the acquisition was in accordance with the procedure and compulsory for the public purpose of the state under the obligations of fundamental rights and principles. It held, as it did in *Olga Tellis* and *Ahmedabad Municipal Corporation*, two seminal cases discussed below, that:

> The right to shelter when used as an essential requisite to the right to live should be deemed to have been guaranteed as a fundamental right, as is enjoyed in the directive principles the state should be deemed to be under an obligation to secure for its citizens, of course subject to its economic budget.

The land acquisition by the state was upheld as it was for a public purpose under a special scheme to provide housing exclusively for the scheduled castes and Dalits.

In *Reliance Petroleum Ltd v Zaver Chand Popatlal Sumaria*[81] the Indian Supreme Court dealt with land belonging to 19 individuals where it was needed by the state or a company for a public purpose. The Supreme Court held that the only reason for the challenge was that the owners wanted to get the maximum price for their land. The Supreme Court decided the case on the facts and held that the company should pay the compensation at the enhanced rate paid to the other 70 individuals who had accepted the company offer. The Court held that if the petitioners really intended on challenging the acquisition, they should have done so immediately after the publication of the notice.

79 2007 (14) SCALE 607.
80 AIR 1996 SC 1051.
81 1996 (4) SCALE 340.

The *Olga Tellis* case[82] set out the content of the protections afforded to persons with precarious or no title to the land or their dwellings in litigation on behalf of persons who lived on pavements and slums in the city of Bombay. In 1981, the state of Maharashtra and the Bombay Municipal Council decided to evict all pavement and slum dwellers from the city of Bombay. Following this, the pavement dwellings of some of the petitioners were demolished by the Municipal Corporation of Bombay.

The Indian Supreme Court found the right to a fair hearing had been violated at the time of the planned evictions. It held that the right to life encompassed a means of livelihood

> if there is an obligation upon the state to secure to citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the context of the right to life. However, the right to livelihood was not absolute and deprivation could occur if there was a just and fair procedure.

The Court declared that sites should be provided for residents with census cards in 1976 and slums in existence for more than 20 years were not to be removed unless land was required for public purpose and, in that case, alternative sites must be provided. Again, as in South Africa, there was larger protection for the long-standing occupier.

For our purposes, it is important to dwell on the Indian Supreme Court's assessment of the norms of justice and fairness as exercised by a public authority:

> Just as a mala fide act has no existence in the eyes of the law, even so, unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his or her fundamental right, in this case the right to life, must confirm to the norms of justice and fair-play. A procedure which is unjust or unfair in the circumstances of a case attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it.

The stress continued to be placed on formal notions of justice rather than on the substantive results arising from justice and fair-play.

In *Ahmedabad Municipal Corporation v Nawab Khan Gulab Kahn*,[83] the Municipal Corporation of Ahmedabad wished to evict 29 pavement dwellers who were in unauthorised occupation of footpaths of the busy Rakhai road where they had constructed huts from which some were running businesses. The High Court granted an interim stay of removal of the encroachment until suitable accommodation had been provided to them.

82 1985 (2) SCALE 5
83 (1997) 11 SCC 121.

The Indian Supreme Court, on appeal, held that before removing the pavement dwellers, a fair procedure of hearing, consistent with the principle of natural justice, should be followed. The pavement dwellers had to be served with adequate notice. Where the occupation was in existence for a shorter time, no notice was required. The question was whether they were entitled to alternative settlement before being ejecting. The Supreme Court allowed the removal of long-term pavement dwellers by the state on condition that alternative accommodation was made available under a scheme of the state corporation which served to provide housing or the weaker section of society. It approved the ruling in *Olga Tellis* that the protection of life would include the right to livelihood.

The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal it is the bare protection of the body; for a human being it has to be suitable accommodation which would allow him to grow in every aspect – physically, mentally and intellectually. The surplus urban vacant land was directed to be used to provide shelter to the poor. In the *Olga Tellis* case, the Constitution bench had considered the right to dwell on pavements or in slums by the indigent and the same was accepted as a part of right to life enshrined under article 21; their ejectment from the place nearer to their work would be a deprivation of their right to livelihood. They would be deprived of their livelihood if they were evicted from their slum and pavement dwellings. Their eviction was tantamount to a deprivation of their life. The right to livelihood is a traditional right to live; the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness, but it would make life impossible to live. The deprivation of right to life, therefore, must be consistent with the procedure established by law.

The Indian Supreme Court held that, due to the lack of facilities and opportunities, the right to residence and settlement was an illusion to the rural and urban poor. It clarified that no person had the right to encroach and erect structures on footpaths, pavements, public streets or any other place reserved for a public purpose. However, the state had a constitutional duty to provide adequate facilities and opportunities by distributing its wealth and resources for settlement of life and the erection of a shelter over their heads to make the right to life meaningful. The Indian Supreme Court did not provide the higher threshold of protection for those who occupy land without the requisite permission, as the South African Constitutional Court did, but called for an evaluation of each case on its merits.

It is true that in all cases it may not be necessary, as a condition for the ejectment of an encroacher, that he should be provided with alternative accommodation at the expense of the state which, if given due credence, is likely to result in abuse of the judicial process. But no absolute principle of universal application would be laid in this behalf. Each case is required to be examined on the given set of facts and appropriate to the facts of the case.

In *Shantistar Builders v Narayan Khimalal Totame*,[84] the respondents challenged the provisions of the Urban Land Ceiling and Regulation Act of 1976 in which the state exempted certain lands from the provisions of the Act on condition that the land was used by builders for the purpose of providing housing for the 'weaker section of society', as provided for in article 46 of the Constitution. The purpose of the Act was to provide for the imposition of a ceiling on vacant land in urban areas, for the acquisition of such land above the ceiling limit and to regulate the construction of buildings with a view to preventing land speculation and profiteering.

On appeal to the Indian Supreme Court, it held that the constitutional right to life guaranteed the equality of the weaker segment of society and found that meeting basic needs was indispensable to the development of individuals.

The basic needs of man have traditionally been accepted to be three – food, clothing and shelter. The right to life is guaranteed in any civilised society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and reasonable accommodation. The Constitution aims at ensuring fuller development of every child. That would be possible only if the child is in a proper home. It is not necessary that every citizen must be ensured of living in a well-built, comfortable house, but a reasonable home, particularly for people in India where it can even be a mud-built thatched house or mud-built fire-proof accommodation.

A shift in the approach of some High Courts to protect pavement dwellers began in the larger cities where the taking for a public purpose was redefined with a view to cleaning up the cities. In *Okhla Factories Owners Association v Government of National Capital Territory of Delhi*[85] the issue of the removal of squatters and encroachers on public land was considered. The Delhi High Court ordered that no alternative sites were to be offered in future to such persons and that they 'should be removed expeditiously without the prerequisite requirement of providing them alternative sites before such encroachment is removed or cleared'. The Court held that the object of the Land Acquisition Act was to make available land for public purposes. Once the taking of such land for a public purpose was made, any resulting hardship had to permit the larger public purpose. While there was a duty on government to provide shelter for the underprivileged, to permit such land to be utilised for the rehabilitation of persons who have encroached upon public land would be a travesty of justice and fair-play and would amount to a reward for dishonesty and encroachment on the land. This was an executive-minded

84 (1990) 1 SCC 520.
85 108 (2003) DLT 517.

approach which was criticised by many commentators.[86] Which understanding of justice and fair-play takes precedence, the one which recognises the rights of pavement dwellers or the other which views such persons as a nuisance and law-breakers?

Some guidance was provided to that question in *Sudama Singh v Government of Delhi*,[87] where the government of Delhi decided in 1990 to resettle the then inhabitants of Jhuggies[88] in Delhi. The state's policy provided that slums would be relocated only from project sites where specific requests had been received from the land-owning agencies and no large-scale removal should be resorted to without any specific use in terms of the master plan for Delhi. The city was also preparing for the Commonwealth Games.

The Court held that the government of Delhi's view that the inhabitants were on the 'right of way' and were therefore not entitled to relocation was unconstitutional and that the inhabitants would have to be considered for relocation. It referred to *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan*,[89] which held that pavement dwellers who had resided there for a long time qualified to be allocated land and resources for resettling. The state agencies must ensure that basic civil amenities, consistent with the right to life and dignity of the Jhuggies, were available at the site of relocation in keeping with the decision in *Shantistar Builders v Narayan Khimalal Totame*.[90] The Court held that where the occupants of the Jhuggies were forcibly evicted and relocated, such an occupant was not worse off and cited the South African Constitutional Court's decision in *Occupiers of 51 Olivia Road*[91] in support. The Court also affirmed the decision of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*[92] and concluded that the jurisprudence of the Indian Supreme and High Courts' decisions required the state 'to engage meaningfully with those sought to be evicted'.[93] While *Sudama Singh* went a long way to rationalise the jurisprudential principles articulated by the Indian Supreme Court, there has been a lack of consistency in the way in which indigent persons have been dealt with by the courts. Many decisions lapse into the rule of law argument to justify the control of the indigent.

86 One commentator accused the courts of engaging in 'a range of threat perceptions, where the urban poor are seen as overrunning cities; their encroachment of public as bordering on criminality; the occupation of public lands as slumlordism and profiteering; their numbers as placing an intolerable burden on infrastructure; and the impossibility of their legal existence in cities as providing a prescription for anarchy'. Usha Ramanathan, 'Illegality and the Urban Poor' (2006) *Economic and Political Weekly* 3197.
87 MANU/DE/0353/2010.
88 Informal or temporary housing or shacks.
89 (1977) 11 SCC 121.
90 (1990) 1 SCC 520.
91 [2008] ZACC 1,
92 2010 (3) SA 454 (CC).
93 Manu/DE/0353/2010 para 55.

One of the examples of civil society engagement in the taking of land for the public purpose of building a dam is found in the Movement to Save the Narmada (Narmada Bachao Andolan) which mirrors the actions of Abahali base Mjondolo in South Africa and the Movimiento sem Terra of Brazil. In *Narmada Bachao Andolan v Union of India*[94] a petition was filed by the state of Gujarat against the reactions of the civil society organisation Narmada Bachao Andolan (NBA) with the decision allowing the increase of in the height of the dam. This was an eminent domain case where land was taken in the public interest to build a complex of dams on a river running through the three states of Gujarat, Madhya Pradesh and Maharashtra. The NBA was started by concerned academics and environmentalists in smaller organisations that coalesced into this movement. They opposed the development of the dam from economic, environmental and human rights perspectives. One commentator summarised their operational methods in this way:

> While the NBA originally employed 'Gandhian methods' such as peaceful marches and protests, after a high-profile hunger fast in 1991 failed, the NBA announced a 'noncooperation movement' in the Narmada valley. This movement campaigned against the payment of taxes and sought to deny entry to the villages to all government officials, except teachers and doctors. The NBA subsequently began to consider litigation as an additional option for a variety of reasons. Their tactics up to this point had frequently drawn violent reactions from the government. In addition, other disadvantaged groups had successfully moved the Supreme Court, inspiring the NBA to do the same.[95]

The issue in this case before court was whether the environmental clearance granted by the Union of India for the construction of the dam had been obtained without a proper study and understanding of the environmental impact of the project. A number of potential evictees were concerned that the state of Madhya Pradesh avoided its responsibility to provide rehabilitation facilities to the evicted by offering them cash compensation. A further issue raised was that since offers to the evicted affected by the new height of 90 metres of the dam, to be settled in the state of Madhya Pradesh had not been made, further construction should not be permitted until one year after the resettlement of these project affected families by the 90 meters.

The Indian Supreme Court held that the evicted were not entitled to opt for land of their choice and the state was not bound to acquire or purchase land for that purpose. All that the parties were entitled to were basic civil amenities and benefits: They could not reject land unless it was shown that the lands were not irrigable or cultivatable or otherwise unsuitable. The court in the main judgment did not say that those evicted had to be relocated as a

94 (2005) 4 SCC 32.

95 S Narula 'The story of Narmada Bachao Andolan: Human rights in the global economy and the struggle against the World Bank' New York University Public Law and Legal Theory Working Papers, Paper 106 (2008) 359 http://lsr.nellco.org/nyu_plltwp/106.

community. The question of rehabilitation would arise as and when they became entitled to it. It appeared as if all the hard-fought gains in the earlier jurisprudence established in *Ahmedabad Municipal Corporation* and *Olga Tellis* were diluted to attend to the state's larger objective to build the dam. Protests on this continue in the streets of Delhi as there is a palpable sense of injustice about the decision to build the dams without due consideration of the rights of the affected parties.

An assessment of the principles arising from these cases needs to be made. On the one hand, the whole debate about what constitutes a fundamental right or not goes to the heart of the separation of powers doctrine and the role of the executive or legislature to amend the Constitution. The *Indira Gandhi* case, which dealt with the candidate's appeal against her election through the passing of a constitutional amendment 329A, illustrated the potential for abuse of this power through political manipulation. She was found guilty of election fraud by the Allahabad High Court and rather than relinquish power, she declared a state of emergency which suspended a number of rights. The Supreme Court declared Amendment 329A to be in violation of the basic structures doctrine.[96] Her appeal succeeded, however, on an amendment of the Representation of the People Act of 1951.

On the other hand, the tenacity of British legal principles continued to hamper any genuine attempt to ameliorate the lot of the disadvantaged in this constitutional arrangement which appeared to prioritise fundamental rights over the directive principle of state practice. The result is that the imperatives or the priorities of independent India are held ransom by the original intention to protect (mainly British) property. It also provided much judicial space for courts to reinterpret the precedents in narrower ways that avoid the applications of certain social imperatives that were central to the independent state.

Today, rural India is made up of mainly small farms, mainly as a result of the land reform programmes and three aspects requiring recent focus: Firstly, security of tenancy, secondly, redistribution of land which exceeded the requisite ceiling and, finally, land rights for women.[97] Each state has the power to legislate on land laws subject to the federal law articulated by the Supreme Court of India. The rights of owners and tenants are legally protected and in some states the law permits tenants who can purchase the land for fair payment to become owners. Some state laws provide for security of tenure and rent controls. For those who are tenants, rents are regulated in many states to not exceed 20 to 25 per cent of gross produce. There are moratoriums on eviction which is permitted on certain prescribed grounds

96 *Indira Nehru Gandhi v Raj Narain* AIR 1975 SCC 2299.
97 DN 'Breaking the deadlock: Land reform revisited' (2002) 37 *Economic and Political Weekly* 2545.

depending upon the type of tenancy and the state where the person is a tenant.

However, land ownership in India brings with it many hazards, including droughts and crop failure. Some farmers resort to financial assistance from loan sharks or other wealthy landowners who threaten the future existence of these operations. Suicide in the farming community is a frequent occurrence. Despite the various measures to regulate land reform, a large number of landless persons continue to exist even though there are ceilings or limits placed on individual land holdings. In theory, all land over the ceiling is sold to the state to redistribute. In reality, the system is bureaucratic, cumbersome and often corrupt as land owners engage in artificial subdivisions, sales or gifts to family members to avoid the state acquisition of the land, which results in little surplus land. This creates further pressure which results in further migration to the cities from the rural areas.

3 Brazil

3.1 Historical background

Brazil's land distribution was inherited from the colonial era, like India and South Africa prior to 1994, where the owners were the wealthy who were politically influential. One writer summarised the position as follows:[98]

> Land in Brazil has traditionally been not merely a factor of production but a reward for service and proximity to power, as well as a foundation for the accumulation and maintenance of more power and privilege. This power includes the ability of large landowners to direct the legal and coercive apparatus of the state in their region. It also entails landlord control over and obligations to subaltern populations.

The original division of the colonial *capitanias* amongst a handful of *amigos do rei* (friends of the king) reflects this reality.[99]

The Portuguese Crown divided the whole of Brazil into only 15 large land tracts with ownership of land in the hands of a few.[100] Sugar farming under the Portuguese dominated agricultural activity in the coastal areas with a large number of slaves and small farmers becoming landless. Independence in 1822 supported the status quo and the 1850 land law was enacted to restrict popular access to land on the frontiers to guarantee a constant labour supply for the sugar farms.[101] The 1850 law permitted the acquisition of land

98 A Pereira 'Brazil's agrarian reform: Democratic innovation or oligarchic exclusion redux?' (2003) 45 *Latin American Politics and Society* 41 42.
99 As above.
100 S Mogab 'The continuing struggle for agrarian reform in Brazil' *Human Rights & Human Welfare* 2.
101 G Ondotti *Land, protest and politics* (2008) 10.

by purchase only and eliminated acquisition through adverse possession or prescription. While sugar farmers were replaced by coffee planters in time and slavery was abolished, the lot of the landless did not feature as a political issue until the peasants became organised and found their voice.

From 1964[102] there was growing popular organised protest, and a constitutional amendment was approved for the state to expropriate land and pay for them with 20-year bonds rather than cash.[103] The proposed Land Statute for land redistribution was, however, not successful but created a platform for land protests. In 1989,[104] under the post-military regime, the issue of land redistribution re-emerged as a social issue and land policy came under sharper social focus since then.[105]

Under President Cardoso, from 1995 'market-assisted agrarian reform' was mooted to allegedly quicken the pace of land reform in Brazil as the expropriation process was lengthy. The scheme was devised by the World Bank[106] to counter the popular drive for expropriation under the social function of land principle in the Constitution which became the lodestone of the Movimiento Sem Terra (Landless Workers Movement) known as MST. In this proposed scheme, the poor and marginalised, organised in associations, were to be financed by a Land Bank partly funded by the World Bank. The idea behind this 'reform' was to create a market for rural land through 'fair negotiation' between the parties for land that was non-productive. The state was to assist in providing finance to farmers in the sale as an alternative to pursuing the expropriation route. The free market principles were offered as the solution to Brazil's unequal land distribution under neo-liberal economic principles. The scheme was planned to be implemented, apart from Brazil, in South Africa, Colombia, Guatemala and Thailand. In South Africa it has resulted in windfall market values for land required for land restitution or land reform. Borras, in his study, questions the basic assumption of the market related advocates and concludes that the market-led principles have not proved to be successful and are unlikely to prove successful elsewhere if implemented.[107] However, the 'social function' of land also became the

102 Brazil was under the military rule of General Branco.

103 Ondotti (n 101 above) 13. While the 1946 Constitution provided that where expropriation was undertaken by the state, 'prior', 'just' and 'monetary' compensation had to be paid, the Ato Institucional 9 of 1969 removed the need for 'prior' payment and replaced that with 'just' compensation under Decree Law 554 in April 1969, which could be ascertained in the landowners' previous tax returns.

104 President Collor came into power in that year.

105 Ondetti (n 101 above) 14-15.

106 See also KW Deininger *Making negotiated land reform work: Initial experience from Colombia, Brazil, and South Africa* (1999) and M Domingos *Agrarian reform in Brazil* http://www.landaction.org/display.php?article=63 (accessed 11 March 2009).

107 SM Borras Jr 'Questioning market-led agrarian reform: Experiences from Brazil, Columbia and South Africa' (2003) *Journal of Agrarian Change* 390: 'Agrarian reform-one that is likely to be truly redistributive, and based on the twin foundations of economic development and social policy- remains urgent and necessary in most developing countries today. But the market, as advocated in the MLAR [Market Related Agrarian Reform] model, cannot carry out a redistributive function in the way the state can.'

lodestar of the Movimiento dos Trabalhadores Rurais Sem Terra Landless Workers Movement) known as MST.

During this period, there was a sharp rise in support for the Movimiento Sem Terra (MST) which began in São Paulo state and quickly spread in 24 of the 26 states when land occupations (some referred to them as 'invasions') took place.

When Luiz Inacio (Lula) da Silva came to power in 2003, the number of MST activities were increased and in 2006, it was reported that some 150 000 families were involved in land protests. The MST are said to have been responsible for 2 000 settlements through their social action on behalf of 350 000 families in Brazil.[108] The Lula government claimed that 381 419 families were granted a plot of land from 2003 to 2006 and that figure is disputed.[109]

The constitutional protection of reform and expropriation of land is found in the Brazilian Federal Constitution of 1988 which was the product of compromise in the negotiating process for the first post-military rule.[110]

> Article 184
>
> It is within the power of the Union to expropriate on account of social interest, for purposes of agrarian reform, the rural property which is not performing its social function, against prior and fair compensation in agrarian debt bonds with a clause providing for maintenance of the real value, redeemable within a period of up to twenty years computed as from the second year of issue, and the use of which shall be defined in the law.
>
> Paragraph 1Useful and necessary improvements shall be compensated in cash.
>
> Paragraph 2The decree declaring the property as being of social interest for agrarian reform purposes empowers the Union to start expropriation action.
>
> Paragraph 3It is incumbent upon a supplementary law to establish special summary adversary proceeding for expropriation action.
>
> Paragraph 4The budget shall determine each year the total volume of agrarian debt bonds, as well as the total amount of funds to meet the agrarian reform programme in the fiscal year.
>
> Paragraph 5The transactions of transfer of property expropriated for agrarian reform purposes are exempt from federal, state and municipal taxes.

108 MST 'About' http://www.mstbrazil.org/?q=about (accessed 11 March 2009).

109 M Osava 'Brazil: No consensus on success of land reform' *Inter Press Service* 22 March 2007, available at http://www.ipsnews.net/2007/03/brazil-no-consensus-on-success-of-land-reform/ (accessed 26 February 2009).

110 Arts 184, 185 and 186 of the Brazilian Constitution. Meszaros described it as 'the most fraught and polarised of the whole drafting process': G Meszaros 'Taking the land into their hands: The Landless Workers' Movement and the Brazilian State' (2000) 27 *Journal of Law and Society* 517 525.

Article 185

Expropriation of the following for agrarian reform purposes is not permitted:

1 small and medium-size rural property, as defined by law, provided its owner does not own other property;

2 productive property.

The law shall guarantee special treatment for the productive property and shall establish rules for the fulfilment of the requirements regarding its social function.

Article 186

The social function is met when the rural property complies simultaneously with, according to the criteria and standards prescribed by law, the following requirements:

1 rational and adequate use;

2 adequate use of available natural resources and preservation of the environment;

3 compliance with the provisions that regulate labour relations;

4 exploitation that favours the well-being of the owners and labourers.

Article 68[111] of the Temporary Constitutional Provisions Act recognised the right to culture and to ownership of property in a collective for descendents of former slaves of African origin known as quilombolos. A report stated that in 2008, out of 3 550 quilombolos recognised by the government, only 87 of them had received titles to their land due to bureaucratic delays and legal challenges to their title.[112] Quilombolos were known to be fiercely independent and defenders of the liberty of their communities and were perceived as a threat by the colonists who sought to eliminate them. The delay in giving them their rights apparently arose from not finding an adequate means of defining what a quilombo is.

As Afro-Brazilians, quilombolas face the same severe problems of racism, structural discrimination and violence encountered by many black citizens of Brazil. They often confront disparately low levels of access to education and health care, and cannot obtain a dignified level of income. The majority of quilombolas live without recognition, respect and the basic rights owed to all Brazil's citizens. They consistently remain in a worse position than people of white or mixed race. This vulnerability has severely impeded their ability to make effective rights claims.[113]

111 Final ownership shall be recognised for the remaining members of the Quilombo communities who occupy their lands and the state shall grant them the respective title deeds.

112 'Between the Law and their Land: Afro-Brazilian Quilombo Communities' Struggle for Land' a report by the Rapoport Delegation on Afro-Brazilian Land Rights (22 September 2008) 2 http://www.utexas.edu/law/centers/humanrights/projects_and_publications/brazil-report.pdf (accessed 27 November 2013).

113 Report by the Rapoport Delegation (n 112 above) 10.

The lack of progress on their land rights over the years led to demonstrations by the quilombolas to shift political will in their favour. The threat led to the National Institute for Colonisation and Agrarian Reform (INCRA) undertaking administrative action to give title to these lands, but the progress is limited. INCRA has been accused of colluding to pay a higher price than necessary for expropriated land.[114] There have been instances when landowners refused INCRA the opportunity to inspect their properties or to accept the formula used for the valuations.[115]

Expropriation of land for land reform was undertaken by INCRA, who have on occasion been accused of colluding to pay a higher price for expropriated land:

> In a September 1999 study of more than 70 cases in which owners of expropriated land had brought judicial actions against INCRA, the Extraordinary Ministry of Agrarian Policy *(Ministerio Extraordinario de Politica Fundiaria)* estimated that the government had overpaid for land on the order of R$7 billion, or enough to place three thousand families on the land and that the compensation paid is 'often far higher than the estimated value of land calculated by the government'. [116]

There have been instances where land owners refused INCRA the opportunity to inspect their properties or to accept the formula used for the valuations.[117]

3.2 Some Brazilian court cases

In a 1996 case, the Superior Tribunal of Justice was reported to have found that the actions of the MST could not be characterised as a crime when the sections of the Constitution that dealt with land reform in the wider social context were considered. The Superior Tribunal of Justice drew a distinction between equality before the law and equality in law: 'Equality was preached by Montesquieu, Rousseau and many others. Often it is in the Constitution, the law. But it is purely formal.' The Superior Tribunal of Justice held that if one kept in mind the intentions of MST, their actions needed to be considered as being 'substantively distinct'.[118]

114 A Pereira 'Brazil's agrarian reform: Democratic innovation or oligarchic exclusion redux?' (2003) 45 *Latin American Politics and Society* 41 58: In a September 1999 study of more than 70 cases in which owners of expropriated land had brought judicial actions against INCRA, the Extraordinary Ministry of Agrarian Policy (Ministerio Extraordinario de Politica Fundiaria) estimated that the government had overpaid for land on the order of R$7 billion, or enough to place three thousand families on the land and that the compensation paid is 'often far higher than the estimated value of land calculated by the government'.

115 Meszaros (n 110 above) 534-535.

116 Pereira (n 114 above) 58.

117 Meszaros (n 110 above) 534-535.

118 Meszaros (n 110 above) 532.

In 2001 the Supreme Court ruled that it was not a crime to occupy unproductive land and that the government had a duty to expropriate land that was unproductive. This gave MST even greater legitimacy as a social movement.[119] There have been allegations that some of the occupations place their protestors at risk because their opponents resist violently.

In Brazil the 'social function' of land has been interpreted to mean that the use and distribution of land are regulated for the good of all its citizens, not for just those in private ownership. Article 5 of the Brazilian Constitution permits the state 'to expropriate for the purpose of agrarian reform, rural property that is not performing its social function'. To determine the social function of rural property, its rational and adequate use is taken into account, in keeping with the preservation of the environment and the labour laws, and the use of the land must be beneficial for both the owners and workers.[120] Where there is unproductive land (*latifundios*), the MST occupies that land to highlight this fact. The legal wheels then begin to be set in motion to expropriate the land. The expropriation process is often lengthy and costly, which adds to the frustration in this process. One writer quoted Judge Urbano Ruiz from São Paulo to illustrate this as follows:

> Imagine out there … someone who has a vast holding of land. He puts a few cows there. Is it productive or isn't it? And what are the criteria for defining this? From there you can string out a discussion for a long time. Technically, is there a means of lancing the boil or not? There is an infinitude of appeal mechanisms … With the Brazilian judiciary, if you have an able lawyer you can almost eternalise the discussion: It never ends![121]

Usually those who occupy the land do not benefit directly from the occupation as the land is held to be allocated to the next landless person on a roster.

In a case in Porto Alegre,[122] in the State of Rio Grande do Sul, Chief Judge Rui overruled the decision of a trial court granting a landowner's petition to evict the MST off his property. The justice tribunal of the state gave the following reasons:

> Before applying a law, the judge must consider the social aspects of the case: the laws' repercussions, its legitimacy and the clash of interests in tension. The [MST] are landless workers [who] want to plant a product that feeds and enriches Brazil in this world so globalized and hungry. But Brazil turns its back. The executive deflects money to the banks. The Legislature … wants to make laws to forgive the debts of the large farmers. The press accuses the MST of violence. The landless,

119 L Ladertinger 'Brazil's Landless Workers Movement (MST)' Winning essay of the 2008 undergraduate-level Baptista Essay Prize (July 2009) http://www.yorku.ca/cerlac/documents/Landertinger.pdf (accessed 27 November 2013).
120 Art 186 of the Brazilian Constitution.
121 Meszaros (n 110 above) 524-525.
122 Decision 70000092288 of August 1999, Porto Alegre, http://www.mstbrazil.org/?q=constitutionalauthority (accessed 27 November 2013).

> in spite of all this, have hope that they can plant and harvest with their hands. For this they pray and sing. The Federal Constitution and Article 5 … offers interpretive space in favour of the MST. The pressure of the MST is legitimate. [I]n the terms of paragraph 23 of article 5 of the Federal Constitution [that land shall attend it social function], I suspend [the eviction].

The need for land reform continues to be a burning issue for Brazil and there have been numerous clashes with owners, which have led to South African civil society organisations issuing press statements in solidarity with MST in August 2008.[123] In a case that resembles the Narmada Bachao Andolan initiative in India, Judge Desterro, in the *Belo Monte Dam* case, said that the Brazilian environmental agency had approved the project without ensuring that environmental conditions had been met. He was concerned that the dam would disrupt the flow of one of the Amazon's main tributaries[124] and halted the building of the dam. On April 2011 the Inter-American Commission on Human Rights granted a number of indigenous communities, affected by the plan to build the hydro-electric dam, a precautionary measure. The precautionary measure called upon the Brazilian government to suspend the project and engage with the affected communities in 'meaningful negotiations' which are free, prior, informed, in good faith and culturally appropriate.[125] This decision resonates well with 51 Olivia Road in the South African Constitutional Court. However, as a direct result of political pressure, the Inter- American Commission on Human Rights modified its precautionary measure and it appears as if the Belo Monte dam project is going to go ahead, despite the protest of the indigenous people.[126]

In 2008 the Brazilian Supreme Court examined complex question on the demarcation of indigenous land as the Constitution recognised the rights of indigenous peoples to their land and required the state to protect and enforce respect for their cultural rights.[127] In March 2009, the Brazilian Supreme Court gave its ruling and ruled in favour of the Raposa Serra do Sol reservation as a the ancestral land of 18 000 indigenous people living in the north-western Amazon territory. A group of farmers occupied the territory and disputed the title of the indigenous people. When the authorities had

123 '"Hands off the MST Brazil!" say South African social movements' *anarkismo.net* 7 August 2008 http://www.anarkismo.net/article/9561 (accessed 27 November 2013).

124 'Brazilian Court's latest decision: Amazon's Belo Monte Dam is off' *BrazzilMag* February 2011 http://www.brazzilmag.com/component/content/article/95-february-2011/12520-brazilian-courts-latest-decision-amazons-belo-monte-dam-is-off.html (accessed 27 November 2013).

125 Letter on file signed by A. Santiago, Executive Secretary, IACHR dated 1 April 2011, Indigenous Communities of the Xingu River Basin, para MC-328-10.

126 See V Jaichand & A de Oliveira Andrade Moraes Sampaio 'Dam and be damned, the adverse impacts of Belo Monte on Indigenous Peoples in Brazil' (2013) 35 *Human Rights Quarterly* 408.

127 STF-PET 3.388/RR Rapporteur Carlos Britto, judgement started on 27 August 2008, reported in 'Constitutional Justice in Brazil' http://www.venice.coe.int/WCCJ/Papers/BRA_SupremeC_E.pdf (accessed 27 November 2013).

tried to evict the farmers, there was violence.[128] The President of the Supreme Court said that '[t]he basis we established in this case, the conditions and procedures, will serve as a guide for other disputes. We are putting an end to the issues surrounding similar cases.'[129]

Another measure used for the regulation of land use in Brazil is taxation on the use-it-or-lose-it principle. The tax rate on vacant or unused land is increased annually for five years, up to a maximum of 15 per cent. If after five years the landowner has not subdivided, used or built on a parcel of land, the local authority can expropriate the land. Compensation for expropriation is paid in municipal bonds at the original use value. In other words, the compensation amount does not include the increase in land value produced by government investment in the area where the property is located, but is dealt with separately. Approximately half of Brazil's rural land is owned by 1 per cent of the population and, like South Africa and India, the gap between the rich and poor is amongst the largest.[130] As is the case in South Africa and India, people migrated to the urban areas in search of jobs.[131]

4 Conclusion

In my search for commonality, it was found that the land laws in South Africa, India and Brazil were strongly influenced by the historical understanding of property laws rooted in their colonial past which proved to be tenacious in the courts. Some additional measures had to be implemented to attend to this legacy as part of its redistributive land reform policy. Both South Africa and Brazil took a negotiated approach, while India took the imposed route where the powers of the state were used to redefine the rights of all parties to the land issue. But it is in the acquisition of land for redistribution, through state expropriation, that the laws in all three countries stumble to a near halt. It is at that point that some might argue that the law and the courts appear to be caught in the proverbial headlights of constitutionalism which become obstacles to the land reform process because the resolution of cases takes such a long time. In the Brazilian case, Meszaros maintained that

> [d]espite the centrality of legislation, legality and legal institutions as reference points, these prove, in fact, to be a remarkably poor guide to the legal dynamics

128 "Brazilian court ruling backs Amazon reservation" *The Washington Times* 20 March 2009 http://washintontimes.com/news/2009/mar/19/brazilian-court-ruling-backs-amazon-reservation/?page=all . (accessed 20 December 2013).

129 T Solum 'Landmark victory for indigenous peoples' rights in Brazil' *The Understory* 20 March 2009 http://understory.ran.org/2009/03/20/landmark-victory-for-indigenous-peoples%E2%80%99-rights-in-brazil/ (accessed 27 November 2013). For a more detailed discussion of the case, see OM de Medeiros Alves 'The new status of lands of native populations in Brazilian constitutional law and international law' (31 January 2010). Abstract available at: http://ssrn.com/abstract=1545344 (accessed 27 November 2013).

130 MST 'MST to hold sixth congress' http://www.mstbrazil.org/?q+constitutionalauthority (accessed 11 March 2009).

131 A study of land occupiers by the Brazilian Intelligence Agency revealed that some 40 per cent had at one time worked in cities: Pereira (n 114 above) 49-50.

> of the land question. On the contrary, it is the interaction of social, economic, administrative, and political factors that proves to be of more decisive importance, impinging heavily on the internal dynamics of the legal process.[132]

Another observer of the decisions in India, Coomaraswamy, believes that the courts have a particular role to play in land rights matters with a political content:

> Which fundamental rights require greater protection? Should they all be treated equally? What are the guidelines that courts should follow to evolve a strategy of intervention? The answer must surely begin with the development of a constitutional doctrine that attempts to argue for the greatest constitutional scrutiny of fundamental rights in cases affecting the most vulnerable sectors of society who have no access to other recourse.[133]

In Brazil, the MST was successful in mobilising people to occupy land to clarify their tenure on it through the use of the courts. Their land invasions are undertaken to underscore the plight of those without land through identifying potential land for redistribution. The Landless People's Movement in South Africa emulated the strategy of MST and began to occupy vacant land which they believed to be state land. The growth of a grassroots organisation like Abahlali baseMjondolo which represents shack-dwellers, started in KwaZulu-Natal, is a sign that the demand for land and housing will grow more strident before the legislature has to act. Both *Port Elizabeth Municipality* and *Modderklip* appear to be examples of this type of strategy. The successful civil society movements in India have protested against the taking of property for building dams and land reform for Dalits and women, for example. There is also a great deal of similarity in the legislation or constitutions in each of these countries which shows a large deference to the right to property. Brazil shares another commonality with India and South Africa in the colonial effect of the laws and practice. While India had a limited number of laws that clarified the social content of and need for land reform, both Brazil and South Africa were better resourced with legal norms, the existence of those did not guarantee a smooth transition of land to the poor.

In South Africa, the Expropriation Bill of 2008 had been shelved[134] after it promised to speed up the process of land acquisition through expropriation but has been reintroduced in 2013. The power of white farmers to megaphone their grievances through allegations of 'land grab' may affect investor confidence in South Africa as the government does not want to be labelled another 'Zimbabwe'. Instead, it is believed that the current government would prefer to negotiate with the farmers, which will lead to inevitable delays in land reform.

132 Meszaros (n 110 above) 519.

133 R Coomaraswamy 'Uses and usurpation of constitutional ideology' in D Greenberg *et al* (eds) *Constitutionalism and democracy: Transitions in the contemporary world* (1993) 168.

134 W Hartley 'South Africa: Controversial Expropriation Bill is "shelved"' *AllAfrica* 28 August 2008 http://allafrica.com/stories/200808280265.html (accessed 27 November 2013).

The rights of property holders with regard to the level of compensation are evaluated on similar norms. In Brazil, 'prior and fair' compensation is required and 'just and equitable' in South Africa, while India was preoccupied with the arbitrary deprivation of property. The content of these norms are not always that self-evident. The Indian government tried to remove the jurisdiction of the court in determining the value of the compensation, not too successfully. Eventually, the right to property as a fundamental right was removed and made into a constitutional right to insulate it from the automatic scrutiny of the Supreme Court. Even that was not totally successful. In all three countries, property lawyers have managed to tie up the court system in litigation for many years, and so frustrated the land reform and redistribution policies. Ironically, the courts in all three countries were involved in trying to seek a just result from some unjust original takings of property under the current rule of law. In Brazil, India and South Africa, the qualifications for the taking of public property in the public interest had to meet certain thresholds.

The South African Restitution of Land Rights Act[135] provides that the 'current use of the farm' which is productive should militate against expropriation. The Brazilian Constitution expressly states that productive property shall not be expropriated. While the Brazilian Constitution permits expropriation after a consideration of the 'social function' of the property, the South African law provides that property may be expropriated 'for the public purpose or in the public interest' and land reform has been defined to be included in these terms. In addition the 'feasibility' of expropriation must be considered.

In Mphela the South African Constitutional Court referred to the criteria to evaluate the compensation to determine the just compensation under the Constitution.[136] State investment in the improvement referred to certain financial assistance and loans granted to farmers in the apartheid era. The analogous Brazilian requirement is found in compensation for 'useful and necessary improvements'.[137] The fact is that the white property lobby in South Africa has painted the government into a corner and the criterion of market value appears to be the primary concern in expropriation cases. No other criteria feature that strongly in the valuation of land. Indeed, amendments to the original Expropriation Act alluded to earlier, which refers only to market value, have been attempted but are currently shelved. The fear of creating hostility with the strong white farmers' lobby group has

135 Act 22 of 1994.

136 Sec 25(3) reads: 'The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.'

137 Brazilian Federal Constitution, 1988, art 184, para 1.

caused a severe slowdown in the land reform process. Indeed, some indication of a similar concern in Brazil is found in the Constitution in article 185, which provides for payment 'in agrarian debt bonds with a clause providing for maintenance of the real value, redeemable within a period of up to twenty years computed as from the second year of issue'. So the cost of expropriation for land reform must be manageable for the governments.

If the cases mentioned here are any guide, there are certainly large human parallels in the struggle to achieve equitable land distribution. It is not clear that law is the best way to achieve it, even though there might be a political will to do so. All three countries display this generalised feature, which Foweraker,[138] in respect of Brazil, describes in the following terms:

> The slowness and bias of the legal system, and the very concept of 'ownership' of land work against the peasant on the frontier. Legal right to land always belongs to others, and their own 'legal' claims and protests are always invalidated by the mysterious language of law and bureaucracy.

The United Nations Special Rapporteurs, on the right to adequate housing and the right to food, have recommended that international human rights law should recognise the right to land[139] and that the international human rights bodies should consolidate the right to land.[140] While this research is limited in its reach or universal applicability, it does reveal seams of concern that might best be addressed by a United Nations Special Rapporteur on land and issues related to land.

In the end, this research does not examine the full role that the International Covenant on Economic, Social and Cultural Rights has in what unravels in all three countries and the research necessitated a look at policies on land reform and implementation through the highest courts in each country. The legal route reveals the need for political empathy from courts to deliver decisions that are cognisant of the needs of the contesting parties.

But law appears to be necessary to quell the mounting emotions attached to land redistribution. None of the three states appears to have sufficient resources to address the imbalances immediately. Perhaps it might

138 J Fowraker *The struggle for land: A political economy of the pioneer frontier in Brazil from 1930 to the present day* (1981) 117.

139 Human Rights Council, Fourth session, Item 2 of the Provisional agenda, para 33 (e) in Implementation of General assembly Resolution 60/251 of 15 March 2006, A/HRC/4/18 5 February 2007, page 19 the first part of which reads: 'Recognize the right to land as a human right and strengthen its protection in international human rights law'.

140 General Assembly, Sixty-fifth session, item 69 of provisional agenda, Promoting and protection of human rights: human rights questions including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, 11 August 2010, page 22, A/65/281. Also cited in Human Rights Council Sixteenth session Agenda item 5 Human Rights bodies and mechanisms, para 43(d) in Right to Adequate Housing Preliminary study of the Human Rights Council Advisory Committee on the advancement of the rights of peasants and other people working in rural areas A/HRC/16/63 18 February 2011, p 19.

be better to define the role of the courts as being a mediator between the parties in a less juridical mode in the way that *Olivia Road* in the South African Constitutional Court does. The requirement to 'meaningfully negotiate' may apply equally to Brazil and India as well. The supervisory function of the courts in these deals creates both legitimacy and certainty in the settlements when they are reached. Perhaps if the courts in all three countries might craft a consequence for failing to 'meaningfully negotiate' for the parties concerned, some quicker progress might be made

The history of all three countries also indicates that it is not enough to leave the whole process for the legislators to undertake on their own. The role and function of civil society organisations like MST, Narmada Bachao Andolan and Abahlali BaseMjondolo, are crucial in keeping the public focused on the issue of rights because neither the politicians nor the courts are going to be persuaded that redistribution of land is fundamental to socio-economic progress for all. Real social pressure appears to grease the wheels of justice in these types of cases.

PART C: SPECIFIC RIGHTS AND THEMES

Social movements and apex courts

CHAPTER 22 REMARKS ON THE ROLE OF SOCIAL MOVEMENTS AND CIVIL SOCIETY ORGANISATIONS IN THE BRAZILIAN SUPREME COURT

Marcela Fogaça Vieira and Flavia Annenberg

1 Introduction

Social movements and civil society organisations play a central role to the recent democratisation of Brazilian institutions and social transformation. In the period after the military *coup* of 1964, the country faced dictatorship and the severe erosion of several freedoms and fundamental rights. 'Social movements, especially those related to human rights, fulfilled a major role in political democratisation, from the first resistance to the authoritarian state in combating violations of privacy and citizenship.'[1] As this authoritarian period lasted for more than 20 years, the process of consolidating democracy in Brazil is still recent and ongoing.

The Constituent Assembly of 1987/88 was crucial to ensure that the new social order would be conceived through the lens of civil society. The Constituent Assembly was an important forum for debates between different sectors of society, including historically-marginalised actors in decision-making, and culminated in the enactment of a constitution referred to as the 'citizens' constitution', because it incorporates demands of civil society that have been extensively involved in the constitution-making process. For that reason, this process was also an opportunity for the reinvention of democratic institutions, especially the judiciary, in view of its 'strategic role for mediation of social conflicts'.[2]

The Brazilian Constitution of 1988 has a broad Bill of Rights, comprising civil, political, economic, social and cultural rights and rights of vulnerable groups, and closely observes the International Bill of Rights developed after 1948. The Constitution also sought to establish a more open architecture allowing social participation with state institutions. It would indeed be

1 SEA Viola '*Direitos humanos e democracia no Brasil*' (2008).
2 JG de Sousa Junior 'Por uma concepção alargada de Acesso à Justiça' (2008) 10 *Revista Jurídica da Subchefia para Assuntos Jurídicos do Ministério da Justiça* 7 www.planalto.gov.br/revistajuridica (accessed 7 January 2012).

useless to have a document guaranteeing basic rights if these rights could not be claimed in the political sphere. The judiciary was also assigned the challenge of responding to the democratic promises of the Constitution. It can therefore be concluded that the Brazilian Constitution did not only represent the transition to democracy, but was explicitly mandated to lead the process of social change.[3]

Although the structure and composition of the Brazilian Supreme Court were not changed by the 1988 Constitution, its power in the Brazilian constitutional system has been expanded.[4] It is important to mention that to the Brazilian Supreme Court were assigned tasks that, in most contemporary democracies, are divided into at least three types of institutions: constitutional courts, specialised judicial fora (or simply diffusing powers throughout the branches the judiciary), and appellate courts of last resort.[5]

In the last 20 years, there was a significant increase in the political role of the Brazilian Supreme Court as an arena for discussion of political and moral issues. According to Vieira,[6] for whom the singular Brazilian institutional arrangement led to the formation of a 'supremocracy',

> this noticeable process of expanding the authority of courts around the world in Brazil took on even more prominent contours. The sheer ambition of the constitutional text of 1988, combined with the gradual concentration of powers within the jurisdiction of the Supreme Court, which occurred over the last twenty years, points to a shift in the balance of the system of separation of powers in Brazil.

Evidence of the Court's increased political significance is the number of cases of extreme social importance that, even after being in one way or another discussed in the representative bodies, are on the agenda of the Supreme Court, which is responsible for issuing the last word. In the field of human rights alone, issues such as research with embryonic stem cells, affirmative action for access to higher education, same-sex unions, civil disarmament, abortion (of anencephalic fetuses), access to essential medicines, demarcation of indigenous and *quilombola* lands, slave labour, land reform, media law, law of heinous crimes, and amnesty law have been decided or are on the agenda of the Brazilian Supreme Court.

This paper seeks to map the participation of civil society organisations and social movements before the Brazilian Supreme Court. By 'civil society organisations' we refer to public interest, not-for-profit associations, not including class associations, trade associations, companies associations, or

3 OV Vieira 'Supremocracia' (2008) 4 *Revista DIREITO GV*, São Paulo 444, available at: http://www.scielo.br/scielo.php?pid=S1808-24322008000200005&script=sci_arttext (accessed 7 January 2012).

4 OV Vieira *Supremo Tribunal Federal: Jurisprudência política* (Editora Revista dos Tribunais 1994) 83.

5 Vieira (n 4 above) 447.

6 Vieira (n 4 above) 444.

any other private interest associations. We understand that in most cases, the demands of social movements are brought to the judiciary through or in close collaboration with civil society organisations in view of the fluid and informal nature of these movements. Especially in the Supreme Court, the level of institutionalisation and technical expertise required distances grassroots organisations and social movements from directly acting in this arena.

It should be emphasised that civil society organisations were not included in the list of persons with constitutional standing to bring lawsuits directly to the Supreme Court, although this list has been expanded by the 1988 Constitution on the position under previous constitutions.[7] This list refers to the system of concentrated control of constitutionality. In this system, only the Supreme Court has jurisdiction over cases involving judicial review. Vieira explains that:[8]

> It should be noted that in this system is not necessary to have a concrete conflict of interests, capable of composing litigation, but the complaint of unconstitutionality may occur abstractly, by the simple detection of a mismatch between the Constitution and ordinary norm.

This kind of control is different from diffuse control, which was inspired by the North American model and is characterised by the fact that all organs of the judiciary are able to decide not to apply a particular law if they believe that it is incompatible with the Constitution in a concrete case. In Brazil, the two models – concentrated/abstract and diffuse/concrete – coexist.

Nevertheless, these actors make use of other mechanisms to make their voices heard and bring their demands to the Supreme Court. In this paper, we discuss the involvement of Brazilian civil society organisations and social movements in some of the cases of great social impact that have been decided or are on the agenda at the Supreme Court. Some of these cases have been instituted by means of representations made directly by civil society organisations to the Attorney-General of the Republic;[9] in other cases such participation occurred through the presentation of *amicus curiae* briefs and, more recently, by participation in public hearings carried out by the Court.

7 The 1988 Brazilian Constitution provides that the following actors: 'may file direct actions of unconstitutionality and declaratory actions of constitutionality: I – the President of the Republic; II – the directing board of the Federal Senate; III – the directing board of the Chamber of Deputies; IV – the Directing Board of a State Legislative Assembly or of the Federal District Legislative Chamber; V – a State Governor or the Federal District Governor; VI – the Attorney-General of the Republic; VII – the Federal Council of the Brazilian Bar Association; VIII – a political party represented in the National Congress; IX – a confederation of labour unions or a professional association of a nationwide nature' (art 103).

8 Vieira (n 4 above) 40.

9 Civil society organisations cannot file a lawsuit directly at the Supreme Court, but they can present a representation to the Attorney-General of the Republic asking him to file the lawsuit. It is important to bear in mind, however, that the Attorney-General has the discretion to decide which cases to take to court.

These tools are ways to broaden the participation of civil society in the decisions of the highest body of the Brazilian judicial system and to pluralise the constitutional debate, which ultimately also generates more legitimacy to the judgments of the Supreme Court. By adopting these tools, the legislator helped to democratise access to the highest court in Brazil. In this paper we briefly discuss some of the cases, on the Court's agenda, that seem most relevant, highlighting the role of civil society organisations and social movements in each instance.

2 Pluralising the constitutional debate through civil society organisations and social movements participation

Below, we briefly discuss some of the most relevant cases in the field of human rights that have been decided by or are on the agenda of the Brazilian Supreme Court. In line with the intended purposes of this article, the focus falls on the institutional aspects related to civil society organisations and social movements' participation and not on the arguments presented by the actors involved or the decisions issued by the Court. Far from exhausting the issues being discussed on the agenda of the Supreme Court, the selected cases are rather representative of the participation tools that enable dialogue with the Court, especially public hearings and *amicus curiae* briefs.

The figure of the *amicus curiae* ('friend of the court') is provided in the Brazilian legislation (Laws 9.868/99 and 9.882/99, amongst others) and it is a mechanism through which public or private organisations, other than the original parties in the case, may contribute to the decisions of the courts by presenting case studies and relevant expertise on the subject. Those organisations should meet the criteria of representativeness and relevance to the issues being debated in the particular case. Besides written arguments that are incorporated in the case file, they can also present oral arguments during the judgment session.

According to De Almeida,[10] the *amici curiae* briefs present to the Justices a concrete vision of the problem. Also, this mechanism leads to an opening of the Supreme Court, allowing

> access and participation in the concentrated control of constitutionality to entities that do not have constitutional standing to bring cases directly to this jurisdiction. This new capability afforded to civil society organizations can make

10 EM de Almeida *Sociedade civil e democracia: a participação da sociedade civil como* amicus curiae *no Supremo Tribunal Federal* Dissertação (mestrado em direito), Faculdade de Direito, Pontifícia Universidade Católica de São Paulo, 2006 37.

> the Supreme Court a space of public debate, in which different actors manifest and operate in finding a solution to conflicts in society.[11]

Public hearings may be convened by the Justices in case of a need for clarification on the matter discussed in the court (art 9, Law 9.868/99). They revolve around a specific case or may be thematic, involving broader issues. To date, there were seven public hearings held at the Brazilian Supreme Court on the following topics: the use of embryonic stem cells for research purposes (2007); the import of used tyres and its impact on environment (2008); anticipating delivery of anencephalic fetuses (2008); the right to health (2009); affirmative action for access to higher education (2010); sale of alcoholic drinks on the side of federal highways (2012); and the prohibition of using materials with asbestos fibers (2012).

The public hearings allow the presentation to the Court of technical issues related to that theme. They are held at the request of the rapporteur of the case and, in general, they are organised in a way that there is balance between different views on the same topic. Each participant, chosen by the Court, has around fifteen minutes to make an oral presentation, which may include empirical research, data collection, legal argumentation and so on. These presentations are broadcast live on television and on the internet. There is also the possibility of filing written arguments, even when not invited to present at the public hearing. All the arguments presented at the public hearing, oral or written, are available on the website of the Court for further consultation. Only the rapporteur-justice has the obligation to attend all sessions of the public hearing; the other justices are invited to attend, but are not required to do so.

2.1 Embryonic stem cell research (ADI 3510) and the first public hearing in the history of the Brazilian Supreme Court

In 2005, the Attorney-General's office brought to the Supreme Court the discussion on the constitutionality of research with embryonic stem cells derived from the technique of *in vitro* fertilisation, which occurs outside the woman's body. This procedure was authorised by the so-called Biosafety Law (Law 11,105/2005) and its importance lies in the fact that embryonic stem cells have the ability to convert in almost all body tissues. Studies with embryonic stem cells hold the promise of curing serious diseases. Despite the scientific and social relevance of these studies, the Attorney-General of the Republic (PGR, acronym in Portuguese) filed a Direct Action of Unconstitutionality (ADI, acronym in Portuguese) ADI 3510, arguing that the Biosafety Law violates the right to life[12] and the dignity of the human

11 De Almeida (n 10 above) studied the participation of *amici curiae* in the cases held at the Supreme Court between 1999 and 2005. In this period, in 40% of the cases the *amici curiae* were presented by class associations and 20% by NGOs.

12 Art 5, *caput,* Brazilian Constitution.

person.[13] According to the argument of the PGR, the beginning of human life occurs at fertilisation and therefore the destruction of any embryo would constitute murder.

To contribute to the judgment of this case, and following a request made by the author of the ADI, the judge-rapporteur of the lawsuit, Justice Carlos Ayres Britto, convened the first public hearing in the history of the Brazilian Supreme Court. In addition to people who could contribute technical information, since the action involved discussions of a scientific nature, the judge also highlighted the democratic potential of such occasions as the basis for convening the hearing. In his words:[14]

> The Supreme Court experiences, today for the first time, a mechanism of direct democracy or participatory democracy, which is the possibility of a segment, very well organised, scientific, of the population to contribute to the structuring of a trial that is directly related to them and affects the lives of all people. Metaphorically, democracy is exactly that, it is honouring the foundations, moving who is usually in the audience to the stage of collective decisions.

Twenty-two specialists were invited by the Court to participate in the public hearing, 11 of them favouring research with embryonic stem cells, and 11 against it. Participants at the public hearing, which took place in 2007, were doctors, researchers and academics from different fields such as neuroscience and genetics. Only one of the participants represented a civil society organisation, namely, anthropologist and professor at the University of Brasilia, Debora Diniz, executive director of *ANIS: Instituto de Bioética, Direitos Humanos e Gênero* (Institute of Bioethics, Human Rights and Gender).

The first public hearing in the history of the Brazilian Supreme Court saw the almost exclusive participation of so-called scientific community, leaving in the background the participation of non-governmental organisations (NGOs) and social movements. Still, the public hearing contributed to publicising the case on an ongoing basis in the Supreme Court, including the live broadcast of the hearing on radio and television, and the mobilisation of civil society around the case which was remarkable. This mobilisation also contributed to the involvement of different sectors of society in the general debate about the issue outside of the Supreme Court. Moreover, several groups defending the rights of disabled people were present in the audience at the public

13 Art 1, sec III, Brazilian Constitution.

14 The excerpt was taken from the audio transcript of the public hearing presented in the monograph 'The Public Hearing held at ADI 3510-0: The organisation and utilisation of the first public hearing in the history of the Supreme Court' Rafael Scavone Bellem de Lima, Brazilian Society of Public Law, 42, available at: http://www.sbdp.org.br/ver_monografia.php?idMono=125 (accessed 7 January 2012).

hearing to exercise public pressure. Public pressure came about mostly as a result of activities outside the Court:[15]

> Although the Supreme Court has declared its goal to provide a greater participation of civil society in the room, this corresponded mainly to some sectors of the scientific community. The real participation of civil society took place through its presence in times prior to the hearing itself, with its transfer to Brasilia and camping in front of the Senate, through publications in newspapers, magazines and websites of specific organisations and by television reports with patients/relatives, lawyers and scientists.

In addition, some civil society organisations also participated as *amicus curiae* in the ADI, which were *Conectas Direitos Humanos* (Conectas Human Rights), in partnership with *Centro de Direitos Humanos* (Center for Human Rights); *MOVITAE - Movimento em Prol da Vida* (Pro-life Movement); and *ANIS: Instituto de Bioética, Direitos Humanos e Gênero* (Institute of Bioethics, Human Rights and Gender). These organisations supported the constitutionality of research with embryonic stem cells. Supporting the opposite view, the *CNBB - Conferência Nacional dos Bispos do Brasil* (National Conference of Bishops of Brazil) was also admitted as *amicus curiae*.[16] All admitted *amici curiae* submitted suggestions of names of participants for the public hearing.[17] Although it is impossible to be sure that the selection of experts occurred as a result of suggestions from these organisations, at least three persons who were invited to present at the hearing were amongst the names proposed by *CNBB, ANIS and MOVITAE*.

One aspect that stands out in this public hearing is the low participation of the justices of the Supreme Court. Only four of the 11 justices attended the opening, of which only two attended the full presentations of the participants in person.[18]

15 L Acero 'Ciência, políticas públicas e inclusão social: Debates sobre células-tronco no Brasil e no Reino Unido' (2010) 53 *Dados* [online] [citado 2011-11-21] 855-887 available at: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0011-52582010000400003&lng=en&nrm=iso (accessed 7 January 2012).

16 There was also a request, by Ghisolfi Reginaldo da Luz, to join as *amicus curiae*, arguing that he had studied issues relating to the human embryo. The request was denied by the rapporteur justice, given the lack of representativeness of the applicant. But his arguments were included in the case as memorials, being available for consultation.

17 The lawyer and legal director of the *Conectas Direitos Humanos* (Conectas Human Rights), Oscar Vilhena Vieira, was initially invited to present at the public hearing, but ended up not participating due to his strictly legal education and activities. The justification was that the justices wanted to hear other arguments besides legal arguments at the public hearing. His presentation occurred during the judgment session, in 2008.

18 At the opening were Justice Carlos Ayres Britto, rapporteur of the ADI, Justice Ellen Gracie, former Chief Justice, and Justices Gilmar Mendes and Joaquim Barbosa. Justices Carlos Ayres Britto and Joaquim Barbosa attended the session and Justice Ricardo Lewandowski followed the session remotely by radio or television (LIMA, 2008:38).

The Supreme Court eventually decided, by a majority vote, for the constitutionality of the Biosafety Law,[19] allowing research with embryonic stem cells to be performed. Some justices said it was '[more noble] to use frozen embryos in research than to throw them in the trash or leave them forever [on] a shelf'.[20]

2.2 The articulation of women's movements around the ADPF 54 on interruption of pregnancy with anencephalic fetuses

A discussion of great importance to the feminist movement concerns the constitutionality of the termination of pregnancy of fetuses suffering from anencephaly,[21] a condition that can be diagnosed from the twelfth week of gestation and engages the higher functions of the central nervous system, commonly known as 'absence of a brain'.

This discussion reached the Brazilian Supreme Court in 2004 by means of an Argumentation of Violation of Fundamental Precept (ADPF, acronym in Portuguese) ADPF 54.[22] The case was filed by *CNTS - Confederação Nacional dos Trabalhadores na Saúde* (National Confederation of Health Workers), which argued that termination of pregnancy of anencephalic fetuses did not constitute an abortion, a crime by the Brazilian Penal Code,[23] but was actually a 'therapeutic anticipation of delivery'. This is because cases of anencephaly are always fatal, so that the death of the fetus does not result from the interruption of pregnancy itself and, therefore, the necessary connection to the constitution of the crime of abortion would not be present in that behaviour. Added to this is the fact that there is a high rate of intra-uterine death in this type of pregnancy, so that the 'therapeutic anticipation of delivery' would be an indication of medical treatment to the mother. Using a novel argument, the ADPF asked that the Court applied the technique of 'interpreting according to the Constitution' to the relevant articles of the Brazilian Penal Code, so as to render unconstitutional any interpretation of criminal law that obstructs the termination of pregnancy of an anencephalic fetus.

19 Justices Joaquim Barbosa, Marco Aurelio, Celso de Mello, Carmen Lucia, Carlos Ayres Britto and Ellen Gracie understood that Law 11.105/05 was constitutional and did not need to be modified. On the other hand, Justices Cezar Peluso, Gilmar Mendes, Carlos Alberto Menezes Direito, Ricardo Lewandowski and Eros Grau have, in different lengths, suggested changes in the law.

20 FX Annenberg *A posição do Supremo Tribunal Federal nos casos da pesquisa com células-tronco embrionárias e da interrupção da gravidez do feto anencéfalo. Existe relação de precedente entre eles?* (Sociedade Brasileira de Direito Público 2008) 17, available at http://www.sbdp.org.br/arquivos/monografia/132_flavia.pdf (accessed 7 January 2012).

21 Some papers compare this case and that of stem cell research presented in the previous section. For example: BARROSO, 2005.

22 In fact, the subject had already been discussed in the Brazilian Supreme Court at HC 84.025-6/RJ, which has not been examined since the pregnancy came to an end before the judgement.

23 In Brazil, abortion is prohibited by criminal law (except in cases of rape and if there is no other way of saving the mother's life).

This case is of great importance to the feminist movement, since it is closely related to the self-determination of women about their choices and about their own bodies. The criminalisation of abortion, not only in the case of anencephaly, is considered a restriction of freedom, penalising women who choose not to follow the paradigm of motherhood as an inevitable destiny, and creating a serious public health problem due to the high number of deaths and health complications resulting from clandestine abortions.

The process of bringing this case to the Supreme Court is especially interesting because the initial petition of the ADPF indicates that the NGO *ANIS: Instituto de Bioética, Direitos Humanos e Gênero* (Institute of Bioethics, Human Rights and Gender) is not officially a co-author of the lawsuit only because it lacks constitutional standing to bring a case directly to the Supreme Court. However, the *CNTS*, the author of the ADPF, pointed out that ANIS provided technical and institutional support to the elaboration of the ADPF, and requested, in the initial petition, that ANIS be admitted as *amicus curiae* in the case.

This shows that, even though lacking constitutional standing to directly present the case, *ANIS* played a key role in the articulation and proposition of the lawsuit in the Supreme Court. The crucial role of *ANIS* in this constitutional challenge is corroborated by a statement made by Debora Diniz, its executive director, who said: 'We went looking for *CNTS* to have an organisation with constitutional standing to file the case at the Supreme Court.'[24] These circumstances underline that, even if institutional mechanisms do not allow a civil society organisation to directly bring a lawsuit to the Supreme Court, a civil society organisation may still act directly to make it happen, by involving an actor with constitutional standing to do so.

Other movements and organisations requested admission as *amici curiae* in this ADPF,[25] demonstrating the great social relevance of the case, and further attempts at following the Supreme Court's agenda by civil society organisations. However, the applications for admission as *amici curiae* were rejected by the rapporteur of the ADPF, Justice Marco Aurelio, on the grounds that the case had already been subjected to public hearing.

24 L Guimarães *Direito das mulheres no Supremo Tribunal Federal: possibilidades de litígio estratégico?* (Sociedade Brasileira de Direito Público (2009) available at: http://www.sbdp.org.br/arquivos/monografia/146_Monografia%20Livia.pdf (accessed 7 January 2012).

25 Amongst them were the following: *Católicas pelo Direito de Decidir* (Catholics for a Free Choice); *Associação Nacional Pró-Vida e Pró-Família* (National Association Pro-Life and Pro-Family); *Associação UNIVIDA* (UNIVIDA Association); *ADEF - Associação pelo Desenvolvimento da Família* (Association for Family Development); *ADVOCACI - Advocacia Cidadã pelos Direitos Humanos* (Citizen Lawyering for Human Rights); *Conectas Direitos Humanos* (Conectas Human Rights); *CDH - Centro de Direitos Humanos* (Center for Human Rights); and *AME - Associação Médico-Espírita do Brasil* (Medical Spiritist Association of Brazil). *CNBB - Conferência Nacional dos Bispos do Brasil* (National Conference of Bishops of Brazil) also requested admission as *amicus curiae* in this ADPF.

In fact, in 2004, the justice-rapporteur determined that a public hearing be held, so that experts could make their contributions known to the Court. Still, the hearing was not held until 2008. All organisations that had requested admission as *amici curiae* were called to present their arguments at the public hearing. Other organisations were also invited by the justice-rapporteur including NGOs, members of the scientific community, churches, Ministers of State and parliamentarians. Several other players requested participation in the public hearing. However, the justice-rapporteur refused the vast majority of applications on the grounds that the different sectors of society were already sufficiently represented. In total, there were four days of public hearings, in which 25 persons made oral presentations, seven of whom represented civil society organisations and social movements.

Although the Supreme Court had accepted to review the ADPF in 2005, the case was only decided in April, 2012. By a majority of votes,[26] the Supreme Court declared the constitutionality of the termination of pregnancy of fetuses suffering from anencephaly.

2.3 The AIDS movement and the right to health and access to medicines in the Brazilian Supreme Court

The attempt to fulfill the human right to health, especially the right to access to medicines, through lawsuits has long been a strategy of civil society organisations in Brazil. The case of the AIDS movement is emblematic in the use of this strategy.

In 2000, the Brazilian Supreme Court issued a historic decision reiterating the right of free access to medicines for the treatment of AIDS.[27] The availability of treatment for AIDS in the Brazilian public health system began in 1991. Parallel with the beginning of large-scale use of the first anti-retroviral drug (AZT) in Brazil, new drugs to control AIDS were launched at the international level. Monotherapy began to be considered inefficient and a combined therapy (known as a 'cocktail') was increasingly being recommended. In this context, lawsuits started arising, in which claims were made for these newer drugs. Although many doctors had by then started to prescribe these drugs, they were not officially available through the Brazilian public health system.[28]

26 Justices Marco Aurélio, Rosa Weber, Luiz Fux, Carmem Lúcia and Ayres Britto voted for the merits of the case. Justices Gilmar Mendes and Celso de Mello added specific conditions for the diagnosis of anencephaly and Justices Ricardo Lewandowski and Cezar Peluso voted for the dismissal of the case.

27 AgReg-RE 271286/RS.

28 M Scheffer *et al O Remédio via Justiça – Um estudo sobre o acesso a novos medicamentos e exames em HIV/Aids no Brasil por meio de ações judiciais* (Ministério da Saúde 2005), available at: http://www.aids.gov.br/sites/default/files/o_remedio_via_justica.pdf (accessed on 7 January 2012).

Lawsuits claiming the newer drugs, mostly proposed by civil society organisations defending the rights of people living with HIV or AIDS, and being pioneered by *GAPA/SP- Grupo de Apoio e Prevenção à AIDS de São Paulo* (Support Group for AIDS Prevention of São Paulo), began to be filed, and decisions were reached that were favourable to patients.[29] These lawsuits also contributed to shaping the public policy on access to health treatment in Brazil and to the adoption of specific legislation guaranteeing universal access to medicine for people living with HIV and AIDS (Law 9.313/ 96 - known as 'Sarney Law'). In addition, the main arguments used in these lawsuits always highlighted the human rights to health and life, strengthening the historical recognition of the right to health as a fundamental right and as such fully justiciable. In the view of activists Scheffer and Beloqui, '[t]he law suits are tools of activism and exercise of citizenship' and 'these individual lawsuits, filed by NGOs on behalf of patients, assured or at least "[sped] up" the availability of several drugs'.[30]

In the decision issued in 2000 in the judgment of the RE 271.286/RS, the Brazilian Supreme Court reaffirmed the understanding that the right to health is not a merely a programmatic right, but a right that can be individually demanded before the judiciary, and that the government has the obligation to draft – and implement – social and economic policies aimed at ensuring citizens' universal and equal access to pharmaceutical services and health care.[31]

This decision was issued in an extraordinary appeal and not in a direct action of constitutionality, which demonstrates that the diffuse/concrete control of constitutionality is also important to the guarantee of fundamental rights. Although more time consuming, the diffuse/concrete control can be directly utilised by civil society organisations since, as said before, they do not have constitutional standing to present a case of concentrated/abstract control of constitutionality directly at the Supreme Court.

For Ventura, who has for many years been carrying out research on the judicialisation of the right to health:

> The AIDS movement in Brazil was able to get out of the legal system its potential for transformation, driving sweeping and structural changes through the strategic use of national laws with a human rights view. The practice of judicial intervention of this movement has helped other movements to reflect and redirect their lines of action. In recent Brazilian history no other movement

29 Scheffer *et al* (n 28 above).
30 Scheffer *et al* (n 28 above) 30.
31 MCF Vieira *Justiciabilidade dos Direitos Fundamentais Sociais: O Direito à Saúde na Visão do Supremo Tribunal Federal* Universo Jurídico, Juiz de Fora, ano XI, 05 de mar de 2007 available at: http://uj.novaprolink.com.br/doutrina/3293/JUSTICIABILIDADE_DOS_DIREITOS_FUNDAMENTAIS_SOCIAIS_O_DIREITO_A_SAUDE_NA_VISAO_DO_SUPREMO_TRIBUNAL_FEDERAL (accessed 7 January 2012).

> achieved a degree of effectiveness of the existing national legislation as satisfactorily as people living with HIV/AIDS.[32]

Notwithstanding legal doctrine and jurisprudence developed in recent years affirming the justiciability of the right to health, the Supreme Court has recently been the stage of a public hearing aimed at discussing the limits and possibilities to demand the provision of treatment and medicines through the courts. In 2009, Justice Gilmar Mendes, Chief of the Supreme Court at the time, convened a public hearing to gather information for the judgment of several cases related to the right to health ongoing at the Court. Fifty experts were invited to present oral arguments at the public hearing, including lawyers, public defenders, prosecutors, judges, teachers, doctors, health technicians, administrators and users of the public health system, of which eight were representatives of civil society organisations. In addition, any person or organisation could send written memorials and documents to the Supreme Court on the subject under discussion at the public hearing. Fifty-five papers were received, authored by civil society organisations, citizens and long-standing activists of the health movement. All the oral and written presentations are publically available on the Court's website.

Following the public hearing, decisions made by Justice Gilmar Mendes[33] confirmed the understanding that the government's omission in the treatment of certain diseases could be subject to judicial review through both individual and collective lawsuits. These decisions reaffirmed the justiciability of the right to health on the basis of its immediate application established by the Brazilian Constitution.[34]

It is important to emphasise that, although the high cost of a medicine is not in itself a reason for failing to provide for it, we understand that this concern is the main point that gave rise to the recent discussion about the justiciability of the right to health in the Brazilian Supreme Court. In fact, the biggest problem raised by health system administrators in the various cases pending in Supreme Court and highlighted during the public hearing is the scarcity of public resources and the need for allocation of these resources as efficiently as possible.

However, before restricting the already neglected fundamental rights of the population, health movements are bringing another element to this discussion: the issue of prices charged for these services, especially for

32 Scheffer *et al* (n 28 above) 103.

33 STA 175, Rapporteur: Chief Justice Gilmar Mendes, judged on 09.18.2009, and STA 244, Rapporteur: Chief Justice Gilmar Mendes, judged on 18.09.2009. Available at http://www.stf.jus.br/portal/jurisprudence/pesquisarJurisprudencia.asp (accessed 2 October 2009).

34 M Vieira & R Reis 'Litigância estratégica em direitos humanos – A atuação da sociedade civil no acesso a medicamentos no Brasi' in D Frigo *et al Justiça e direitos humanos: Experiências de assessoria jurídica popular* (2010) 64 available at: http://terradedireitos.org.br/wp-content/uploads/2010/09/Miolo_PB_final.pdf (accessed 7 January 2012).

essential medicines. It is not only the issue whether the state should provide health care for those in need (an obligation imposed by the Brazilian Constitution and by infra-constitutional legislation, and consolidated by legal doctrine and jurisprudence) that must be analysed, but also the price that the government is paying for these treatments. Another aspect that is also included in this debate is the responsibility of pharmaceutical companies in setting high prices, by taking advantage of a monopoly granted through patents, which is in many cases abusive.[35]

At least since 2001, the AIDS movement has included in its agenda of activism, besides the claim for new drugs, 'breaking patents' to ensure access in Brazil to existing drugs.[36] The participation of *Conectas Direitos Humanos* (Conectas Human Rights), representing the Working Group on Intellectual Property of the Brazilian Network for the Integration of Peoples (GTPI/Rebrip, acronym in Portuguese) at the public hearing on the right to health held at the Supreme Court, drew attention to this issue by highlighting the impact of intellectual property rights on the prices of medicines and on public health policies.[37]

This is also the discussion in another case pending before the Brazilian Supreme Court: ADI 4234. In late 2007, *FENAFAR - Federação Nacional dos Farmacêuticos* (National Federation of Pharmacists), on behalf of GTPI/ Rebrip, presented to the Attorney-General's office (PGR) a representation requesting the proposal of an ADI in the Supreme Court challenging the constitutionality of a peculiar mechanism of granting patents, known as the *pipeline* mechanism. GTPI presented a representation to the PGR since civil society organisations do not have standing to directly file this type of lawsuit in the Supreme Court. In April 2009, the Attorney-General – at the time Antonio Fernando de Souza Barros e Silva – filed the ADI 4234 challenging the constitutionality of the *pipeline* mechanism.[38] Through this mechanism it was possible to obtain in Brazil the revalidation of patents granted abroad, allowing retroactive protection for technologies that were already in the public domain in the country and preventing the local production of generic drugs, which were the basis of universal and free treatment for HIV/AIDS at the beginning of the epidemic.

Different organisations and associations with both a private and public interest presented *amicus curiae* briefs in ADI 4234 in order to influence the

35 Vieira & Reis (n 34 above) 65.

36 Scheffer *et al* (n 28 above) 27.

37 Oral arguments presented by *Conectas Direitos Humanos* (Conectas Human Rights), on behalf of GTPI/Rebrip, available at: http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaSaude/anexo/Heloisa_Almeida.pdf, Written arguments, available at: http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaSaude/anexo/Memorial_Conectas.PDF (accessed 7 January 2012).

38 L Hasenclever *et al* 'O instituto de patentes *Pipeline* e o acesso a medicamentos: Aspectos econômicos e jurídicos deletérios à economia da saúde' (2010) 11 *Revista de Direito Sanitário*, available at: http://www.revistasusp.sibi.usp.br/scielo.php?pid=S1516-41792010000300007&script=sci_arttext (accessed 7 January 2012).

decision to be taken by the Court, with arguments for and against.[39] It is noteworthy that *Agência Nacional de Vigilância Sanitária - ANVISA* (National Health Surveillance Agency) and *Fundação Oswaldo Cruz - FIOCRUZ*, two public entities, also presented *amicus curiae* briefs in ADI 4234.[40] Only ABRASEM, ABPI and INTERFARMA were against the declaration of unconstitutionality of the *pipeline* mechanism; petitions from ANDEF and FIOCRUZ are not yet available for consultation at the Supreme Court's website, and all other organisations defended the unconstitutionality of *pipeline* patents.

ADI 4234 is still awaiting the judgment of the Brazilian Supreme Court. If the decision declares the *pipeline* mechanism unconstitutional, several high-cost medicines that are currently protected by such patents and are marketed in a monopoly situation will return to the public domain, allowing local manufacture or importation of generic drugs at prices much more affordable and thereby increasing the population's access to them.

This case demonstrates that representation made by civil society organisations to PGR can be a way to overcome the barrier of their lack of constitutional standing to directly bring actions of concentrated control of constitutionality at the Supreme Court, and thereby to bring the Court to analyse their social demands.

2.4 Affirmative action for admission to higher education and the role of the black movement

Racism is one of the most serious problems in Brazil when it comes to discrimination and segregation. Recent data show that black people are more than 73 per cent amongst the poorest and only 12 per cent amongst the richest;[41] there are two times more blacks than whites illiterate;[42] less than 6 per cent of blacks have college degree;[43] and more than double the

39 Amongst the organisations with a private interest were the following: *Associação Brasiliera de Sementes e Mudas - ABRASEM* (Brazilian Association of Seeds and Seedlings); *Associação Brasileira de Química Fina - ABIFINA* (Brazilian Association of Fine Chemicals); *Associação da Indústria Farmacêutica de Pesquisa - INTERFARMA* (Association of Pharmaceutical Industry of Research); *Associação Brasileira das Indústrias de Medicamentos Genéricos - Pró-Genéricos* (Brazilian Association of Generic Drugs Industry); *Associação Brasileira de Propriedade Intelectual - ABPI* (Brazilian Association of Intellectual Property); and *Associação Brasileira de Defesa Vegetal - ANDEF* (National Association of Plant Protection). Public interest organisations, members of GTPI/Rebrip also presented *amicus curiae* briefs*:* The first petition was signed by *Conectas Direitos Humanos* (Conectas Human Rights) and *GAPA São Paulo*, and the second by the *Associação Brasileira Interdisciplinar de AIDS - ABIA* (Brazilian Interdisciplinary AIDS Association), Doctors Without Borders Brazil (MSF), *Grupo de Incentivo à Vida - GIV* (Group Life Incentive), *GAPA Rio Grande do Sul*, *Instituto de Defesa do Consumidor - IDEC* (Institute for Consumer Defense) and *Federação Nacional dos Farmacêuticos - FENAFAR* (National Federation of Pharmacists).

40 Hasenclever *et al* (n 38 above).

41 Instituto Brasileiro de Geografia e Estatística - IBGE Censo 2010.

42 Instituto Brasileiro de Geografia e Estatística - IBGE Síntese dos Indicadores Sociais 2010.

43 As above.

homicide victims are black.[44] In this context, there are some cases in which the Supreme Court is debating the constitutionality of affirmative action for university entrance.

In March 2010, the fifth public hearing at the Brazilian Supreme Court was held. It addressed the theme of Affirmative Action Policies on Access to Higher Education. This hearing was convened by Justice Ricardo Lewandowski in the context of ADPF 186, filed by *Partido Democrata - DEM* (Democratic Party) against the policy of quotas for blacks adopted by the *Universidade de Brasília - UnB* (University of Brasilia). The main argument of *DEM*, the plaintiff, is that affirmative action policies should be based solely on social and not racial criteria. Thus, there is an attempt to assert that there is no racism in Brazil and that racial quotas would create a segregated state. In the *DEM's* argument, lack of access to higher education was only related to poverty and not to skin colour.

For many organisations who contributed to this case in the Brazilian Supreme Court, the *DEM* reaffirms the infamous myth of racial democracy, built over the last century, with the ultimate goal of maintaining the current status quo. However, one of the central characteristics of racism in Brazil is exactly the denial of its existence.[45] In opposition to *DEM's* thesis, various participants in the public hearing presented arguments to support that racism is still a current problem in Brazil. Alencastro, a historian who represented a public institution promoting African-Brazilian culture (*Fundação Cultural Palmares*), presented data that showed the historical specificities of Brazilian slavery, which has been the longest process of slavery in America and the one that received the largest number of slaves. Fabio Konder Comparato, a professor who represented an important organisation of black people (*EDUCAFRO*), presented impressive data on the exclusion of black people from the university, labour market, and access to basic rights, amongst others.

In total, forty-two people attended the public hearing, including representatives from government agencies, legislators, judges, prosecutors, public defenders, teachers, representatives of different public universities and eight representatives of civil society organisations and social movements, including *Coordenação Nacional de Entidades Negras - CONEN* (National Coordination of Black Entities). The public hearing sought to balance presentations opposing and favourable to the constitutionality of the policy of racial quotas and gave space for universities that have adopted such a system to report on their experience. All of them indicated a positive evaluation of the results of affirmative action policies.

44 JJ Waiselfisz *Mapa da violência 2011: Os jovens no Brasil* (2011).

45 The argument was developed more completely by anthropologist Kabengele Munanga in his presentation at the public hearing at the Brazilian Supreme Court. The full presentation is available at: http://www.stf.jus.br/portal/cms/verTexto.asp?servico=processoAudienciaPublica AcaoAfirmativa (accessed 7 January 2012).

In addition to presenting oral arguments in the public hearing, several players requested admission to ADPF 186 as *amicus curiae.*[46] The case was brought to the plenary of the Supreme Court in April 2012. By a unanimous decision, the constitutionality of affirmative actions based on racial criteria was confirmed. All organisations admitted as *amici curiae* were able to present oral arguments during the judgment session.

The quantity of requests for admission as *amicus curiae*, including several black movement organisations, is an indication that civil society organisations and social movements in Brazil are becoming more inclined to fight these matters in courtAs noted by Oscar Vilhena:[47]

> Although some groups have a strong tradition in the use of law and justice as instruments of social change, such initiatives are marginal in the wider context of the country. Brazilian civil society has a greater tradition of presenting complaints and negotiating politically with political actors than face them in court.

It is worth remembering that similar cases have been brought to the Brazilian Supreme Court earlier and saw the progressive participation of the black movement and civil society organisations. The first two cases of concentrated control of constitutionality brought to the Brazilian Supreme Court in respect of affirmative action for admission to higher education were ADI 2858 and ADI 3197, both filed by *CONFENEN - Confederação dos Estabelecimentos de Ensino Privado* (Confederation of Private Educational Institutions) in 2003 and 2004, respectively. The first challenged state laws of Rio de Janeiro that implemented, for the first time, a system of racial and social quotas in two state universities: *Universidade Estadual do Rio de Janeiro - UERJ* (State University of Rio de Janeiro) and *Universidade Estadual do Norte Fluminense - UENF* (State University of the North of Rio de Janeiro). However, the laws

46 *Central Única dos Trabalhadores no Distrito Federal - CUT/DF* (Central Union of Workers in the Federal District); *Partido dos Trabalhadores - PT* (Workers Party); Public Defender General's Office; *Fundação Nacional do Índio - FUNAI* (National Indian Foundation); *Fundação Cultural Palmares* (Palmares Cultural Foundation); Federal Council of the Brazilian Bar Association; Central Directory of Students at the University of Brasilia – UNB/ DCE; and several black movements and human rights organisations: *Instituto de Advocacia Racial e Ambiental - IARA* (Institute for Racial and Environmental Lawyering); *AFROBRAS - Sociedade Afro-Brasileira de Desenvolvimento Sócio Cultural* (Afro-Brazilian Society of Socio Cultural Development); *ICCAB - Instituto Casa da Cultura Afro-Brasileira* (House Institute of Afro-Brazilian Culture); *IDDH - Instituto de Defensores dos Direitos Humanos* (Institute of Human Rights Defenders); CRIOLA; *MNU - Movimento Negro Unificado* (Unified Black Movement); *EDUCAFRO - Educação e Cidadania de Afro-descentes e Carentes* (Education and Citizenship for Afro-descendants and the poor); *ANAAD - Associação Nacional dos Advogados Afrodescentes* (National Association of African-Descent Lawyers); *CEERT - Centro de Estudos das Relações de Trabalho e Desigualdade* (Centre for the Study of Labor Relations and Inequality); and *Conectas Direitos Humanos* (Conectas Human Rights). *Movimento contra o Desvirtuamento do Espírito da Política de Ações Afirmativas* (Movement against the distortion of the spirit of affirmative action policies in public universities); *Instituto de Direito Público e Defesa Comunitária Popular - IDEP* (Institute of Public Law and Popular Community Defense); and *MPMB - Movimento Pardo-Mestiço Brasileiro* (Brazilian Mestizo Movement) also requested admission as *amici curiae*, being the only ones against the policy of quotas for black people.

47 OV Vieira *Assistência jurídica às populações menos favorecidas* (2010) 10.

were replaced by another state law (Law 4.151/03), causing ADI 2858 not to be examined on its merits. CONFENEN then filed the second ADI (ADI 3197), which challenged the new state law. However, this law was also replaced by another law (Law 5.346/08) and ADI 3197 was also dismissed with no examination of merits.

In ADI 2858, a relatively small number of actors, amongst them organisations representative of the black movement, presented requests for admission as *amicus curiae*.[48] In ADI 3197, a greater number of organisations submitted requests to join as *amicus curiae,* especially from the black movement.[49]

Subsequently, ADI 3330, ADI 3314 and ADI 3379 were proposed respectively by CONFENEN, former PFL (DEM) and FENAFISP - Federação Nacional dos Auditores Fiscais da Previdência Social (National Association of Social Security Tax Auditors), all challenging the constitutionality of the public policy called ProUni – Programa Universidade para Todos (University for All Programme). This programme is also organised as a form of affirmative action, but differs markedly from that observed in the cases of the

48 These were *IPEAFRO - Instituto de Pesquisas e Estudos Afro-Brasileiro* (Institute for Research and Afro-Brazilian Studies); *AFROBRAS - Sociedade Afrobrasileira de Desenvolvimento Sócio Cultural* (Afro-Brazilian Society of Socio Cultural Development); *GELEDÉS - Instituto da Mulher Negra* (Black Women's Institute); *CEERT - Centro de Estudos das Relações de Trabalho e Desigualdades* (Center of studies for Labor Relations and Inequalities); *Fala Preta! Organização de Mulheres Negras* (Organisation of Black Women); *CNAB - Congresso Nacional Afro-brasileiro* (Afro-Brazilian National Congress); *CIDAN - Centro Brasileiro de Informação e Documentação do Artista Negro* (Brazilian Center for Information and Documentation of the Black Artist); CRIOLA; *CEAP - Centro de Articulação de Populações Marginalizadas* (Center for Articulation of Marginalized Populations); *UBES - União Brasileira de Estudantes Secundaristas* (Brazilian Union of Secondary Students); and *Conectas Direitos Humanos* (Conectas Human Rights).

49 These included the following: *Conectas Direitos Humanos* (Conectas Human Rights); *CEERT - Centro de Estudos das Relações de Trabalho e Desigualdade* (Centre for the Study of Labor Relations and Inequalities); *IPEAFRO - Instituto de Pesquisas e Estudos Afro-Brasileiros* (Research Institute and Afro-Brazilian Studies); *AFROBRAS - Sociedade Afrobrasileira de Desenvolvimento Sócio Cultural* (Afro-Brazilian Society for Socio-Cultural Development); *GELEDÉS - Instituto da Mulher Negra* (Black Women's Institute); *Fala Preta! Organização de Mulheres Negras* (Organisation of Black Women); *CNAB - Congresso Nacional Afro-Brasilero* (Afro-Brazilian Congress); *CIDAN - Centro Brasileiro de Informação e Documentação do Artista Negro* (Brazilian Center for Information and Documentation of the Black Artist); CRIOLA; *CEAP - Centro de Articulação de Populações Marginalizadas* (Center for Articulation of Marginalised Populations); *INSPIR - Intituto Sindical Interamericano pela Igualdade Racial* (Inter-American Trade Union Institute for Racial Equality); *NEN - Núcleo de Estudos Negros* (Center for Black Studies); *IARA - Instituto de Advocacia Racial e Ambiental* (Institute of Racial and Environmental Lawyering); *Comunidade Baháis do Brasil* (Community Baha'is of Brazil); IROHIN; *CUFA - Central Unica das Favelas do Rio de Janeiro* (Unified Center of Favelas of Rio de Janeiro); *Associação Carnavalesca Bloco Afro Olodum* (Carnival Association Bloco Afro Olodum); *EDUCAFRO - Educação e Cidadania de Afrodescentes e Carentes* (Education and Citizenship of African Descent and the poor); ILÉ IMO OJÚ ARO; *INDEC - Instituto de Desenvolvimento Cultural* (Institute of Cultural Development); *Congregação Espírita Beneficente Pai Jerônimo* (Father Jerome Spiritist Beneficent Congregation); *Sociedade Nossa Senhora das Candeias* (Society Our Lady of Candeias); ILÉ AXÉ YA MANJELE; *Templo da Águia Dourada Sagrada* (Sacred Temple of the Golden Eagle); *GLMERJ - Grande Loja Maçônica do Estado do Rio de Janeiro* (Grand Masonic Lodge of the State of Rio de Janeiro); and *MPMB - Movimento Pardo-Mestiço Brasileiro* (Brazilian Mestizo Movement).

universities of Rio de Janeiro and Brasilia. ProUni is not a policy to reserve places for students from minorities groups, but a kind of funding of the study in private universities for students who meet certain requirements, and who are approved in the university entrance examination. As numerous issues (such as tax issues and university autonomy) are involved in these ADIs, the issue of equality is not discussed in great depth. However, it is possibly to argue that the redistribution remedies are ingeneral accepted as legitimate[50] and when policies are based on race, the discrimination factor (even 'positive discrimination') is more strongly challenged.[51]

All three ADI were decided together in a judgment session that started in April 2008. Rapporteur Justice Ayres Britto voted against the merits of the case, but the session was suspended due to a request to view the case made by Justice Joaquim Barbosa. In April 2012, the Supreme Court declared the constitutionality of the ProUni Program by majority decision (7-1). In ADI 3330, only *Conectas Direitos Humanos* (Conectas Human Rights) and *CDH - Centro de Direitos Humanos* (Centre for Human Rights) were accepted as *amici curiae* and made oral presentations during the judgment session of the case. *MPMB - Movimento Pardo-Mestiço Brasileiro* (Mestizo Brazilian Movement) also requested admission as *amicus curiae*, but the request was rejected because it was made after the judgment of the case had already started.

2.5 ADPF 132 and ADI 4277: The counter-majoritarian role of the Supreme Court in the recognition of same-sex unions

Lesbian, gay, bisexual, transgender, transsexual or intersex (LGBTTI) people suffer much prejudice and are not treated the same as heterosexual people by some laws in Brazil. A recent opinion poll contained a question about the perception of respondents regarding the constitutional provision according to which all persons are equal before the law. The interviewers asked respondents if they thought that the rights of LGBTTI people in the country were being respected. Forty-three per cent said that these rights are not respected and only five per cent thought that those rights were being fully respected. The same survey showed that guaranteeing the right of inheritance to same-sex partners should be the main measure in the field of human rights to combat discrimination against LGBTTI people.[52]

50 MJL da Silva *Igualdade e ações afirmativas sociais e raciais no ensino superior: O que se discute no STF?* (2009) 41, available at: http://www.sbdp.org.br/arquivos/monografia/137_Monografia%20Marina%20Jacob.pdf (accessed 7 January 2012).

51 Da Silva (n 50 above) 70.

52 Fundação Perseo Abramo (2010) available at http://www.fpabramo.org.br/o-que-fazemos/pesquisas-de-opiniao-publica/pesquisas-realizadas/dados-comparativos (accessed 21 December 2013).

In view of this background, the judgment recognising the constitutionality of same-sex unions, which was handed down in 2011, is amongst the most important in the history of the Brazilian Supreme Court.

ADPF 132 was filed by the State Governor of Rio de Janeiro and had as rapporteur Justice Carlos Britto. The case aimed at invalidating provisions of the Statute of Civil Servants of the State of Rio de Janeiro (Decree-Law 220/75) and decisions of state courts in the same state that were denying same-sex unions the same legal regime as opposite-sex unions. In turn, ADI 4277 was presented by the Attorney-General's office (PGR) and also had Justice Carlos Britto as its rapporteur. ADI 4277 had as its object the declaration of compulsory recognition of same-sex unions as family entities, provided they meet the same requirements for opposite-sex unions, therefore expanding the demand for the entire national territory. In this case, PGR challenges the constitutionality of a provision of Brazilian Civil Code (article 1723), which regulates the union between a man and woman, and requires the Supreme Court to apply 'interpretation according to the Constitution' for the provision to be applied also to same-sex unions, provided they have fulfilled the same requirements. A significant number of civil society organisations requested admission as *amici curiae* in ADPF 132, both in favour of and against the recognition of same-sex unions.[53]

53 The following were in favour: *Conectas Direitos Humanos* (Conectas Human Rights); *EDH - Escritório de Direitos Humanos do Estado de Minas Gerais* (Human Rights Office of the State of Minas Gerais); *GGB - Grupo Gay da Bahia* (Gay Group of Bahia); *ANIS - Instituto de Bioética, Direitos Humanos e Gênero* (Institute of Bioethics, Human Rights and Gender); *GEDI UFMG - Grupo de Estudos em Direito Internacional da Universidade Federal de Minas Gerais* (Group Studies in International Law at the Federal University of Minas Gerais); *Centro de Referência GLBTTT - Gays, Lésbicas, Bissexuais, Travestis, Transexuais e Transgêneros do Estado de Minas Gerais* (Reference Center for Lesbian, Gay, Bisexual, Transsexual and Transgender in the State of Minas Gerais); *CELLOS - Centro de Luta pela Livre Orientação Sexual* (Center for the Fight for Free Sexual Orientation); *ASSTRAV - Associação de Travestis e Transexuais de Minas Gerais* (Association of Transvestites and Transsexuals of Minas Gerais); *GAI - Grupo Arco-Íris de Conscientização Homossexual* (Rainbow Group for Homosexual Awareness); *ABGLT - Associação Brasileira de Gays, Lésbicas, Bissexuais, Travestis e Transexuais* (Brazilian Association of Gays, Lesbians, Bisexuals, Transvestites and Transsexuals); *Grupo Humanus* (Humanus Group); *Libertos Comunicação* (*Libertos* Communication); SBDP - Sociedade Brasileira de Direito Público (Brazilian Society of Public Law); *AIESP - Associação de Incentivo à Educação e Saúde de São Paulo* (Association for the Encouragement of Education and Health of São Paulo); *and IBDFAM - Instituto Brasileiro de Direito de Família* (Brazilian Institute of Family Law). In the opposite direction, *CNBB - Confederação Nacional dos Bispos do Brasil* (National Conference of Bishops of Brazil) and *Associação Eduardo Banks* (Eduardo Banks Association) presented *amici curiae* briefs. In ADI 4277, requests for *amicus curiae* in favour of the merits of the case were made by the following: *Conectas Direitos Humanos* (Conectas Human Rights); *ABGLT - Associação Brasileira de Gays, Lésbicas, Bissexuais, Travestis e Transexuais* (Brazilian Association of Gays, Lesbians, Bisexuals, Transvestites and Transsexuals); *Corsa - Cidadania, Orgulho, Respeito, Solidariedade e Amor* (Citizenship, Pride, Respect, Love and Solidarity); *Associação de Incentivo à Educação e Saúde de São Paulo* (Association for the Encouragement of Education and Health of São Paulo); and *IBDFAM - Instituto Brasileiro de Direito de Família* (Brazilian Institute of Family Law). *Associação Eduardo Banks* (Eduardo Banks Association) and *CNBB - Confederação Nacional dos Bispos do Brasil* (National Conference of Bishops of Brazil) presented *amicus curiae* briefs in the opposite direction.

It should be noted that ADI 4277, filed by PGR, started with a representation made by the Working Group on Sexual and Reproductive Rights of the Federal Attorney's Office for Citizens' Rights (an organ of the Federal Prosecutor Office) and also by the following organisations of the LGBTTI movement: *ABGLT - Associação Brasileira de Gays, Lésbicas, Bissexuais, Travestis e Transexuais* (Brazilian Association of Gays, Lesbians, Bisexuals, Transvestites and Transsexuals); *Associação da Parada do Orgulho dos Gays, Lésbicas, Bissexuais e Transgêneros de São Paulo* (Association of the Pride Parade of Gays, Lesbians, Bisexuals and Transgenders of São Paulo); *IDENTIDADE - Grupo de Ação pela Cidadania Homossexual* (Action Group for Homosexual Citizenship); and *Corsa - Cidadania, Orgulho, Respeito, Solidariedade e Amor* (Citizenship, Pride, Respect, and Solidarity Love). This shows, once again, the active participation of civil society organisations and social movements in taking their demands to the Supreme Court, despite the lack of constitutional standing to directly file concentrated control of constitutionality lawsuits.

The joint judgment session of ADI 4277 and ADPF 132 included oral presentations from the organisations admitted as *amici curiae.* In its unanimous decision, the Brazilian Supreme Court recognised same-sex unions as a family entity to which the same rules as those concerning a civil union between a man and a woman applies.

In his opinion, Justice Celso de Mello reaffirmed the counter-majoritarian role of the Court claiming it to be the body vested with the institutional responsibility and power to protect minorities against the excesses of majority groups, or even against omissions that are 'prejudicial, given the inertia of the State, to the rights of those suffering the harmful effects of prejudice, discrimination and legal exclusion'. Moreover, he criticised the inaction of the legislature, attributing its omission to the current majority opinion in Congress, asserting that such a framework ends up generating a state of subjugation 'of minority groups to the hegemonic will of the majority, which compromises, seriously, by reducing it, even the coefficient of democratic legitimacy of the parliamentary institution'.[54]

It is worth remembering that several bills, including a proposal for constitutional amendment dealing with same-sex unions, have been before the National Congress since the mid-1990s, but have not come to a vote. According to Chaves:[55]

> Bills that have not been archived are lost in some back drawer, and when unarchived, bump in the commissions, whose overwhelming majority is made up

54 MO Chaves 'Julgamento da ADPF 132 e da ADI 4277 e seus reflexos na seara do casamento civil' (2011) 16 *Jus Navigandi*, available at: http://jus.com.br/revista/texto/20672 (accessed 7 January 2012).

55 As above.

of parliamentarians whose moral fundamentalism - especially with religious bias - stamp denial of civil rights to a large portion of society.

This omission of the legislature violated a fundamental right of a significant portion of the population. Despite the existence of social pressure for legislative change, this demand did not find support in the Congress, primarily due to the pressure exerted by majority segments that are against the recognition of homosexuals' minority rights. The historical demand of the LGBTTI movement was finally answered by the Supreme Court's finding, in which it supports the counter-majoritarian role of the judiciary in defence of the Constitution's essential principles.

2.6 Demarcation of *quilombola* lands (ADI 3239) and the request for a public hearing

Another relevant case on the agenda of the Brazilian Supreme Court that should be addressed by this article is ADI 3239, which deals with the demarcation of *quilombola* (descendants of black slaves) lands. The ADI was proposed in 2004 by the former *Partido da Frente Liberal - PFL* (Liberal Front Party), nowadays *DEM*, and its rapporteur is Justice Cezar Peluso. The ADI challenges the constitutionality of Presidential Decree 4.887/2003, which regulates the procedure to be adopted for recognition of ownership of land occupied by the remnants of *quilombos*,[56] as guaranteed by the Brazilian Constitution.

A significant number of social actors presented *amici curiae* briefs in this case. Amongst them were several civil society organisations, the environmental movement, the *quilombola* movement and the black movement, and also academics.[57]

56 *Quilombos* are lands that sheltered mainly runaway or freed black slaves during the period of slavery in Brazil.

57 *Instituto Pro Bono* (Pro Bono Institute); *Conectas Direitos Humanos* (Conectas Human Rights); *Sociedade Brasileira de Direito Público - SBDP* (Brazilian Society of Public Law); *Centro pelo Direito à Moradia contra Despejos - COHRE* (Centre on Housing Rights and against Evictions); *Centro de Justiça Global* (Global Justice Center); *Instituto Socioambiental - ISA* (Social and Environment Institute); *Instituto de Estudos, Formação e Assessoria em Políticas Sociais - POLIS* (Institute for Research, Training and Consulting in Social Policy); *Terra de Direitos* (Earth of Rights); *Centro de Assessoria Jurídica Popular Mariana Criola* (Centre of Popular Lawyering Mariana Criola); *Associação dos Quilombos Unidos do Bairro Preto e Indaía* (Association of the United Quilombo of Preto Neighborhood and Indaía); *Associação de Moradores Quilombolas de Santana* (Association of Residents of Quilombo Santana); *Coordenação das Comunidades Negras Rurais Quilombolas de Mato Grosso do Sul* (Coordination of Rural Black Quilombolas Communities of Mato Grosso do Sul); *IARA - Instituto de Advocacia Racial e Ambiental* (Institute for Racial and Environmental Lawyering); and *CPVR - Clube Palmares de Volta Redonda* (Palmares Club of Volta Redonda), all admitted as *amici curiae.* Other organisations also requested to be *amici curiae* in the case, but their requests were denied since they were presented after the case was ready to be decided. They are: *Federação N'Golo* (N'Golo Federation); *Escritório de Direitos Humanos* (Office of Human Rights); *GEDI UFMG - Grupo de Estudos em Direito Internacional da Universidade Federal de Minas Gerais* (Study Group on International Law

Furthermore, trade associations, political parties and federal states and institutional agencies also requested admission as *amici curiae* in ADI 3239.[58]

Besides the great number of social actors that formally requested admission as *amici curiae* in ADI 3239, another fact that attracts attention in this case is the great number of petitions, made by several organisations, both those that had requested and those that had not requested admission as *amici curiae,* requesting a public hearing to be held on this issue by the Brazilian Supreme Court.[59]

Despite the significant interest shown by different social actors about the topic under analysis in ADI 3239, the rapporteur, Justice Cezar Peluso did not convene a public hearing. This case is illustrative of the discretion granted to the rapporteur-justice on the convening of a public hearing in the cases pending before the Supreme Court and, further, of the prerogative to control the agenda of issues that will be considered by the Supreme Court, since the lawsuit was filed in 2004 and was only decided in April 2012.

of the Federal University of Minas Gerais); *Programa Pólos de Cidadania da Universidade Federal de Minas Gerais* (Poles Citizenship Program of the Federal University of Minas Gerais); *Fórum Brasileiro de Direitos Humanos* (Brazilian Forum of Human Rights); *Comissão Pastoral da Terra - Regional Maranhão* (Pastoral Land Commission of Maranhão); and *AMECES - Associação dos Moradores e Agricultores da Comunidade Espiríto Santo* (Association of Residents and Farmers of Community Holy Spirit).

58 They were: *FETAGRI/Pará - Federação dos Trabalhadores na Agricultura do Estado do Pará* (Federation of Agricultural Workers of Pará); *PT - Partido dos Trabalhadores* (Workers Party); *CNBB - Conferência Nacional dos Bispos do Brasil* (National Conference of Bishops of Brazil); *CNA - Confederação da Agricultura e Pecuária do Brasil* (Agriculture and Livestock Confederation of Brazil); *CNI - Confederação Nacional das Indústrias* (National Confederation of Industry); *Sociedade Rural Brasileira* (Brazilian Rural Society); *BRACELPA - Associação Brasileira de Papel e Celulose* (Brazilian Association of Pulp and Paper); Attorney General of the State of Para; State of Parana; State of Santa Catarina, Municipality of Nova Iguaçu and *INCRA - Instituto Nacional de Colonização e Reforma Agrária* (National Institute of Colonisation and Agrarian Reform).

59 Besides the organisations already mentioned, other organisations that have asked for the public hearing are: *CONAQ - Coordenação Nacional das Comunidades Negras Rurais Quilombolas* (National Coordination of Rural Black Quilombolas Communities); *Comissão Pastoral da Terra* (Pastoral Land Commission); *ASSERA - Associação dos Servidores da Reforma Agrária* (Association of Civil Servants of Agrarian Reform); *AATR - Associação de Advogados de Trabalhadores Rurais da Bahia* (Association of Lawyers of Rural Workers of Bahia); *CPI/SP - Comissão Pró-Índio de São Paulo* (Pro-Indian Commission of São Paulo State); *Koinonia Presença Ecumênica e Serviço* (Koinonia Ecumenical Presence and Service); *Comunitária Kilombo da Família Silva* (Community Kilombo Family Silva); *Dignitatis - Assessoria Técnica Popular* (Popular Technical Advice); *Grupo de Trabalho Combate ao Racismo Ambiental* (Working Group Against Environmental Racism); *Fórum Cearense de Mulheres* (Women's Forum of Ceara); *AMB - Articulação de Mulheres Brasileiras* (Articulation of Brazilian Women); *NEP/UFPB - Núcleo de Extensão Popular de Mandacaru* (Extension Center of the People of Mandacaru); *AACADE - Associação de Apoio aos Assentamentos e Comunidades Afrodescentes* (Association of Support for Settlements and Communities of African Descendant); Human Rights Commission of the Federal University of Paraiba; *Comunidades Quilombolas do Paraná* (Quilombolas Communities of Parana); *UNEGRO - União de Negros pela Igualdade* (Union of Blacks for Equality); and *FAECIDH - Francisco de Assis: Educação, Cidadania, Inclusão e Direitos Humanos* (Education, Citizenship, Inclusion and Human Rights). Senator Serys Slhessarenko, the Parliamentary Front in Defense of Quilombos, the Federal Prosecutor (Ministério Público Federal) and the Attorney-General of the Union also presented requests for a public hearing.

In an attempt to overcome the justice-rapporteur's denial to hold a public hearing in this case, several social movements and civil society organisations have had meetings with other justices from the Supreme Court as a way to garner support for holding the public hearing and to express their opinion on the subject under consideration on ADI 3239.[60]

In April 2012, the case was finally brought to the plenary of the Supreme Court to be decided. Some of the organisations admitted as *amici curiae* presented their arguments orally at the judgment session. Justice Cezar Peluso, rapporteur of the case and Chief Justice at the time, voted against *quilombola's* right to land declaring the unconstitutionality of the Presidential Decree. However, the judgment was suspended due to a request for view of the case made by Justice Rosa Weber and was not being retrieved yet.

2.7 The Supreme Court as the guarantor of human rights: The right to memory and truth (ADPF 153)?

In the discussion thus far, cases were presented in which social movements and civil society organisations had, to a greater or lesser degree, received the desired response from the Supreme Court. In the cases presented, amongst those who have already been tried, it can be said that the Court acted as a guarantor of human rights.

In 2010, however, the Brazilian Supreme Court issued a decision that seemed to go against the recognition of rights. This is the claim of ADPF 153, filed by *OAB - Ordem dos Advogados do Brasil* (Brazilian Bar Association), alleging that the interpretation according to which the Law 6.683/79 (called the Law of Amnesty) would have granted amnesty for public officials responsible for brutalities committed during the military regime is unconstitutional. Thus, OAB requested an interpretation of that law that is consistent with the Constitution, advocating for an understanding that amnesties granted under the law do not encompass state agents accused of the crimes of murder, enforced disappearance, abuse of authority, bodily injury and rape. Put another way, OAB argued that these were ordinary, and not political crimes, in respect of which amnesty does not apply. OAB contended that a contrary interpretation would violate constitutional rights.

The rapporteur of the case, Justice Eros Grau, considered that it is not up to the courts to give an interpretation of the law different from that at the time of its adoption. This task falls to the legislature. In this particular case, Justice Grau observed that the legislature, as a result of a political agreement, provided that amnesty would apply to crimes committed by state agents

60 Supreme Court News, available at: http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=109206&caixaBusca=N (accessed 7 January 2012).

against persons who challenged the military regime. Only two justices of the Brazilian Supreme Court disagreed with this decision.[61]

This case inspired a number of social actors to file *amicus curiae* briefs before the Court: *CEJIL - Centro pela Justiça e o Direito Internacional* (Center for Justice and International Law); *AJD - Associação Juízes para a Democracia* (Association of Judges for Democracy); *ABAP - Associação Brasileira de Anistiados Políticos* (Brazilian Association of People who were granted Political Amnesty); and *ADNAM - Associação Democrática e Nacionalista de Militares* (Nationalist and Democratic Association of Military).

At least a part of the civil society organisations that engaged in public dialogue around ADPF 153 seemed to see it as an opportunity for a broader discussion than just a provision of the Law of Amnesty. In fact, they saw this case as an opportunity for the state to take a 'public commitment to rescue the history and hold responsible those who committed atrocities'.[62] *CEJIL*, in turn, invested in this case as an opportunity to contribute to the national incorporation of international standards of protection of human rights.[63]

It is interesting to note that, in the process, other actors who do not appear as *amicus curiae* also participated in the civil society articulation around the ADPF. Through interviews, it is clear that *Tortura Nunca Mais* (Torture Never Again), which brings together family members of dead, missing and tortured people during the dictatorship, for example, had a dialogue with *AJD*. In the words of Judge Luis Fernando, a member of *AJD*:

> We have almost a methodological principle in our association that we rarely do things for ourselves. The idea is that we, within our goals participate with other entities and with civil society movements.[64]

Furthermore, *ADNAM's* participation in the case resulted from a contact made by a group of graduate researchers at the Federal University of Parana, the Centre for Research in Law and Democracy. This group focuses, amongst others, on the Brazilian process of democratisation and on 'hard cases of constitutional jurisdiction'. Thus, the researchers first developed a thesis to be presented in ADPF 153 and then sought an organisation, *ADNAM*, who had the legitimacy to express it to the Supreme Court.[65]

Despite the fact that all the organisations that presented *amici curiae* briefs before the Court were defending the reinterpretation of the Law of Amnesty, the Brazilian Supreme Court ruled in the opposite direction. These

61 Carlos Ayres Britto and Ricardo Lewandowski.
62 HEC de Oliveira *Um estudo sobre o impacto da decisão do STF na ADPF 153* (2010) 73, available at: http://www.sbdp.org.br/arquivos/monografia/160_Monografia%20Hilem%20Oliveira.pdf (accessed 7 January 2012).
63 As above.
64 De Oliveira (n 62) 71.
65 De Oliveira (n 62) 63.

organisations saw a lack of confidence expressed by the Supreme Court which, according to them, had already been shown before the decision. Still, they chose to get involved with the case because of the potential it had to promote discussion in society and to give more publicity to the issue. Interviews with representatives of these organisations indicate that they believe there has been pressure from the executive branch due to the divergence between the Ministry of Defence, the Ministry of Justice and the Human Rights Secretariat. In this sense, they identify as an obstacle to the success of the demand the political momentum of the proposition of the case before the Supreme Court, since the ambiguous position of the government has not supported the thesis defended by OAB at the ADPF.[66]

3 Final remarks

The cases briefly discussed in this paper demonstrate that civil society organisations and social movements have played an increasingly activist role before the Brazilian Supreme Court. The prominent role of the Court in the Brazilian political system as a privileged arena of public deliberation, and the great importance of the cases on the agenda of the Court, contributed to the recognition by civil society organisations and social movements of the importance of the judiciary as a locus of political action and guarantor of rights.

Humberto Adami, the attorney submitting ADI 3197 on the affirmative action for admission of black people in higher education, expressed the following understanding:[67]

> The Supreme Court is the 'mat' of the assessment of constitutionality in Brazil. That is why real 'war' is being waged there ... We can see issues that in actuality are or will be decided there and only there (verticalisation on elections, consumers rights in banks, nepotism, etc). That is why I call attention again to the ADI filed by CONFENEN, which may be the decisive 'battle' in this war. If that case is ruled favourably, a 'domino effect' will extend to other affirmative action initiatives, even by induction, where any judge will feel comfortable to block them. Therefore, I consider Combating Lawyering in racial issues absolutely fundamental, and a commitment to the thousands of beneficiaries from affirmative actions that are, every day, fighting their personal and specific battles in their own areas.

The presence of social movements and civil society organisations, expressing the polarity of views diffuse amongst the various segments of Brazilian society, definitely diversified the legal debate carried out in the Supreme Court, especially through the public hearings.[68] They open the possibility of the Court having contact with positions that are often not manifested in the

66 De Oliveira (n 62) 76.
67 Excerpt from e-mail available, on file with the authors.
68 Vieira (n 3 above) 452.

lawsuit. Generally, researches from organisations specialising in the subject matter of the judgment show another approach on that issue and enrich the votes. Regarding the *amicus curiae* briefs, De Almeida notes as follows:[69]

> It was possible to see that the possibility of manifestations from civil society organisations in the actions of concentrated control of constitutionality permitted the representation of social plurality and diversity in the reasons and arguments to be considered by the Supreme Court, giving thus, undeniably, higher quality and legitimacy to the decisions.

It is of interest to note that, more than having the intent of obtaining a particular decision in a case, the organisations or movements who act as *amici curiae* or participate in the public hearings often aim to put matters under discussion, understanding there is an 'educational process' in their performance: 'Once a case is in the Supreme Court or Superior Court of Justice it wins the general debate in society, as happened with the anencephaly case. There is, in that, an educational process'.[70]

The judgments of the Supreme Court also have consequences in the field of public policies. The case of abortion, for example, requires that the executive branch develop policies to comply with the decision. After the court's decision, the health care sector faces the challenge of designing a policy for pregnant women of anencephalic fetuses to be received in the public health care system, amongst other measures.

On the other hand, we must point out that there are some limitations in this model of participation in the constitutional debate. It is noticeable, for example, that grassroots organisations and social movements face difficulties to participate in this process, since the intervention in the Supreme Court requires technical expertise and some degree of professionalisation. The public hearings, however, are more open to participation of social movements since they require a less significant level of institutionalisation. Still, the criteria used by the Court to choose who will present at the public hearings are not clear and can be an obstacle to participation.

Moreover, it is important to point out that the justices have considerable power over the agenda of the Court, deciding when a case will be judged. This means that some human rights violations can be perpetuated over time due

69 De Almeida (n 10 above).

70 Interview conducted by Guimarães (2009) about Declaratory Action of Constitutionality – ADC 19, which sought a declaration of constitutionality of arts 1, 33 and 41 of Law 11340/ 2006, called the Maria da Penha Law. In this case, the following organisations manifested as *amici curiae: Themis*; *Instituto Antígona* (Antigone Institute); *Comitê Latino Americano e do Caribe para a Defesa dos Direitos da Mulher – CLADEM* (Latin American and Caribbean Committee for the Defence of Women's Rights); and *Instituto para a promoção da Igualdade – IPÊ* (Institute for the Promotion of Equality). All organisations expressed their opinions in defence of women's rights, expressing the Maria da Penha Law was a tool to fight domestic violence, a serious problem in Brazil.

to the omission of the Court once civil society organisations do not have tools to determine its agenda.

The same applies to public hearings and *amici curiae*. The rapporteur-justice has discretion to accept or deny participation as *amicus curiae* and the decision cannot be appealed. In some cases, requests to participate as *amicus curiae* are denied without much justification. For example, in the case of affirmative action, *Conectas* and *CEERT* required admission in partnership, but only the first organisation has been admitted. The *rapporteur* claimed that *CEERT* did not meet the admissibility requirements (representativeness and relevance to the issues being debated) yet he did not specify the reasons for this conclusion.

It has been mentioned that the criteria for selection of who will present at public hearings is still not clear and, as shown by the case of *quilombola* lands, the rapporteur-justice has the discretion to decide even if a public hearing will or will not be held by the Court, without having to give any explanation about his decision. Accordingly, we believe that the justices should be required to grant a formal decision on requests for public hearings and they should have the burden of justifying the refusal. Furthermore, it is important to point out that some justices do not value the mechanisms of participation much. The fact that few justices are present at the public hearings shows that this space is not taken as seriously as it should. Therefore, we also believe there should be a formal requirement to all justices to attend the public hearings.

There is, further, also a discussion of the role to be played by *amici curiae* in the sense that applicants should be 'friends of the court' and not from one of the parties involved in the case. That is, there is the expectation that these organisations contribute with specialised information in a neutral and impartial way. What happens in practice is that every organisation that goes to the Supreme Court defends a thesis and ultimately provides arguments for one side.

However, this is not problematic, since the supposed neutrality would be impossible in a constitutional court that decides on essentially political issues, as seen in this paper. Moreover, being a 'friend of the party' does not mean not contributing to the quality of the Court's decision and especially to the legitimacy of the process. Instead, arguments carried by militant organisations provide the Supreme Court a point of view that could be disregarded by the justices if they were restricted to what the parties say. Therefore, it can be said that 'the social actresses involved in the litigation of women's rights work with dual positioning strategies, being friends of the court and friends of the party at the same time'.[71]

71 Guimarães (n 24 above) 37.

The Brazilian Supreme Court itself acknowledges that mechanisms of social participation as *amicus curiae* and public hearings – beyond mere technical support – represent the search for democratic legitimacy to the decisions of the Court. However, the substantial effects of this pluralisation should be, over time, perceived in the reasoning of the justices in their opinions, with eventual reception of the arguments presented by the *amici curiae* and the participants of public hearings.[72] That is a task that is beyond the scope of this paper, but that seems to be a research field still open for further discussions.

72 De Almeida (n 10 above) 92.

CHAPTER 23 SWALLOWING A BITTER PIL? REFLECTIONS ON PROGRESSIVE STRATEGIES FOR PUBLIC INTEREST LITIGATION IN INDIA

Arun K Thiruvengadam[1]

1 Introduction

Against the background of an alleged shift in the nature and role of the judiciary in India between the 1980s and the 1990s, this essay focuses on the following two questions: (i) What exactly is the nature of the shift that has taken place within the Supreme Court of India on issues of social rights and distributive justice?; and (ii) Should this shift lead progressives to abandon the site of legal intervention?

In formulating responses to these two questions, this essay in turn advances two arguments. The first – descriptive – argument seeks to assess the shift in the approach of the Indian Supreme Court to issues of human rights and Public Interest Litigation (PIL) between the 1980s and the 1990s. The second – normative – argument urges progressives to increase – rather than abandon – engagement with the law and the courts.

2 The changing character of Public Interest Litigation: The debate over assessing this claim

Several scholars have asserted that PIL in India has been transformed from the time of its inception in the late 1970s to the causes it embraced in the period since the 1990. The seeming consensus amongst progressives is that the Supreme Court's stance has changed from being progressive in the 1970s to one that became actively hostile to progressive causes in the 1990s. This has been termed the 'conservative turn' of the Indian judiciary. Some other

1 This is a modified version of an essay that was written in 2009 for a workshop that sought to analyse the Indian Supreme Court's conservative turn since the advent of neoliberalisation in the early 1990s. The full essay appears in M Suresh & S Narrain (eds) *The shifting scales of justice: The Supreme Court in a neo-liberal era* (2014). I am grateful to Professors Viljoen, Baxi and Vilhena for including my work here.

scholars have questioned whether such a turn has occurred in the way that is asserted.

My view is that those asserting the existence of a conservative turn can rely on various forms of evidence to back their claims. My first argument, therefore, seeks to bolster the claim of a 'conservative turn' by describing the terrain while relying upon scholarly assessments and actual court decisions.

In its early stages, the Court's focus in PIL cases was on very specific causes, almost all of which affected constituencies that were particularly disempowered. Very often the Court cited the fact that most of these constituencies would not have ready access to justice, to justify its admittedly adventurous steps to improve their situation. Thus, for instance, a number of these early cases (especially those involving Justice VR Krishna Iyer, who had a particular interest in ameliorating prison conditions having undergone incarceration himself) focused on the rights of prisoners. Clearly, prisoners were a category of citizens who were severely handicapped in being able to pursue the rights that were due to them. The Supreme Court held, for instance, that those charged with criminal offences had positive rights to legal aid[2] and a speedy trial.[3] On the negative side, prisoners were held to have constitutional rights against the following: solitary confinement;[4] bar fetters;[5] handcuffing;[6] delayed execution;[7] custodial violence;[8] and public hanging.[9] Other groups whose causes were addressed in early PIL cases were the following: migrant labourers;[10] pavement dwellers;[11] children;[12] and mentally-ill persons.[13] All of these groups fit the general category of cases that were the focus of the early phase of PIL cases, as each of these groups faced special difficulties in being able to espouse its grievances through the regular channels of democratic politics and access to justice.

Things began to change in the 1990s. To illustrate briefly what these changes entailed, I rely on a comprehensive survey of PIL cases that were decided in the 1997-1998 period. In the conclusion of the survey, Muralidhar presciently observed: 'The cases that were taken up for detailed consideration by the courts reflected a perceptible shift to issues concerning governance.'[14] This was the period during which the Supreme Court became proactive in its efforts towards (i) cleaning up the political process by focusing

2 *MH Hoskot v State of Maharashtra* MANU/SC/0119/1978.
3 *Hussainara Khatoon v Home Secretary, State of Bihar* MANU/SC/0084/1980.
4 *Sunil Batra v Delhi Administration* MANU/SC/0184/1978.
5 *Charles Sobhraj v Supt Central Jail* MANU/SC/0070/1978.
6 *Prem Shankar Shukla v Delhi Administration* MANU/SC/0084/1980.
7 *TV Vatheeswaran v State of TN* MANU/SC/0383/1983.
8 *Sheela Barse v State of Maharashtra* MANU/SC/0382/1983.
9 *AG of India v Lachma Devi* MANU/SC/0059/1985.
10 *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802.
11 *Olga Tellis v Bombay v Municipality* AIR 1985 SC 180.
12 *Lakshmikant Pandey v Union of India* AIR 1984 SC 469.
13 *Upendra Baxi v State of Uttar Pradesh* (1983) 2 SCC 308.
14 S Muralidhar 'Public Interest Litigation' (1997-1998) 33-34 *Annual Survey of Indian Law* 525.

on corruption at the highest levels of the political set-up in the *Hawala* case[15] and the *Fodder Scam* case;[16] (ii) solving the chaotic traffic and pollution in Delhi;[17] (iii) cleaning up the Taj and its surrounding area;[18] (iv) regulating the disposal of hazardous waste;[19] (v) regulating the manufacture and sale of pesticides;[20] (vi) addressing the issues of sexual harassment[21] and female foeticide;[22] and (vii) regulating the collection and distribution of blood by blood banks.[23]

Usha Ramanathan documents the changing nature of PIL in the mid-1990s, describing the original constituency of PIL as being that portion of the Indian population which was 'caught in the throes of severe disenfranchisement, dispossession and rightlessness', and includes within this category 'the bonded labourer, the incarcerated undertrial, the labouring child, migrant labour, and women in custodial institutions'.[24] In her telling, PIL cases across the 1980s and into the 1990s began to focus on a vast range of issues, most of which centred on issues affecting the middle classes in India, as opposed to the marginalised sections. Ramanathan states that in this new phase, which emerged more clearly in the 1990s, the Supreme Court had to balance competing interests, and it gradually began to turn away from protecting the interests of the original constituencies of PIL. Ramanathan describes these competing interests in vivid terms: [25]

> The right of over 30 per cent of the residents of Delhi to their shelter in the slum settlements was pitted against the need to 'clean up' the city. The right to a relatively unpolluted environment by means of the relocation of industries was pitted against the right of the working classes to their livelihood. The right to life, livelihood and protection from immiseration and exploitation of communities displaced along the Narmada was pitted against the right to water that the dam was expected to reach to the people in parts of Gujarat; it was also pitted against the enormous amounts of money that had already been expended on the dam. Even the right of the victims of the Bhopal gas disaster to receive compensation was pitted against the bureaucratic imperative of winding up the processing of claims.

Ramanathan therefore argues that 'the constituency on whose behalf the enhancement of judicial power' had been justified in the first phase of PIL, 'began to emerge as the casualty of that exercise of power' in the new phases

15 *Vineet Narain v Union of India* (1998) 1 SCC 226.
16 *Union of India v Sushil Kumar Modi* (1997) 4 SCC 770.
17 *Suo Moto Proceedings in Re: Delhi Transport Department* (1998) 9 SCC 250.
18 *MC Mehta v Union of India* (1998) 9 SCC 381; (1998) 9 SCC 711; (1998) 8 SCC 711.
19 *Research Foundation for Science and Technology v Union of India* 1997 (5) SCALE 495.
20 *Dr Ashok v Union of India* (1997) 5 SCC 10.
21 *Vishaka v Union of India* (1997) 6 SCC 241.
22 *Chetna v Union of India* (1998) 2 SCC 158.
23 *Common Cause v Union of India* (1998) 2 SCC 367.
24 U Ramanathan 'Of judicial power' 19(6) *Frontline* 16-29 March 2002, available online at http://www.flonnet.com/fl1906/19060300.htm (accessed 13 September 2012).
25 As above.

of PIL that appeared in the 1990s.[26] More recently, Shukla has reached a similar conclusion after examining a body of case law relating to civil liberties, slum clearance and labour rights, all of which directly affect the conditions of the poor in India: 'From the beginnings of PIL as pro-poor and trying to effectuate the rights of the exploited, it is increasingly taking *a diametrically opposite direction*'.[27]

Evidence that the Supreme Court in the 1990s and in the current decade is refusing to enforce rights which the Court of the 1980s would have, is supported by quantitative analysis. In support of their arguments, the critics of PIL cite several significant decisions to make good their claim, which can be classified under three categories. One category of cases includes the following three cases: *Narmada Bachao Andolan v Union of India* (2000);[28] *ND Dayal v Union of India* (2003);[29] *Tata Housing Development Company v Goa Foundation* (2003)[30] – all of which involved the displacement of thousands of people as a result of large dam projects that were ultimately endorsed by the Supreme Court. A second set of cases which have been consistently attacked for their neglect of the concerns of migrant workers is the series of orders passed in the long-running *MC Mehta v Union of India* (1986) case[31] that oversaw the relocation of thousands of polluting industries outside of the limits of the city of Delhi. The third category of cases which attracts the ire of the critics is cases such as *Almitra Patel v Union of India* (2000),[32] where the Supreme Court ordered the demolition of slums and unauthorised structures set up by migrant workers and the poor. Even if these cases are few in number, one has to recall that the effect of each of these cases was typically felt by a large section of the population and, in that sense, each case had a potentially huge impact.

Shankar has undertaken a statistical survey,[33] asserting that the success rate in socio-economic rights cases (specifically in the health and education

26 U Ramanathan 'Displacement and the law' (1996) 31 *Economic and Political Weekly* 1486; U Ramanathan 'Demolition drive' (2005) 40 *Economic and Political Weekly* 2908.

27 R Shukla 'Rights of the poor: An overview of the Supreme Court' (2006) 41 *Economic and Political Weekly* 3755.

28 2000 10 SCC 664. Here the Supreme Court allowed the Sardar Sarovar project that created one of the world's largest dams to proceed even though a comprehensive environment appraisal had not been conducted. In addition, this affected thousands of tribes and other disempowered groups of people who were forcibly relocated without adequate rehabilitation efforts or compensation.

29 2003 7 SCALE 54. Again, the Court approved of a large dam project by dispensing with the requirement of an environmental impact assessment programme, and by ignoring an expert committee report which pointed to serious environmental problems.

30 2003 7 SCALE 589. In this case, the Supreme Court approved a housing project that was to come up on forest land. Its order, according to Bhushan, effectively deprived hundreds of poor fishermen of their livelihood.

31 AIR 1996 SC 2231. The original case was initiated in 1985, but has had several off-shoots over the years. Several of the orders issued by the Supreme Court over the last two decades have been helpfully catalogued and reproduced at http://www.elaw.org/resources/regional.asp?region=Asia (See the cases listed as *MC Mehta v Union of India*) (accessed 21 December 2013).

32 (2000) 2 SCC 166.

33 S Shankar *Scaling justice: India's Supreme Court, anti-terror laws, and social rights* (2009).

sectors) had declined from the 1980s to the 1990s. The fact that Shankar's study was primarily focused upon cases relating to health and education seems like a reasonable objection. Shankar's study relied upon reported cases, which form a small subset of the actual cases decided by the Supreme Court. Epp, in conducting a similar quantitative study of the Supreme Court's record on rights cases, has called this the difference between the Court's 'public agenda' (consisting of decisions on major issues that are published in law reports) and its 'routine agenda' (consisting of tens of thousands of routine decisions, forming the bulk of the case load of the Court, which remain unpublished and are known only to the lawyers and the parties to the case).[34]

A more comprehensive study that is relevant for our purposes is that conducted by Gauri, who has attempted to empirically test the claims of the critics of PIL in a systematic way.[35] Gauri's study covers a wider spectrum. Like Epp, Gauri appears to have worked in tandem with the Supreme Court Registry as is indicated by the description of his dataset: (i) cases that, according to the Supreme Court registrar's office, the Court has itself classified as PIL from 1988-2007 (some 2800 'cases' overall); (ii) all Supreme Court cases in the Manupatra database that involved fundamental rights and that addressed concerns regarding women and children rights, whether or not explicitly admitted as PILs (86 cases); (iii) all Supreme Court cases in the Manupatra database that involved fundamental rights and were related to issues regarding SC/ST/OBCs, whether or not explicitly admitted as PILs (180 cases); and (iv) all Supreme Court cases in the Manupatra database that the Supreme Court explicitly called a PIL (44 cases).[36]

Gauri concludes that his findings are 'consistent with the claim that judicial receptivity in the Supreme Court to fundamental rights claims made on behalf of the poor and excluded individuals has declined in recent years'. His data shows 'not only a decline in the win rate for marginalised individuals, but a simultaneous increase in the win rate for advantaged individuals'. Gauri concludes that his findings

> constitute a *prima facie* validation of the concern that judicial attitudes are less favorably inclined to the claims of the poor than they used to be, either as the exclusive result of new judicial interpretations or, more likely, in conjunction with changes in the political and legislative climate. [37]

As Gauri concedes, the ambiguous manner in which the Supreme Court Registry classifies PIL cases creates difficulties in making definitive

34 CR Epp *The rights revolution: Lawyers, activists and Supreme Courts in comparative perspective* (1998) University of chicago press 90.

35 V Gauri 'Public interest litigation in India: Overreaching or underachieving?' World Bank Policy Research Working Paper 5109 (November 2009) available online at http://elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-5109 (accessed 13 September 2012).

36 Gauri (n 35 above) 9.

37 Gauri (n 35 above) 13.

determinations about trends in PIL cases. Also, the specific methodological choices made by Gauri in seeking to conduct his study may also be open to debate, especially the factors he uses to assess success rates of the categories that he terms as 'marginalised', 'disadvantaged' and 'advantaged.' It cannot be doubted, however, that Gauri's study is an important step towards making quantitative assessments of the PIL jurisprudence of the Supreme Court.

It would appear that a number of public interest organisations and non-governmental organisations (NGOs) have, for some time now, acted in a way which shows an appreciation of the conclusions reached by Gauri. This is what is suggested by Krishnan who argues, based on an extensive survey of 73 prominent social advocacy groups, that the changed reality is leading to a situation where the most prominent social advocacy groups tend to avoid litigation as a deliberate strategy.[38] Krishnan explains that groups like the People's Union for Democratic Reforms (PUDR) have become disenchanted with the slow pace and inconsistent progress of PILs, and prefer to focus on alternative strategies, such as grassroots political mobilisation. For several other groups (Krishnan specifically identifies the Centre for Law and the Environment, Conservazone, Lokayan, the National Federation of Women, Saheli, and the National Alliance of Women), the costs and institutional focus required for mounting and sustaining long-drawn PIL campaigns has caused them to avoid using them altogether. Overall, Krishnan emphasises that social groups are beginning to shy away from using PILs in their strategies.

For these reasons, I support the view advanced by a number of progressive scholars that the Indian Supreme Court has, in a process which began in the 1990s and has continued over the current decade, transformed the nature of PIL and in some cases turned away from concerns it embraced in its original phase. I take the methodological objections raised by some commentators on board, while reiterating their call for more comprehensive and empirically rigorous research to be undertaken to facilitate a firmer grasp on the actual practice of contemporary PIL.

3 The way forward

I now turn to the second question set out earlier: What should progressives do, when faced with an increasingly bleak situation where judges on the Indian Supreme Court have turned their back on at least some of the central progressive causes and concerns?

In my view, abandoning the site of legal intervention is an alarming trend, and needs to be reversed. What is the alternative? Some progressives have implicitly suggested that what is required is a return to the original phase of PIL. In essence, they could be seen as demanding that a new generation of

38 JK Krishnan 'Social policy advocacy and the role of the courts in India' (2003) 21 *American Asian Review* 91.

judges in the mould of Justices Iyer, Bhagwati, Chinappa Reddy and Desai be appointed to redeem the potential of PIL for progressive causes. I believe that such a view is both unrealistic and problematic.

The contemporary situation, which is characterised by excessive and overweening judicial power, where judges adopt 'command-and-control' strategies in PIL cases, may well be a direct result of the exhortations offered by the generation of progressive scholars who sought to influence and shape the discourse of PIL in its founding era. Looking at some of the landmark scholarly literature from the 1980s, one finds an astonishingly instrumental vision advanced for the judiciary. I focus here on the writings of Baxi, whose role and influence in that founding era has been widely acknowledged. In an article that was widely cited and came to symbolise the dominant thinking amongst progressives at the time, Baxi exhorts judges to become 'activist'. For Baxi, an activist judge is a judge who is aware that she wields enormous executive and legislative power in her role as a judge and this power and discretion have to be used *militantly* for the promotion of constitutional values.[39]

I find this statement problematic on two counts. First, the presumption here appears to be that only 'activist' judges can provide deliverance from the many social ills that afflicted India by promoting constitutional values. Noticeably, no other social actor is relevant in this scenario: Grassroots movements, social organisations, lawyers, and even clients are completely missing from this picture. The only people who seem to be important for bringing about the necessary social change are 'activist' judges. Second, the task of interpreting and promoting constitutional values is also presumed to be straightforward, and entirely free from either complexity or problems. Baxi appears to suggest that the text of the Indian Constitution inexorably points to progressive ends, ignoring the reality that there can be several conflicting interpretations of what exactly the constitutional values are and, more importantly, how they are to be achieved. Justice Bhagwati, one of the pioneers of the PIL movement, offers very similar advice in a much cited article.[40]

In another article written around the same time, Baxi offers a more nuanced perspective, acknowledging that PIL was not without problems. Here, Baxi specifically notes that, despite encouraging signs, the crucial phase of PIL between 1980 and 1982 had shown that the use of PIL had continued apace with the judiciary making 'constitutional compromises' which 'create

39 U Baxi 'On the shame of not being an activist: Thoughts on judicial activism' in N Tiruchelvam & R Coomaraswamy (eds) *The role of the judiciary in plural societies* (1987) 172. The same article appeared in the *Indian Bar Review* in 1984, and was probably written in the early 1980s (my emphasis).

40 PN Bhagwati 'Judicial activism and Public Interest Litigation' (1985) 23 *Columbia Journal of Transnational Law* 561.

new sources of anxiety'.[41] Baxi also concedes that the movement in its early years could be viewed as 'relatively minor exercises in class-transcendence.' Yet, this nuance gets drowned out in the overall message of the article, which celebrates early successes in PIL cases, and exhorts other judges on the Indian Supreme Court to convert to the cause.

Many judges of the Indian Supreme Court, having taken these messages to heart, began to flex their muscles particularly in the 1990s when the weakened political executive had no choice but to tolerate such judicial adventurism. Part of the problem was also the fact that the judges favoured by progressives (referred to more recently by Baxi as the Four Musketeers)[42] had retired, and were replaced by other judges who did not always share the same judicial philosophy or values. Baxi once referred to the evolution of PIL in India as 'at best an "establishment revolution"'.[43] The story of PIL in the 1990s seems to be consistent with the historical storyline of the weak records of other establishment-led revolutions.

When progressive scholars writing in the 21st century ask how Supreme Court judges came to believe that they wield untrammelled authority when deciding PIL cases, at least part of the answer can be traced to progressive scholarship in the 1980s, which prompted judges to believe that they were all-powerful and fully justified in incorporating their own understanding of the values of the constitution into their decisions. So, when Justice Kirpal writes in a judgment about encroachers being akin to pickpockets,[44] he was merely incorporating his own value judgments into the task of adjudication – and was thus directly acting on the questionable advice offered by progressive writings in the 1980s. The deification of activist judges by progressives seems, albeit with the benefit of hindsight, a mistake.[45]

Progressive scholars and judges do not seem, while offering this advice, to exhibit a genuine belief in the values of constitutionalism and the rule of law. In adopting such an instrumental view of the task of judging, they seem to be unconcerned with maintaining the institutional credibility and neutrality of judges, to enable them to speak authoritatively while deploying the language of constitutionalism and the rule of law. Much of the initial criticism by some judges of the Supreme Court was indeed directed at the potential harm such nakedly ideological actions would cause to the credibility

41 U Baxi 'Taking suffering seriously' in Tiruchelvam & Coomaraswamy (n 39 above) 32. This piece has appeared in print in several different versions, the earliest of which was in the *Delhi Law Review* in 1979.

42 U Baxi 'The promise and peril of transcendental jurisprudence' in C Raj Kumar *et al* (eds) *Human rights, justice and constitutional empowerment* (2007) 5. The reference is to Justices Krishna Iyer, Bhagwati O Chinappa Reddy and DA Desai.

43 Baxi (n 42 above) 49.

44 *Almitra Patel v Union of India* MANU/SC/2767/2000 para 14.

45 For a different critique of such advocacy of judicial activism, see M Khosla 'Addressing judicial activism in the Indian Supreme Court: Towards an evolved debate' (2009) 32 *Hastings International and Comparative Law Review* 60.

of the Supreme Court.[46] Progressive scholars like Baxi were quick to dismiss these valid criticisms as being outdated and regressive, but in doing so, ignored the sensible pleas made to focus on a credible conception of the judicial role for handling PIL.

In charting strategies for the future, I believe progressives should avoid making the same mistake, and must instead advocate a role for judges where they can justifiably lend support to PILs without appearing to act in partisan or ideologically motivated ways. The first move in this regard is a negative one, where I seek to rely on what progressive judges should *not* do in PIL cases. In many PIL cases, judges seek to dominate the agenda of the proceedings, and adopt 'command-and control' measures,[47] where they mimic bureaucracies by laying down fixed and specific rules, which prescribe the inputs and operating procedures of the institutions they seek to regulate.

By way of illustration, I focus on two examples drawn from different eras of PIL cases. One can see symptoms of this tendency in the early 1980s PIL that sought to regulate inter-country adoption of children, where detailed orders were issued to the authorities to solve the problem.[48] Although the Court did seek to solicit participation from NGOs and government agencies dealing with the issue of inter-country adoption, its final order reads like a legislative enactment, complete with the setting of age limits and precise procedures for conducting specified tasks. It was unclear exactly how the Court obtained the background information which it based its definitive conclusions upon. The inflexibility of the rule-like 'guidelines' laid down by the Court later led to problems of implementation and confusion, after the case was finally disposed of by the order. A more recent example of a PIL where the Court exercised an extraordinary degree of overweening control over the proceedings is the *Hawala* case (*Vineet Narain v Union of India* (1998).[49] To recall, the PIL was brought by two journalists and two lawyers, seeking investigation by the Central Bureau of Investigation (CBI) on details of illegal payments made by way of *hawala* transactions to several politicians for favours in the award of government contracts. Over a period of two years, the Court (especially after the case began to be heard by a bench headed by Justice JS Verma) adopted a posture that has been described by a sympathetic observer as 'dynamic, fearless and dominating'.[50] As Muralidhar describes it, the Court's actions achieved many things, including infusing investigatory authorities like the CBI with autonomy and insulating them from executive interference. Yet, in the process of doing so, the Court

46 See, eg, the criticisms voiced by Justices Tulazpurkar and Hidayatullah during the initial stage of the development of PIL, pointing to several troubling aspects of the phenomenon. VD Tulzapurkar 'Judiciary: Attacks and survival' AIR 1983 (Journal) 9; and M Hidayatullah 'Highways and bye-lanes of justice' (1984) 2 SCC 1.

47 CF Sabel & WH Simon 'Destablisization rights: How public law litigation succeeds' (2004) 117 *Harvard Law Review* 1015 1019.

48 *Lakshmikant Pandey* (n 12 above).

49 n 15 above.

50 Muralidhar (n 14 above).

displaced the actual petitioners, and appointed a senior advocate as *amicus curiae* to assist the Court. At the same time, intervention in the proceedings by everyone else was shut out, while some of the hearings were held *in camera*, by shutting out the public. Muralidhar, whose credentials as a PIL litigant and astute and insightful chronicler of its development are impeccable, is critical of these aspects of the case, which 'defeat the very purpose of the jurisdiction', 'deprive public-spirited petitioners of their right to espouse a public cause' and render the participation of other organs of the state redundant. These criticisms echo those made by others about the overweening attitude of court-appointed *amici curiae,* committees and the judges themselves.

I argue that progressives should critique such modes of adjudication, and urge judges to abandon the 'command-and-control' strategies that are currently on display. Judges should instead be encouraged to adopt a far more modest, *facilitative* role, where the focus is on the citizens who suffer, the social movements who organise their interests, and the lawyers who represent them. This will enable an avoidance of some of the problems of domineering judges, individual lawyer dominated agendas, and idiosyncratic judicial preferences that have plagued PIL in more recent times.

Elsewhere,[51] I have set out more details about what such a facilitative role would entail in its details. Due to constraints of space, I can only outline the broad details of that conception here. Judges in India gain legitimacy for their extravagant actions in PIL cases from the fact that they are seen as making up for the deficiencies of the elected branches. Indeed, in several PILs, the Court has consciously sought to act as a deliberative forum for policy making, and has used the judicial process to solicit – even mandate – responses from all wings of government. In doing so, the Court has reached beyond the central government to seek responses from state governments on issues that affect them, required all ministries potentially affected by its decisions to provide their considered inputs, and so forth. My assertion is that judges should continue to be sensitive to the need to focus upon filling the deliberative gap, rather than seeking to impose their own subjective choices upon the judicial process. They must remember that their primary role should be to *facilitate* the reaching of sound policy decisions in cases that come up before them.

This *facilitative* role can be enhanced by a focused change in mindset which eschews the domineering methods noted in the two examples above. What is required, instead, is a much more decentralised form of intervention, where the emphasis is on enabling all possible stakeholders to contribute

51 A Thiruvengadam 'Revisiting "*The Role of the Judiciary in Plural Societies (1987*)": A progressive conception of the role of the Indian judge'(draft presented at the LASSNET conference 2009); A Thiruvengadam 'Revisiting "The role of the judiciary in plural societies (1987)": A quarter-century in S Khilnani *et al* (eds) *Comparative constitutionalism in South Asia* (2013) 363-69.

meaningful inputs. Such inputs should be used to design flexible rules that are capable of responding to changing – and sometimes unpredictable or hostile – circumstances on the ground. Throughout this process, the emphasis should be on making every stage of the judicial process transparent.[52]

Progressives also need to attend to other worrying features of contemporary PIL. We have already noted Krishnan's disturbing findings that public interest organisations and social organisations have begun to abandon the route of PIL. This trend makes sense if we take account of the contemporary PIL scene, which is dominated by individual lawyers who file PILs quite often with no direct connection to the clients or causes they seek to represent. This is followed by a 'top-down' process employed by the judges who subsequently hear the case and decide on its future development with inputs from 'experts' and 'court-appointed *amici*' who, once again, have very little direct contact with affected interests.

In his provocative study of PIL in India, Epp concludes that the Indian case offers a paradox: Despite having one of the most activist courts in the world, which is also the most supportive of egalitarian and procedural rights, India has been 'unable to develop a sustained agenda' on rights. Epp argues that this is primarily because 'the Indian support structure for legal mobilization – the complex of financial, legal and organizational resources necessary for appellate litigation – remains weak and fragmented'.[53]

If PIL is to truly become a vehicle for addressing concerns of the marginalised in Indian society, its future will have to be crafted for it to be able to do so effectively and meaningfully. It is imperative that progressives focus on strengthening the network of social organisations that can build grounded and bottom-up litigation strategies, which seek to genuinely represent the concerns of the actual clients in PIL cases. Arguably, the recent '*Right to Food PIL'* represents one example of such a trend.[54] Another example – albeit drawn from comparative law – is the *Treatment Action Campaign* case[55] decided by the South African Constitutional Court, where an AIDS NGO was able to use the courts to thwart the South African government's opposition to plans to distribute a free drug that would significantly reduce mother-to-child transmission of AIDS.[56]

52 My normative views are influenced by the experimentalist modes of intervention that have been reconstructed by Sabel and Simon after studying successful recent examples of public law litigation in the US. Sabel & Simon (n 47 above).

53 Epp (n 34 above).

54 http://www.righttofoodindia.org/links/updates/update14.html (accessed 21 December 2013).

55 *Minister of Health v Treatment Action Campaign (No 2)* (2002) 5 SA 721 (CC).

56 A Belani 'The South African Constitutional Court's decision in *TAC*: A "reasonable" choice?' CHR&GJ Working Paper: Economic, Social and Cultural Rights Series, Number 7 (2004) 24-31; W Forbath *et al* 'Cultural transformation, deep institutional reform, and ESR practice: South Africa's Treatment Action Campaign' in LE White & J Perelman *Stones of hope: How African activists reclaim human rights to challenge global poverty* (2011).

These examples provide hope that once such a 'support structure' is in place, judges will feel obliged to adopt more modest roles by deferring to the greater credibility and representational capacity enjoyed by a strengthened support structure.

4 Conclusion

In this short essay, I have sought to highlight specific questions about the changing character of PIL through the 1980s to the 1990s, while acknowledging the need for more detailed and rigorous empirical studies of the issue. While agreeing with other contributors about several worrying aspects of contemporary PIL, I find myself disagreeing with the general cynicism exhibited towards a continued engagement with the law. I believe that PIL has achieved many successes, and what is required is not abandonment, but renewed engagement with its foundational ideas. I have sought to show how progressives of the 1980s made mistakes in charting strategies for the future of PIL, and how these will need to be corrected and remedied as we conceive of its future in the current moment.

I am fully conscious of the seductive power of the law, and how it has historically frustrated and belied progressive hopes. Yet, like the British historian EP Thomson, I believe that the law *matters*, and is of deep consequence for progressive causes. I conclude with these words from his revealing study of the tradition of the rule of the law in eighteenth century England:[57]

> In a context of gross class inequities, the equity of the law must always be in part sham. Transplanted as it was to even more inequitable contexts, this law could become an instrument of imperialism. But even here the rules and rhetoric have imposed some inhibitions upon the imperial power. If the rhetoric was a mask, it was a mask which Gandhi and Nehru were to borrow, at the head of a million masked supporters.
>
> I am not starry-eyed about [the law] … I am insisting only upon the obvious point, *which some modern Marxists have overlooked*, that there is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretentions of power continue to enlarge, a desperate error of intellectual abstraction. More than this, it is a self-fulfilling error, which encourages us to give up the struggle against bad laws and class-bound procedures, and to disarm ourselves before power. It is to throw away a whole inheritance of struggle about law, and within the forms of law, whose continuity can never be fractured without bringing men and women into immediate danger.

57 EP Thompson *Of whigs and hunters: The origins of the Black Act* (1975) 266.

Much as we may have reason to be disappointed with the achievements of Indian constitutionalism, we must broaden our vision to see how we have fared comparatively. When one looks across South Asia, and the post-colonial nations in Asia and Africa more generally, one begins to appreciate the value of the struggles of Gandhi and Nehru to establish the foundations of constitutional government in India. If they held fast to a belief in the power of the rule of law while struggling against the dark forces of imperialism, surely we can do so when faced with the challenges of the contemporary?

To 'abandon the site of legal intervention', as has been suggested by some, would, in my view, be a mistake of monumental proportions and would also amount to 'throw[ing] away a whole inheritance of struggle about law'. What is required of progressive communities, instead, is a fulsome re-engagement with the enterprise of PIL with a view to correcting strategic errors of the past, and reclaiming ownership over its future.

CHAPTER 24 SOCIAL MOVEMENTS AND THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Tshepo Madlingozi

> For government to be defeated at the Constitutional Court by some shack dwellers; that is not a small thing![1]
>
> Government is afraid of the Constitutional Court.[2]
>
> It would be very dangerous to put our faith in legal processes. Courts are seldom neutral and often tend to serve the interests of the ruling class. That is the reason we have delayed taking this matter to the Constitutional Court. For more than a year we have relied on our own mass strength and we still do. In the coming period we will utilise the so-called democratic space provided by the new Constitution as well as working class resistance. Key strategies include intensifying mobilisation, building consciousness and continuing with mass struggle in the form of marches and rallies. This struggle will be won in the street! [3]

1 Background

The South African Constitutional Court is often held up by constitutional scholars as an exemplar of how a post-colonial/post-conflict judicial institution can dextrously steer the process of social transformation, inculcate a culture of human rights and the rule of law while retaining political legitimacy.[4] At the same time, social movement scholars often look up to post-apartheid social movement activists for inspiration of how poor and

1 *Abahlali* leader, Focus Group Discussion 14 August 2010, Durban.

2 TAC leader cited in S Friedman & S Mottiar 'A moral to the tale: Treatment Action Campaign and the politics of HIV/AIDS' A case study for the UKZN project entitled: Globilisation, marginalisation, and new social movements in post-apartheid South Africa (2004) available at http://ccs.ukzn.ac.za/files/friedman%20mottier%20tac%20research%20report%20short.pdf (accessed 23 December 2013).

3 Merafong Demarcation Forum Leader in N Kolisile 'The crying of Khutsong' *Amandla Publishers* 1 October 2008 available at http://www.amandlapublishers.co.za/content/view/71/32/ (accessed 2 November 2008).

4 P de Vos 'The constitutional, innovative face of South African law' *The Guardian* 25 November 2011 available at http://www.guardian.co.uk/commentisfree/libertycentral/2011/nov/25/ constitutional-south-african-law (accessed 29 October 2012); T Roux

marginalised actors can mobilise extra-institutionally in pursuit of counter-hegemonic goals.[5] This chapter explores social movements' perceptions of the Constitutional Court.

It could be argued that in the final analysis, the Court decides which political and social demands are reasonable and which are not. Put differently, it can be argued that, in its ruling, the Court decides which political struggles are legitimate and which are not. On the other hand, social movements, by their nature, exist to struggle for demands and visions that are not part of the hegemonic political discourse. Through brief case studies of three very different social movements, this chapter demonstrates that movement perception of the Court, and the impact of the Court's decisions on a social movement's collective action frame, strategies and trajectory depends on the movement's legal consciousness, attitude to state institutions, its positionality in 'civil society', and the overall political opportunities and threats a movement faces.

By social movements, I mean collectives of marginalised actors who develop a collective identity; who put forward change-oriented goals; who possess some degree of organisation; and who engage in sustained, albeit episodic, extra-institutional collective action.[6] From this description it is clear that social movements are, firstly, distinguishable from non-governmental organisations (NGOs), NGO coalitions, and interest groups by the fact that the action repertoires of social movements are generally skewed in a non-institutional direction and their goals are often more far-reaching than those of the above-mentioned groups.

Secondly, social movement activity is distinguishable from the kinds of 'spontaneous' community protests that have engulfed South Africa from the middle of the 2000s. The scale and magnitude of these 'unorganised' protests – what Alexander calls the 'rebellion of the poor'[7] – are profound indeed. Police estimate that approximately more than 10 000 protests take place every year – one of the highest rates of protests in the world.[8] Unlike movement mobilisation activities, these latter protests are *usually* not based on underlying social networks; they lack some degree of organisation; they fail to develop a collective identity; and they thus do not develop the capacity

4 'Principle and Pragmatism on the South African Constitutional Court' (2009) 7 *International Journal of Constitutional Law* 106; H Richardson III 'Patrolling the resource transfer frontier: Economic rights and the South African Constitutional Court's contribution to international justice' (2007) 9 *African Studies Quarterly* 81.

5 NC Gibson *Fanonian practices in South Africa: From Steve Biko to Abahlali baseMjondolo* (2011); E Zuern *Politics of necessity: Community organising in South Africa* (2011).

6 See also D Snow *et al* 'Mapping the terrain' in D Snow *et al* (eds) *The Blackwell companion to social movements* (Blackwell 2004) 3-16.

7 P Alexander 'Rebellion of the poor: South Africa's service delivery protests – A preliminary analysis' (2010) 37 *Review of African Political Economy* 25.

8 P Alexander 'Protests and police statistics: Some commentary' *Amandla Publishers* 28 March 2012 available at http://www.amandlapublishers.co.za/general-downloads/protests-and-police-statistics (accessed 29 October 2012).

to maintain sustained challenges against the state and others.[9] Moreover, 'established' movements are usually not involved in the instigation and co-ordination of these 'spontaneous' protests.[10] This chapter confines itself to more 'established' social movements.

2 Post-apartheid exclusion and marginalisation

South Africa has a 'vibrant' civil society sector which campaigns robustly for various causes.[11] This sector routinely engages courts in pursuit of their campaigns. This chapter focuses on organisations of the poor and marginalised; organisations that are found at the margins of the sphere of civil society or, as is often the case, are excluded from 'civil society'. In this regard, there is a growing body of research that shows that, unlike their middle-class counterparts, poor residents and their movements are routinely subjected to a mixture of repression and patronage. Neocosmos observes that poor township residents exist in a political domain where 'rules are bent, political relations are often informal (if not downright illegal) and where the majority are only tenuously "rights-bearing citizens"'.[12] Similarly, drawing from his research on local politics in Durban, Pithouse also notes this split and concludes that this distinction has led to a dual political system, with a system of liberal democracy for the middle class and a politics of patronage and repression for the poor.[13] The co-existence of local illiberalism/despotism and liberal constitutionalism is not unique to South Africa and has been documented in other post-colonial contexts.[14] This chapter is interested in finding out how and why these movements of the poor have engaged with Constitutional Court, the guardian of the post-colonial constitutionalism.

The two main aspects of the political context that mostly shape the struggles of post-apartheid social movements are the hardships entrenched by austere macro-economic policies and the truncated nature of local

9 For examples of these struggles, see J Karamoko 'Community protests in South Africa: Trends, analysis, and explanations – Continuation report' (2011) available at http://ldphs.org.za/publications/publications-by-theme/local-government-in-south-africa/community-protests/Community_Protests_SA.pdf/view (accessed 20 October 2012); Luke Sinwell *et al* 'Service delivery protests: Findings from quick response research in four "hot-spots" – Piet Retief, Balfour, Thokoza and Diepsloot' Centre for Sociological Research, University of Johannesburg (1 September 2009).

10 Khanya College *Annual Report 2010* (2011) available at http://khanyacollege.org.za/sites/default/files/kc-annual-report10.pdf (accessed 30 October 2012) 15-16.

11 The Department of Social Development (2011) indicates that as of March 2011, there were 76 175 *registered* non-profit organisations (NPOs). Most of the NPOs are in the social services sector (34%), followed by community development and housing (21%), then religion (12%) and education and research (11%).

12 M Neocosmos 'Transition, human rights and violence: Rethinking a liberal political relationship in the African neo-colony' (2011) 3 *Interface: A Journal For and About Social Movements* 359 374.

13 R Pithouse 'Shifting the ground of reason' in J Heather & P Vale (eds) *Re-imagining the social in South Africa: Critique, theory and post-apartheid society* (2009) 141 146.

14 P Chatterjee *The politics of the governed: Reflections on popular politics in most of the world (Leonard Hastings Schoff lectures)* (Columbia University Press 2004); B de Sousa Santos *Towards a new legal common sense: Law, globalisation and emancipation* (2002).

democracy. The state's embrace of a largely neoliberal macro-economic policy – formalised in 1996 with the adoption of the Growth, Economic and Redistribution programme (GEAR) – led to steady cutbacks in central government allocations to local authorities, leaving municipalities with little choice but to introduce cost-recovery and cost-cutting measures. In the months following the adoption of GEAR, millions of residents suffered evictions and water and electricity disconnections.[15] The state's neoliberal policy also worsened the economic situation inherited from apartheid. For example, the racialised nature of poverty has hardly shifted since 1994. The 2011 census report shows that white households earned six times more than their black counterparts – which have more individuals per household.[16] The effects of punitive economic policies thus constitute the first aspect of the political context that shapes the struggles of these movements.

The second aspect of the political context that triggers contemporary social movement activism is the lack of genuine democracy at the local government level. Since 1993, the sphere of local government has been restructured to reflect its new role as the engine of redistribution and development, and the main locus of participatory democracy. In order to enhance participatory governance at local government level, provision is made for the establishment of ward committees in metropolitan and local councils. The main functions of ward committees are to act as the interface between the community and municipality, to provide advice to the councillor, and to make any recommendation on any aspect of their ward. In this way, ward committees are meant to be the central vehicles for community participation in decisions regarding the developmental priorities of the ward. In particular, municipalities are under an obligation to cultivate a 'culture of municipal governance that complements formal representative government with participatory governance' and to involve community members in the development of Integrated Development Plans (IDPs), annual budgets and other strategic decisions of the municipality.[17]

The way the system of local government works in practice constitutes, instead, a significant political constraint for social movements and other marginalised groups. Firstly, ward committees are failing to play their role as non-partisan vehicles for community participation, largely due to the fact that political parties dominate and influence the process of nomination and election of committee members.[18] The result is that, instead of representing a diversity of interests, committee members are often drawn from the same

15 See eg DA McDonald and J Pape (eds) *Cost recovery and the crisis of service delivery in South Africa* (2002).

16 P de Wet 'Census 2011: 50 years for blacks to catch up' *Mail and Guardian Online* 30 October 2012 available at http://mg.co.za/article/2012-10-30-census-2011-50-years-for-blacks-to-catch-up (accessed 28 October 2012).

17 Sec 16(1) of the Local Government: Municipal Systems Act 32 of 2000.

18 T Smith & J de Visser *Are ward committees working? Insights from six case studies* (2009); L Piper & R Deacon 'Party politics, elite accountability and public participation: Ward committee politics in the Msunduzi Municipality' (2008) 66 *Transformation: Critical perspectives on Southern Africa* 61.

party as the ward chairperson.[19] Various studies have thus found that the agendas of ward committees are 'colonised' and 'hijacked' by political parties and intra-party factions.[20]

Secondly, municipalities are not meaningfully engaging local communities when drafting medium and long-term development plans, annual budgets and other priorities of municipalities. In most cases, community 'consultation' takes place at advanced stages of policy formulation, only for purposes of obtaining political buy-in and adhering to legislative requirements rather than at the beginning of the process.[21] Available research shows that state and non-state elites are the most influential actors in the formulation of developmental plans and budgets for municipalities.[22]

Post-apartheid social movements therefore operate in a political context marked by severe political constraints in the form of unresponsive and inaccessible government structures and prevailing strategies of exclusion and marginalisation. Poor people's movements and organisations respond to these political threats and constraints by employing learned action repertoires from the anti-apartheid struggle. These tactical repertoires include erecting barricades to prevent evictions and cut-offs; reconnecting disconnected water and electricity supplies; occupying unused private and public land; and campaigning for election boycotts.

2.1 Activists' legal consciousness

Elites respond to struggles of these movements through a mixture of vilification, counter-movements, co-optation, criminalisation and repression. It is important to emphasise that legal strategies are the principal strategies the state employs to make collective action more arduous. Firstly, there is evidence that the Regulations of Gatherings Act of 1993 (RAG) – the legislation that regulates marches and picketing – is often abused to prohibit protest marches and other forms of gatherings.[23] Secondly, state authorities

19 I Buccus *et al* 'Public participation and local governance' Research report prepared by the Centre for Public Participation in association with the Human Sciences Research Council and the University of KwaZulu-Natal (May 2007).

20 J Hicks & I Buccus 'Crafting new democratic spaces: Participatory policy-making in KwaZulu-Natal, South Africa' (2008) 65 *Transformation: Critical perspectives on Southern Africa* 94; M Low *et al* 'Dilemmas of representation in post-apartheid Durban' (2007) 18 *Urban Forum* 247.

21 SE Mohamed 'From ideas to practice: The involvement of informal settlement communities in policy-making at city level in South Africa' (2006) 37 *South African Review of Sociology* 35.

22 R Ballard *et al* 'Conclusion: Making sense of post-apartheid South Africa's voices of protest' in R Ballard *et al* (eds) *Voices of protest: Social movements in post-apartheid South Africa* (2006) 397-417.

often deploy the whole array of the criminal justice system to counter local movement struggles.[24]

The legal consciousness of local activists is thus structured by these negative encounters with the law.[25] Thus, social movement activists are sceptical about the use of the law for a progressive agenda. The following statements by movement activists point to this pervasive sentiment:

> Rights are for everyone on paper. In reality they are only there for the rich.[26]
>
> We need to understand that the law works for the capitalist class and it is not always accessible to the working class and the poor.[27]

Activists' animosity towards the law is intensified by the fact that in many cases, government officials and police officers react with hostility when poor people invoke the law. The following account by a Motala Heights resident captures succinctly the challenges poor township activist groups face when confronted by state authorities' intent on acting illegally:

> When the evictions happened … the South African law and the Constitution didn't work for us. They were pointing guns at us, threatening us, meantime we were fighting for our rights [as guaranteed by the law]. One comrade came asking them 'What about section 26?' but they didn't say anything … When our chairperson came to ask, 'By what right and by what law can you do this?' teargas just got thrown in his face.[28]

The idea that the law only 'works' for the rich, and is repressive towards the poor goes together with a pervasive perception amongst many activists that

23 M Dawson 'Resistance and repression: Policing protest in post-apartheid South Africa' in J Handmaker & R Berkhout (eds) *Mobilising social justice in South Africa: Perspectives from researchers and practitioners* (2010) 101-136; M Memeza 'A Critical Review of the Implementation of the Regulation of Gatherings Act 205 of 1993 – A Local Government and Civil Society Perspective' (2006) available at http://www.fxi.org.za/PDFs/Legal%20Unit/RGAReport-Mzi.pdf (accessed 1 October 2011).

24 D McKinley & A Veriava *Arresting dissent: State repression and post-apartheid social movements* (Centre for the Study of Violence and Reconciliation 2005).

25 The legal consciousness of movements is also structured by the fact that most poor people have low levels of awareness of pertinent rights, a fact confirmed by many national surveys. A 1998 survey by the Community Action for Social Agency (CASE) found that only 30% of the population was aware of the existence of the Bill of Rights (Mubangizi 2005;41). More pertinently, knowledge of human rights was generally very poor amongst 'coloured' people (30% affirmative response) and Africans (24% affirmative response). A follow-up survey in 2000 found that the situation had improved; still an alarming 36% of respondents answered that they were not aware of the existence of the Bill of Rights and 20% reported that they had heard about the Bill of Rights but were not sure what its purpose was (Mubangizi 2005;42). These results were confirmed in 2003 by a National Research Foundation-sponsored survey which reported that 33,2% of the population did not know about the Bill of Rights.

26 B Mdlalose 'Marikana shows that we are living in a democratic prison' *Abahlali* 22 September 2012 available at http://abahlali.org/node/9061 (accessed 29 October 2012).

27 S Segodi, Anti-Privatisation Forum Legal Team Co-ordinator 'Legal representation and the struggle of the APF' *Struggle Continues* Newsletter 1 April 2007.

28 R Pithouse & M Butler 'Lessons from eThekwini: Pariahs hold their ground against a state that is both criminal and democratic' *Abahlali* 11 April 2007 1 available at http://abahlali.org/filesAFRAreport.final_doc. (accessed 30 August 2012).

courts are 'institutions of bourgeois rule'. Thus, Trevor Ngwane of the Soweto Electricity Crisis Committee worries that court victories might serve to co-opt movements into the hegemonic political and economic system:

> We must not allow the court victory to shift our struggle away from mass action. We must continue to destroy the meter and not fall into bourgeois legalism. We must celebrate the court victory but not allow the celebration to hide our mistakes and weaknesses. The struggle for socialism must continue.[29]

Apart from the feeling by some activists that court victories only offer temporary victory and do not challenge the political and economic neoliberal juggernaut, some activists point out that court processes are expensive and might shift badly-needed resources away from poor peoples' movements.[30] One Cape Town activist put it as follows: 'If there is relief, it comes at a very high financial cost. Lawyers and advocates exploit the problems of the poor for their own financial gain. Court actions favour the legal profession.'[31]

Part of the reason for this antipathy towards the law, courts and constitutionalism has to do with the fact that, despite the certainty that the South African Constitution sets out a vision of 'transformative constitutionalism', access to the courts still remains a pipedream for most South Africans. Whilst constitutionally-mandated legal assistance is offered to indigent accused persons, no such assistance is available for poor people seeking to vindicate their fundamental rights. Poor people's access to courts is mediated via middle-class NGOs and university-based law clinics.[32]

Focusing directly on the Constitutional Court, we find that the Court has failed in its duty to facilitate 'constitutional dialogue' owing to the fact that the Court chooses to communicate with the public (and other branches of government) via lengthy, complex legal decisions published on its website

29 T Ngwane 'The water case victory: Lessons to strengthen our struggle' (2008) (on file with the author) (unpaginated). For excellent discussions regarding the co-optive power of the law, and how the law can serve to reify ongoing domination, transmute radical desires, lower expectations and induce passivity, see W Brown & J Halley 'Introduction' in W Brown & J Halley *Left legalism/Left critique* (2002) 1-37; P Gabel & D Kennedy 'Roll over Beethoven' (1984) 36 *Standard Law Review Law* 1.

30 On how legal tactics can be detrimental to movement building because they deflect resources and attention from protest action, often leading to the dominance of poor people's organisations by lawyers and other elites, see D NeJaime 'Convincing elites, controlling elites' (2011) 54 *Studies in Law, Politics and Society* 175; L Jones 'The haves come out ahead: How cause lawyers frame the legal system for movements' in A Sarat & SA Scheingold (eds) *Cause lawyers and social movements* (2006) 182-196. For a prototypical argument about how courts are institutionally incapable of ushering in fundamental transformation and as such court victories may offer merely 'hollow hope', see G Rosenberg *The hollow hope: Can courts bring about social change* (1991).

31 Roy, a Cape Town-based activist cited in I Steyn 'Socioeconomic rights in post-apartheid South Africa: How do they articulate to poor people's material expectations of democracy?' Democracy Development Programme Report (2010) 31.

32 Law societies currently require their members to commit a minimum of only 24 hours per year for *pro bono* work.

only in English, and it lacks a systematic out-reach programme.[33] Furthermore, although the rules of standing are wide enough to enable movement to bring cases on behalf of their constituencies, the Court has interpreted its rules conservatively to restrict direct access.[34] All of these factors account for poor people's perception of the Constitutional Court – like other government institutions – as inaccessible and elitist.

Nonetheless, assisted by public interest litigation organisations, some movements have engaged with the Court, tactically, to extract concessions from the state. In this paper I shall look at some of the factors that led the Treatment Action Campaign, the Merafong Demarcation Forum and *Abahlali baseMjondolo* to take their struggles to the Constitutional Court.[35] This paper does not seek to undertake an in-depth analysis of the final judgment of the Court in each matter, as this is done in other papers in this series. Rather, my aim here is to tease the road from the street to the Court. I finish the paper by making some tentative remarks about what we can learn about the relationship between post-apartheid social movements and the Constitutional Court. The aim of this paper is to make a contribution to studies of the way poor peoples' movements engage with apex courts in transitional or post-conflict societies especially ones marked by Euro-modernist constitutionalism and in contexts where liberalism and illiberalism exist side by side.

3 Treatment Action Campaign

> The anxiety of the applicants to have the government move as expeditiously as possible in taking measures to reduce the transmission of HIV from mother to child is understandable … In our country the issue of HIV/AIDS has some time been fraught with an unusual degree of political, ideological and emotional contention. This is perhaps unavoidable, having regard to the magnitude of the catastrophe we confront. Nevertheless it is regrettable that some of this contention and emotion has spilt over into this case.[36]

In July 2002 the Treatment Action Campaign (TAC) successfully challenged the government's policy of limiting the prevention of mother-to-child HIV/

33 See T Madlingozi 'The Constitutional Court, court watchers and the commons: A reply to professor Michelman on constitutional dialogue, "interpretive charity" and the citizenry as *Sangomas*' (2008) 1 *Constitutional Court Review* 63.

34 J Dugard 'Courts and structural poverty in South Africa: To what extent has the Constitutional Court expanded access and remedies for poor people?' in DB Maldonodo *Constitutionalism in the global south: Activist tribunals in India, South Africa and Colombia* (Cambridge University Press 2008); L Berat 'Constitutional Court of South Africa and the jurisdictional question: In the interest of justice?' (2005) 3 *International Journal of Constitutional Law* 39.

35 Elsewhere I engage in an in-depth analysis of the impact of legal mobilisation on post-apartheid social movements. See T Madlingozi 'Post-apartheid social movements and legal mobilisation' in M Langford *et al Socio-economic rights in South Africa: Symbol or substance?* (2013) 92-130.

36 *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) (*TAC*) paras 130 & 20.

AIDS treatment (PMTCT) to a few research and training sites.[37] The Constitutional Court ordered the government to administer the PMTCT drug in all public health facilities whenever it is medically indicated. Many analysts consider this triumph as exemplary of how social movements can creatively utilise political mobilisation and court-based strategies to advance their causes.[38] Through its affirmative response to the TAC's demand for treatment for HIV-positive pregnant mothers, the Court legitimated and cemented the moral victory that this movement had already won in the public imagination.[39] Any reflection on the interface between South African social movements and the Constitutional Court has to start with the TAC's 2002 victory at the Constitutional Court.[40]

The TAC's success before the Constitutional Court was no small victory. The government's response to the scourge of HIV/AIDS was characterised by a lack of co-operation with – and sometimes open hostility towards – civil society organisations and by attempts to silence those organisations critical of its position.[41] Given the magnitude of the AIDS epidemic in Africa and South Africa in particular, government attitude and policy were literally costing thousands of lives. To put the magnitude of the problem into context: By the early 2000s, the South African government itself admitted that the scourge of HIV/AIDS was already 'an incomprehensible calamity' and 'the most important challenge facing South Africa since the birth of our democracy'.[42]

37 As above.

38 See M Heywood 'South Africa's Treatment Action Campaign: Combining law and social mobilization to realize the right to health' (2009) 1 *Journal of Human Rights Practice* 14; M Heywood *South Africa's Treatment Action Campaign (TAC): An example of a successful human rights campaign for health* (2008) available at http://www.tac.org.za/ (accessed 23 December 2013); PS Jones '"A test of governance": Rights-based struggles and the politics of HIV/AIDS policy in South Africa' (2005) 24 *Political Geography* 419; and Freidman & Mottiar (n 2 above).

39 On the TAC's moral victory, see S Robins *From revolution to rights in South Africa* (University of KwaZulu-Natal Press 2008), Friedman & Mottiar (n 2 above).

40 The TAC was only the second social movement to approach the Constitutional Court for a remedy. The pioneer organisation in this regard is the National Coalition for Gay and Lesbian Equality (NCGLE). See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) available at http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/z7nC9V8Ush/MAIN/0/57/518/0/S-CCT10-99 (accessed 29 October 2002); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) available at http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/hzgtFe3pst/MAIN/140220008/9#top (accessed 29 October 2012). Zackie Achmat, the TAC's first national director, had previously been director of the NCGLE. On how the NCGLE's strategy of focusing on institutional gains and formal equality hindered the possibility of building a strong social movement and growing gay activism beyond its base of white, male, middle-class membership, see N Oswin 'Producing homonormativity in neoliberal South Africa: Recognition, redistribution, and the equality project' (2007) 32 *Signs* 649; J Cock 'Engendering gay and lesbian rights: The equality clause in the South African Constitution' (2003) 26 *Women's Studies International Forum* 35. For a good exposition on how, despite formal and institutional gains, poor, black, township-based lesbians continue to suffer from homophobia and even targeted 'corrective rape', see N Mkhize *et al The country we want to live in: Hate crimes and homophobia in the lives of black lesbian South Africans* (2010).

41 Jones (n 38 above) 429.

42 *TAC* case (n 36 above) para 1.

One of the most vulnerable groups affected by the scourge of HIV/AIDS is unborn babies of pregnant mothers living with HIV/AIDS. In the early 2000s, the government estimated that since 1998, 70 000 children had been infected by their mothers at and around birth.[43] It for this reason that as early as 1997, several NGOs began a sustained campaign to lobby the government to adopt a comprehensive policy and programme for the prevention of mother-to-child HIV/AIDS treatment (PMTCT) as articulated in the government's own National AIDS Plan. This campaign received impetus with the formation of TAC in 1998.

Mark Heywood, one of the key leaders of the TAC, reports that initially the government was sympathetic to calls for a policy and plan on PMTCT and in April 1999 released a joint statement with TAC stating that the major barrier to a PMTCT programme was the prohibited cost of the required anti-retroviral drug, Zidovudine (AZT).[44] In May 1999, Thabo Mbeki was installed as the second democratic President of South Africa. Many commentators point to this moment as the moment when government, albeit unofficially, changed its position on HIV/AIDS and the required approach to tackle it and began siding with the 'AIDS denialists'. In 2000, when it became clear that the government was just adopting delaying tactics that appeared politically motivated, TAC threatened to embark on litigation.

After a serious of well-publicised civil disobedience campaigns which enabled the TAC to mobilise grassroots support and consolidate its partnerships with international donors and organisations,[45] in August 2001, the TAC decided that 'both morally and politically it had no other options than to launch a case against the government'.[46] The government opposed the case on the grounds that the efficacy and safety of Nevirapine had not been fully proven and that its widespread use risked a public health catastrophe.[47] In December 2001, the Pretoria High Court found in favour of the TAC and found that the government had not reasonably addressed the need to reduce the risk of HIV-positive mothers transmitting HIV to their babies at birth.[48] The Minister of Health and other respondents responded to this ruling by launching an appeal. At the first hearing, the TAC and its partners organised a march of over 5 000 people.

By the time the case landed in the Constitutional Court, the Court observed that the dispute had been characterised by 'a regrettable degree of

43 *TAC* case (n 36 above) para 19.
44 M Heywood 'Preventing mother-to-child HIV transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign case against the Minister of Health' (2003) 19 *South African Journal on Human Rights* 278 281.
45 Treatment Action Campaign *Fighting for our Lives: The History of the Treatment Action Campaign 1998-2010* (Treatment Action Campaign 2010) 44.
46 As above. The TAC was assisted by the Legal Resources Centre, a public interest litigation organisation, with funding from Legal Aid South Africa's Impact Litigation Unit.
47 Heywood (n 44 above) 296.
48 *Treatment Action Campaign v Minister of Health* 2002 (4) BCLR 356 (T).

animosity and disparagement'.[49] The Court subsequently ordered the government to, 'without delay', provide the anti-retroviral Nevirapine where it was medically indicated. Such were emotions around this case that, according to Mark Heywood of the TAC, one of the Constitutional Court judges cried after the handing down of this judgment.[50]

TAC activists felt that their struggle had been vindicated by the Constitutional Court and asserted that the case demonstrated that 'skilful litigation can take advantage of constitutional promises' and that 'the outcome of the case … should confirm to those who still suffer marginalisation and deprivation that the Constitution can materially impact on and better their lives'.[51] The subsequent decision by the South African Cabinet to approve a bold national treatment plan – beyond the PMTCT – aimed at rolling out anti-retroviral drugs to all HIV/AIDS patients, confirmed in the minds of TAC activists that there was value in investing a large amount of resources in this Constitutional Court battle. TAC activists have a lot of trust in the Court, invoking in arguments with adversaries or to threaten the state. As one TAC activist put it, 'government is afraid of the Constitutional Court'.[52]

4 Merafong Demarcation Forum

> On the 20th September 2007 the Merafong Demarcation Forum will be taking the government to [the Constitutional] court in the bid to reverse the unjust and draconian law called the Twelfth Amendment Act which resulted in Merafong [been] dumped into the North West province unlawfully despite the fact that the overwhelming majority of the residents of Merafong still want to fall under Gauteng ... We want to send a clear message to the government that we are still opposed to incorporation into the North West and we will continue to resist by any means necessary until the government listens to the people.[53]
>
> The people of Merafong rightly brought their dispute to this Court … [but] this Court is not and cannot be a site for political struggle.[54]

On 20 September 2007 members of the Merafong Demarcation Forum (MDF) took their campaign to seek an order declaring that a constitutional amendment that sought to abolish cross-border municipalities was unconstitutional because law makers failed to heed the community's wish that Merafong City Local Municipality (Merafong) should be incorporated into Gauteng province, and not the North West province. This petition came after two years of often violent resistance by this movement. On the day of

49 *TAC* case (n 36 above) para 20.
50 Heywood (n 38 above) 32.
51 Heywood (n 44 above) 279.
52 TAC leader cited in Friedman & Mottiar (n 2 above).
53 Merafong Demarcation Forum *Final Push for Peoples' Victory!!* Petition Signature Request Leaflet 2007 (on file with author).
54 *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC) paras 308 & 306, available at http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/x/0/0/5/0 (accessed 29 October 2009).

the first hearing, more than a 1 000 protesters gathered outside the court room singing liberation songs and 'toyi-toying'. During the course of the day, things turned nasty when protestors started burning tyres just outside the Constitutional Court building, brandishing dangerous weapons and pelting police officers with stones.[55] Never before nor since has the Constitutional Court witnessed such a protest at its doorsteps. Uniquely too, although the Court subsequently rejected the MDF's petition, the movement continued its mass resistance until the state was forced to reverse its decision. Unlike the TAC, a professionalised/NGO-ised organisation, the MDF's violent demonstration at the Court and its subsequent refusal to be deradilised by the Court's negative judgement, is a good example of how differently situated movements engage with the Court. A brief overview of the history of this case follows.

Merafong was established in 2000 as a cross-border municipality that straddled the provinces of Gauteng and the North West with 74 per cent of the population situated in Gauteng and the remaining 26 per cent in the North West. Numerous difficulties arose in the administration of cross-border municipalities. These included poor service delivery and the fact that residents were often left frustrated not knowing which provincial authority to turn to.[56] The government thus enacted the Constitution Twelfth Amendment Act of 2005 (Twelfth Amendment) in order to abolish cross-boundary municipalities.

Pursuant to this constitutional amendment, in August 2005 the Municipal Demarcation Board published proposals to redraw the boundary of Merafong. The Board recommended that the whole of Merafong should be incorporated into the North West. As the Constitutional Court observed, this proposal was met with 'widespread and spontaneous mass protests' in Khutsong, one of the townships in Merafong.[57] According to media reports:

> On 2 November they organised a stay-away. Armed with petrol bombs and stones, they took on the police, who shot them … with rubber bullets …The next day, local municipal offices were set alight, telephone booths were dismantled and the main intersections of the townships were barricaded … In all, 6 000 people were involved in the protest.[58]

The residents of Khutsong did not question the rationality of doing away with cross-border municipalities. What angered the residents of Merafong was the specific decision to re-demarcate all of Merafong into North West and not in

55 See 'Khutsong battle reaches the Constitutional Court' *Mail & Guardian* 20 September 2013 available at http://mg.co.za/article/2007-09-20-khutsong-battle-reaches-constitutional-court (accessed 29 October 2009).

56 A Christmas & D Singiza 'Taking participation to the streets and courts: The *Merafong* judgment' (2008) 10 *Local Government Bulletin* 26.

57 *Merafong* para 135.

58 RJ Thomson 'Identity Politics in South Africa: Lessons from the People' (2006) 14 available at http://ccs.ukzn.ac.za/files/identity%20politics%20revised%20rjt%202006%2003%2014.pdf (accessed 23 December 2013).

Gauteng as they had preferred.[59] They felt that the two provincial governments had acted undemocratically by ignoring their clearly-expressed wish. The MDF was thus set up to campaign 'for democracy to prevail in Merafong'.[60] This strong movement was made up of political organisations, taxi associations, woman and student groups, trade unions, churches and business organisations.

The Municipal Demarcation Board then decided to withdraw its recommendation, pointing out that it agreed with some of the motivations provided by the community as to why the whole of Merafong should be incorporated into Gauteng and not the North West. Despite this, the next day the Minister of Local and Provincial Affairs ('the Minister') stated his preference for the whole of Merafong to be incorporated into the North West. A meeting with the Minister failed to reach any consensus as each side stuck to its guns. By the time the community submitted a collective memorandum to the Minister – pursuant to the Minister's invitation – the legislative process had, however, already started. One house of Parliament, the National Assembly, had already approved a Bill to incorporate Merafong into North West. This Bill had been sent immediately to the second house of Parliament, the National Council of Provinces (NCOP). The Minister had then set very tight time frames for the affected provinces – Gauteng and North West – to submit their views to the NCOP.

In November 2005, a constitutionally-mandated joint public hearing involving the Gauteng and North West provincial legislatures was held. This well-attended meeting received a number of written and oral submissions. In its negotiating mandate to the NCOP, the Gauteng legislature highlighted the overwhelming public opposition to the incorporation. It also put on record that it agreed with the incorporation of the whole of Merafong into Gauteng. The provincial legislature thus recommended that the Twelfth Amendment Bill should be amended to provide for that position. Despite this mandate, and the fact that the Gauteng provincial representative had earlier, in the words of one Constitutional Court judge, presented it to the NCOP 'faithfully and with effusive conviction',[61] on 5 December 2005 the Gauteng legislature changed its decision and decided that its representative should vote in

59 Thomson (n 58 above) 15 summarises the MDF position as follows: 'First, Khutsong is closer to the capital of Gauteng than to that of the North West. Secondly, more of Khutsong's workers commute to other parts of Gauteng than to the North West. Thirdly, the people who built Gauteng through their labour on the mines should be recognised as part of the province. Fourthly, the people are attached to Gauteng; it is their province. Finally, Gauteng is "by far the most developed province". Excluding the people from the province would be a "slap in the face".'

60 *Merafong Demarcation Forum v President of the Republic of South Africa* Founding Affidavit, para 2.1 available at http://www.constitutionalcourt.org.za/Archimages/10585.PDF (accessed 30 October 2012).

61 *Merafong* (n 54 above) para 154.

support of the Bill in the NCOP.[62] On 14 December 2005, the Bill was agreed to by the NCOP, with all provinces in favour of it.

That night the epicentre of the MDF's struggle, Khutsong – literally translated as the 'place of peace' – erupted into one of the most uncontrollable places in post-apartheid South Africa.[63] The people were angered by the fact that the provincial legislature appeared to take their views into account and to agree with them, only to change its mind later without any consultation and discussion. From December 2005 until the end of 2007, the township had been rendered 'ungovernable'. In scenes very much reminiscent of the 1980s township revolts against the apartheid regime, television cameras captured daily images of young people blockading the streets with burning tyres and stones, preparing 'molotov cocktails', and torching shops, libraries, schools, government buildings and local councillors' homes. Between December 2005 and April 2006, violent protests caused damage to private and public property estimated at US $10 million.[64] The community's deep level of discontent is further reflected by a successful boycott of the municipal elections in March 2006. Of almost 30 000 registered voters, only 232 cast their ballots.

It took a very long time before the people of Khutsong decided to take their struggle to the Constitutional Court. It was not an easy decision. According to the Chairperson of the MDF, they had won every battle against the government in the street:

> Merafong community has taken a decision that says they want to remain in Gauteng Province. We made submissions to the government on 25 November 2005 and 90 per cent plus of the community are in favour of this view. This followed several other submissions made and protests to voice out the will of the people of Merafong. We have won all fights at all fronts, however, the referees, the government, have ensured that no victory comes our way, despite the fact that we have outplayed them in the field. As opposed to what we all know and expect, the chambers of our parliaments have been used to undermine the genuine and legitimate will of the people of Merafong. The last few months of 2005 have [and] will live as a sad memory of our democratic dispensation. We have since opened the [bank] account to challenge this unfairness to the constitutional court …[65]

62 For more on the functions and powers of provincial legislatures, see T Madlingozi & S Woolman 'Provincial legislative authority' in S Woolman *et al* (eds) *Constitutional law of South Africa* 2nd edition (2005) ch 19.

63 The media recorded the events of that night as follows: 'Police vehicles were met with "a hail of stones and bullets". They reacted with rubber bullets. Five police offices were injured. Eight police vehicles were damaged. Schools were vandalised. [T]he houses of the major, a soldier and several municipal councillors were set alight, as well as the library, a church and the community hall. 71 people were arrested.' Thomson (n 58 above) 16.

64 See Centre for Development and Enterprise 'Voices of Anger: Protest and conflict in two municipalities' *CDE Focus* (April 2007) 10.

65 D Baqwana 'Fund-Raising Letter' January 2006, available at http://amandlandawonye.wikispaces.com/Merafong+Demarcation+Fund (accessed 30 October 2012).

Lawyers for Human Rights, a public interest litigation organisation, agreed to represent the MDF. The MDF obtained direct access to the Court because only the Constitutional Court may decide the constitutionality of an amendment to the Constitution.[66] In the main, the MDF asked the Court to declare that the Gauteng Provincial Legislature had failed to comply with the constitutional duty to facilitate public involvement in processes leading to the approval of the Twelfth Amendment by the NCOP. On 13 June 2008 the Court handed down its decision. The Court stated that under the new constitutional dispensation, participatory democracy and representative democracy are mutually supportive. However, the Court also made the point that the obligation to facilitate public involvement is open to innovation and legislatures have a discretion as to how to fulfil that obligation.

In this case, the majority of the Court found that the legislature had afforded the public the opportunity to be heard and considered the views of the public in great detail. Most importantly, the Court held that the fact that the process of public involvement is mandatory does mean that the legislature must follow the views of the community: 'But being involved does not mean that one's views must necessarily prevail.'[67] The Court held that the legislature's failure to return to the public to inform it that it had subsequently altered its negotiating mandate and decided to vote in favour of the Bill was 'possibly disrespectful'; but that failure did not rise to the level of unreasonableness which could result in the invalidity of the Twelfth Amendment. In the words of the majority decision, '[p]ossible discourteous conduct does not equal unconstitutional conduct which has to result in the invalidity of the legislation'.[68] The Court therefore dismissed the application.

This dismissal only served to embolden the movement and its conviction that all arms of state are elitist, unresponsive and anti-poor. One of the affiliates of the MDF responded that even though it had not yet studied the Court's decision, it was its 'contention that matters related to forceful and illegitimate demarcations cannot be mitigated or resolved through the organs of class rule - the courts'.[69] During the following months, Khutsong continued to resemble a battlefield with residents engaging in often violent protests, work stay-aways and school boycotts. This extra-institutional, mass resistance prevailed. The ruling party subsequently decided that the whole of the Merafong municipality would be incorporated back into Gauteng province.[70] The whole of Merafong has now been incorporated into the Gauteng province, in a move that the new Minister of Provincial and Local Government proclaimed is aimed at 'putting the final nail into the coffin that

66 Sec 167(4)(d) of the Constitution.
67 *Merafong* (n 54 above) para 50.
68 *Merafong* (n 54 above) para 60.
69 See 'YCL [Young Communist League] Statement on Khutsong's Ruling by the ConCourt' 13 June 2008 available at http://groups.google.com/group/yclsa-press/browse_thread/thread/67c0616a73a6f791 (accessed 20 June 2008).
70 The decision was also strongly influenced by the fact that the 2008 general elections were around the corner.

buries unhappiness [and] protests from the people of Merafong and Khutsong in particular'.[71]

Thus, while the Court was not particurlaly moved by the plight of these indignant residents, this social movement did not allow itself to be demobilised by the apex court's order or for the Court to be the final arbiter of the legitimacy of its struggle. To be sure, even before the Court handed down its decision, the MDF was not convinced that the Constitutional Court could not assist it in its struggle. Thus, even before the Court could make its ruling, one of the leaders of the MDF declared as follows:

> It would be very dangerous to put our faith in legal processes. Courts are seldom neutral and often tend to serve the interests of the ruling class. That is the reason we have delayed taking this matter to the Constitutional Court. For more than a year we have relied on our own mass strength and we still do. In the coming period we will utilise the so-called democratic space provided by the new Constitution as well as working class resistance. Key strategies include intensifying mobilisation, building consciousness and continuing with mass struggle in the form of marches and rallies. This struggle will be won in the street! [72]

5 Abahlali baseMjondolo

> Abahlali baseMjondolo will once again climb another high mountain for the first time when our struggle for safety, dignity, and equality of the poor ascends to the Constitutional Court of the Republic of South Africa. In 2005 when we formed our movement, we commitment ourselves to do whatever it takes to protect the rights, lives and future of the shack dwellers and the poor in South Africa.[73]

On 13 May 2009, members of Abahlali baseMjondolo ('those who live in shack-settlements') got onto a bus in Kennedy Road Informal Settlement (Kennedy Road) in Durban, KwaZulu-Natal and made a 12-hour trip to the Constitutional Court building in Braamfontein, Gauteng. They went to observe the first hearing of their appeal against a High Court ruling that found the (self-explanatory) KwaZulu-Natal Elimination and Prevention of the Re-emergence of Slums Act in line with the Constitution. When they got to the Court, hundreds of Abahlali members, together with others from the Poor Peoples' Alliance, observed proceedings from a packed public gallery, while others sat outside watching the proceedings on large television screens.[74]

71 See 'NCOP passes Merafong Bill' *Parliament* 19 March 2009 available at http://www.parliament.gov.za/live/content.php?Item_ID=849 (accessed 10 August 2009).

72 Kolisile (n 3 above).

73 'Abahlali baseMjondolo will challenge the KZN Slums Act in the Constitutional Court on 14 May 2009' *Abahlali* 6 May 2009 available at http://abahlali.org/node/5120 (accessed 30 October 2012).

74 N Tolsi 'Shack dwellers' victory bus' *Mail & Guardian Online* 24 May 2009 available at http://www.mg.co.za/article/2009-05-24-shack-dwellers-victory-bus (accessed 30 October 2012).

After the hearing, they sang anti-apartheid liberation songs and religious hymns. One Abahlali member expressed a common sentiment:

> This was a beautiful day for me, because in 2007 I was shot six times with rubber bullets during a march and put in jail by the police. Listening to these judges today made me feel like I was part of this democracy again.[75]

The Constitutional Court dispute between Abahlali and the provincial government was just another episode in a series of very acrimonious encounters between the two parties. Since its formation in 2005, Abahlali had resisted attempts by local officials to treat shack dwellers as 'people who don't count'.[76] Abahlali's campaign for land, housing, basic services and dignity of poor people was instead criminalised. To put the scale of this criminalisation into context, Abahlali alleges that between 2005 and early 2007, more than 160 of its members were arrested on trumped-up charges.[77] State officials have also banned several protest marches by the movement. Furthermore, local elites have caused Abahlali leaders to lose their jobs, to be attacked and to be tortured by the police.[78] It is no wonder, then, that the opportunity to appear before the Constitutional Court and declare to the whole world that they count and that their homes are not 'slums' fit for 'eradication' was so meaningful to this movement. What transpired before and after Abahlali's Constitutional Court challenge, however, demonstrates that victories obtained from this august institution can have both positive and negative symbolic impacts for movements positioned outside the sphere of civil society and constitutional liberalism.

Richard Pithouse reports that when the ANC was unbanned in 1990, it encouraged people to embark on land invasions and appeared to sympathise with the plight of shack dwellers.[79] However, this position changed in 2001 when local authorities in Durban – later working under the auspices of United Nations Habitant Cities Without Slums project – earmarked the city for a pilot project named the Slums Clearance Project.[80] Under this project, about 70 settlements were earmarked for 'slum clearance' and 'relocation' to new townships. Kennedy Road was identified as one of the beneficiary settlements. When it turned out that residents of Kennedy Road were instead

75 As above.

76 S Zikode 'The struggle to affirm the dignity of the poor in a society in which we don't count' *Abahlali* 7 August 2012 http://abahlali.org/node/9006 (accessed 30 October 2012). For more on the history of *Abahlali* and its achievements, see Madlingozi (n 35 above).

77 S Lynch & Z Nsibande 'The police and Abahlali baseMjondolo' (2006) available at http://libcom.org/tags/south-africa?page=11 (accessed 20 October 2011).

78 K Chance 'The work of violence: A timeline of armed attacks at Kennedy Road' (2010) 83 *School of Development Studies Research Report*.

79 R Pithouse '"Our struggle is thought, on the ground, running" The University of Abahlali baseMjondolo' (2006) 1 Centre for Civil Society Research Report 40 available at http://www.ukzn.ac.za/ccs/files/RREPORT_VOL106_PITHOUSE.pdf (accessed ?) 15. Also see Centre on Housing Rights and Evictions (COHRE) *Business as usual? Housing rights and 'slum eradication' in Durban, South Africa* (2008) 41 available at http://www.cohre.org/store/attachments/081007%20Business%20as%20Usual_final.print.pdf (accessed 29 October 2012).

80 Pithouse (n 79 above) 15.

going to be evicted so that the land could be used for commercial development, the residents protested. The origins of Abahlali are usually traced to this 19 March 2005 uprising when about 750 people blockaded a major road with burning tyres and mattresses and had a stand-off with the police for more than four hours.

The Slums Clearance Project signalled a shift on the part of the government from a rights-based approach with respect to the situation of the urban poor to militarised language based on the 'eradication of slums'.[81] Those who oppose the Slums Act saw it as a concretisation of this approach.

COHRE records that when the KwaZulu-Natal Elimination and Prevention of Re-Emergency of Slums Bill (Slums Bill) was officially tabled, it was opposed by academics, lawyers, NGOs and shack dwellers' organisations.[82] This opposition took the form of protest marches as well as official submissions to the provincial legislature. From March 2007 when Abahlali became aware of the Slums Bill, it vehemently opposed the Slums Bill, stating that it is an attempt to 'mount a legal attack on the poor'.[83]

Abahlali vowed to fight this Bill everywhere: 'We will fight in the courts. We will fight this Bill in the streets. We will fight this Bill in the way we live our ordinary lives every day.'[84] Indeed, Abahlali took part in every forum available to voice their opposition against the Bill.[85] In the meantime, Abahlali held regular meetings with their members to familiarise them with the contents and import of the Bill. They also elected a Slums Bill Elimination Task Team 'to take the resistance forward'.[86] The movement also decided to engage with policy and legal experts to help them take the case to the courts if the Bill became law.[87] Despite 'extraordinary criticism' of the Slums Bill by a range of stakeholders, the Bill became law in June 2007. [88]

In February 2008, Abahlali decided to launch a constitutional challenge against the Act at the Durban High Court. Abahlali explained why they were going to court:

81 COHRE (n 79 above) 61.
82 COHRE (n 79 above) 66.
83 'Operation Murambatsvina comes to KZN: The notorious Elimination and Prevention of Re-Emergence of Slums Bill' *Abahlali* Press Statement 21 June 2007 available at htpp://www.abahlali.org/node/1629 (accessed 29 October 2012).
84 As above.
85 See 'No house, no land, no Bill!' *Abahlali* 11 May 2007 available at http://www.abahlali.org/node/1292 (accessed 2 June 2009) and Z Mkhize 'A review of the KZN Slums Bill public hearing process (A closer look at the Slums Clearance Bill public hearing process)' available at http://www.cpp.org.za/main.php?include=docs/space.html&menu=_menu/main.html&title=Publications (accessed 2 June 2009).
86 See 'Meeting to discuss legal and political strategies to oppose the Slums Bill – Friday July, 9:00 am Kennedy Road' *Abahlali* 12 July 2007 available at http://www.abahlali.org/node/1700 (accessed 2 June 2009).
87 See 'Minutes of the Abahlali baseMjondolo Meeting to Discuss Legal and Political Strategies to Oppose the Slums Bill' *Abahlali* 19 July 2007 available at http://www.abahlali.org/node/1718 (accessed 2 June 2009).
88 COHRE (n 79 above) 67.

- On 28 September 2007 we marched against the Slums Act in our thousands. We were beaten and 14 of us were arrested.
- On 21 June 2007 we sent a delegation to the provincial parliament to oppose the Slums Act there. We were denied the right to speak.
- On 4 May 2007 hundreds of us crowded into the Kennedy Road Hall to tell the government that we are absolutely opposed to the Slums Act. We were ignored.
- We are going to court because we know that in court we will not be beaten, arrested, denied the right to speak or ignored.[89]

The Centre for Applied Legal Studies, University of the Witwatersrand, represented Abahlali. In particular, the applicants argued that section 16 of the Act, read together with other provisions of the Act, conflicted with the constitutional right to access to adequate housing because it did not constitute a reasonable measure to progressively realise this right within the meaning of section 26(2) of the Constitution. Further, they argued that section 16 was unconstitutional because it rendered the constitutional requirement of meaningful engagement futile. Section 16 compelled the owner of land or a building which is occupied by unlawful occupiers to institute an eviction procedure against such occupiers. If they fail to do so, a municipality is obligated to institute eviction proceedings itself.

On 27 January 2009, the High Court dismissed Abahlali's application, commenting that the province should be applauded for 'attempting to deal with the problem of slums and slum conditions'. On appeal, the Constitutional Court decided to uphold the Act but to nullify section 16.[90] Abahlali could claim victory because this section was the most contentious. Given the many years of harassment, marginalisation and criminalisation, the Constitutional Court had huge symbolic significance for Abahlali because it essentially halted apartheid era-style mass evictions. At the symbolic level, the movement, often suppressed and repressed by state institutions, put a lot of value in the Court's affirmative decision. The president of Abahlali, Zikode, summarised the significance of the Court's ruling in the following words:

> The Constitutional Court ruling in favour of *Abahlali* means that a people's democracy will not be undermined at every turn … The Constitutional Court ruling also means that while party politics is trying to bring our democracy to the brink of catastrophe, the Court recognises our humanity and that the poor have the same right as everyone else to shape the future of the country.[91]

89 'Abahlali baseMjondolo take the provincial government to court over the notorious Slums Act' *Abahlali* Press Statement 13 February 2008 available at http://www.abahlali.org/node/3335 (accessed 2 June 2009).

90 *Abahlali base Mjondolo v Premier of KwaZulu-Natal Province* 2010 (2) BCLR 99 (CC) available at http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/x/0/0/5/0 (accessed 30 October 2012).

91 S Zikode 'Democracy is on the brink of catastrophe' 2009 http://www.ru.ac.za/latestnews/2009/name,36269,en.html (accessed 1 August 2011).

On the other hand, this high-profile Constitutional Court case led to a serious local backlash against the movement. A few days before the judgment was to be handed down, a local militia, allegedly aligned to the ruling party, subjected Abahlali to a vicious attack. Abahlali believes that the main motivation behind that attack was a publicly-expressed resentment by local elites over the movement's decision to take the government to court.[92] By the time the attacks came to an end, the Kennedy Road informal settlement resembled a war zone: Three people were dead, dozens of people were injured, over 1 000 people were displaced, shacks belonging to Abahlali organisers were burnt down, and the Abahlali headquarters were occupied by the militia. All of this, it is alleged, took place under police watch and complicity.[93] The following day, police arrested 12 members of the KRDC. None of the attackers was arrested. Those arrested spent many months in police custody before being released on bail.

6 Conclusion

> South Africa has the most beautiful Constitution amongst all countries. Its beauty is well documented and respected. But we are living in a democratic prison … It is clear that we do not have the rights and freedoms that are written in the Constitution in reality. Let's not fool ourselves and say we are in a democratic country while we are in a democratic prison.
>
> Bandile Mdlalose, General Secretary of *Abahlali baseMjondolo*[94]

This chapter investigated social movements' perceptions of the Constitutional Court. Although disputes involving large groups of people have landed in the South African Constitutional Court,[95] I have confined my discussion to those groups of people who have gone to the Court under the banner of a social movement – as defined above. Given the fact that all aspects of South African society are saturated with legalism, myth of neutrality in adjudication and constitutional fetish, it is inevitable that social movement struggles will land at the Constitutional Court. Social movement activists' perception of the Court is mediated by a number of things. First, it depends on movement character and its relationship to the state. This chapter demonstrated that more counter-hegemonic movements view the Court with suspicion believing that, like other institutions of bourgeois democracy, it is biased towards the ruling class. This position is exemplified by the Merafong Demarcation Forum which was consistently betrayed by various state institutions. Thus, when the movement got to court, they acted

92 Sibusiso Zikode, interview 15 August 2010, Durban.
93 Chance (n 78 above).
94 n 26 above.
95 These include the 900 applicants in the famous *Government of South Africa v Grootboom* 2001 (1) SA 46 (CC), available at http://www.constitutionalcourt.org.za/Archimages/2798.PDF (accessed 30 October 2012), and some 36 000 individuals affected in *President of Republic of South Africa v Modderklip Boerdery Ltd* 2005 (5) SA 3 (CC), available at http://www.constitutionalcourt.org.za/Archimages/3493.PDF (accessed 30 October 2012).

like they would act before any other state organ, that is, make their displeasure violently visible. On the other hand, movements that have tried to campaign extra-institutionally and suffered constant repression like Abahlali baseMjondolo welcome the opportunity to appear before this majestic institution and its bewitching edifice and to enter into a courtroom battle with the state. For rights-based movements like the TAC, however, going to court is not just another tactic; the court is an indispensable terrain of their struggle.

Secondly, the chapter showed that positionality matters. To understand the divergent perceptions of the Court, one would need to understand the bifurcated nature of the South African polity. This bifurcation is not only between the rural areas (residents as subjects) and the urban areas (residents as citizens). In the urban areas, there is also a split with favourable political opportunities available for more resource-endowed, suburb-based NGOs and social movements, while poor, township-based movements operate under political threats marked by illegality, repression and marginalisation. The TAC, a middle-class professionalised movement, operates at the national level where, overwhelmingly, the body politic is characterised by what Comaroff and Comaroff refer to as an 'almost fetishised faith to constitutionality and the rule of law'.[96] The TAC's positive attitude to the Court has therefore to do with the fact that access to the Court is relatively easy for the movement,[97] and the fact that the movement has reasonable expectations that the Court's decisions will be enforced.

On the other hand, locally-based movements are often left frustrated with unenforced court decisions.[98] Thus, referring to its prominent and successful Constitutional Court case, Abahlali bemoans the fact that they 'won the case against the Slums Act and yet government continues to build transit camps'.[99] Furthermore, although suppressed movements like Abahlali

96 J Comaroff & J Comaroff 'Policing culture, cultural policing: Law and social order in post-colonial South Africa' (2004) 29 *Law and Social Enquiry* 513 515.

97 The TAC's rights-based campaign is bolstered by the fact that right from the start, it could rely on the AIDS Law Project (ALP, now Section 27) for support and mutual strategising. The relationship between the TAC and ALP is symbiotic. Achmat was ALP's founding director and until 2008 its board member. The executive director of Section 27 is Mark Heywood who was TAC's treasurer until 2008 and is now a member of the TAC Secretariat. The General Secretary of TAC, Vuyiseka Dubula, is Chairperson of Section 27's board of directors. Lastly, Nonkosi Khumalo, a senior researcher at Section 27, has been seconded to the TAC as its full-time Chairperson. Unlike the TAC, most social movements do not have the benefit of a permanent legal advocacy organisation partner, although more recently Abahlali has benefitted from its very close relationship with the Socio-economic Rights Institute of South Africa.

98 See, for examples, *Abahlali* and SERI 'eThekwini Municipality Disobeys Court Order to Provide Housing and Investigate Corruption' Press Release 29 February 2012 available at http://www.abahlali.org/node/8648 (accessed 30 October 2012). L Sinwell 'Wynberg concerned citizens' disempowering court victory' 2010 21 *Urban Forum* 153; CAWP 'Johannesburg Water defies court ruling on prepaid water meters' Press Statement 8 May 2008, available at http://apf.org.za/spip.php?breve14 2008 (accessed 15 October 2012).

99 'Statement on the anniversary of the attack on *Abahlali baseMjondolo*' *Abahlali* Press Statement 26 September 2010, available at http://www.abahlali.org/node/7324 (accessed 30 October 2012).

value the Court's recognition of their struggle, given the fact that such movements are, *de facto*, positioned outside of civil society, counter-hegemonic movements' engagement with the Court is fraught with danger. For instance, the 2009 attack on Abahlali and the almost three-year expulsion from its headquarters has meant that, although Abahlali continues to engage courts in pursuance of its goals (with great success), it continues to worry about the local consequences of high-profile court decisions. Thus, after a recent important victory before the Durban High Court, the movement expressed the following reservation:

> While we celebrate this victory, Abahlali are worried that we may be attacked and receive death threats, as happened after the Constitutional Court victory against the KZN Slums Act when Kennedy Road was attacked leaving two people dead in September 2009.[100]

Lastly, the Constitutional Court has failed to be an 'institutional voice for the poor'.[101] Jackie Dugard sums this failure up as follows:

> 'Court has balked at allowing poor people who might otherwise be denied justice to gain direct access and has failed to operationalise a meaningful recognition of poverty in its socio-economic judgments.'[102]

In addition, the Court has arguably failed in its mission to facilitate 'constitutional dialogue', making it inaccessible, unaccountable and ultimately alien to poor people. Its practice is characterised by thinly-reasoned judgments, a failure to translate and make its judgments widely accessible, and a willingness to engage more with academics, NGOs and English-medium media than with social movements, trade unions, poor people's organisations and African-language media.[103]

In conclusion, we can make the following general observations regarding the road from the street to the Court:

(a) During the course of claim-making, post-apartheid social movements mobilise the law in order to frame their demands and thus draw public sympathy (sometimes making explicit reference to the Bill of Rights and sometimes in referring just to a 'right').

(b) Even though social movements and community organisations appeal to rights to legitimise their demands, before resorting to courtroom-based strategies, they often resort to illegal and extra-legal tactics to press for their demands.

100 'Court Victory Against the eThekwini Muncipality!' Media Statement issued by Abahlali baseMjondolo and Socio-Economic Rights Institute of SA (SERI) 19 September 2012 available at http://abahlali.org/node/9170 (accessed on 30 October 2012).

101 J Dugard & T Roux 'The record of the South African Constitutional Court in providing an institutional voice for the poor: 1995-2004' in R Gargarella *et al* (eds) *Courts and social transformation in new democracies: An institutional voice for the poor?* (2006) 107-125.

102 Dugard (n 34 above) 1-2.

103 Madlingozi (n 33 above).

(c) Although most movements do not believe that courts are 'legitimate' forums to resolve their disputes, they ended up going to court in order to revive their struggles after they had been crushed through criminalisation and intimidation by the state.

(d) Having said this, most social movements make reference to previous judgments of the Constitutional Court to buttress their claims during their extra-legal campaigns, suggesting that they consider the decisions of the Court to have some binding authority.

(e) Deciding to take the route of litigation and eventually landing in court involves a lot of resources which by nature - except the TAC - social movements do not have. The decision to resort to court-based strategies is therefore dependent on the support and solidarity from public interest litigation NGOs.

PART D: RIGHTS BEYOND THE STATE

CHAPTER 25

SOVEREIGNTY, CITIZENSHIP AND THE UNIVERSALITY OF SOCIO-ECONOMIC RIGHTS

Sam Adelman

1 Introduction

The 1996 South African Constitution is widely regarded as a successful example of transformative constitutionalism, not least because it includes justiciable socio-economic rights that have enabled the Constitutional Court to transform views about the enforceability of these rights. Sandra Liebenberg describes the Constitution as 'the culmination of a process of struggle to recognise the socio-economic dimensions of human dignity, freedom and equality'.[1] The Preamble declares transformation to be an explicit aim of the Constitution, which is also designed to redress the historical wrongs of apartheid and to facilitate the construction of a new economic, political and social dispensation 'based on democratic values, social justice and fundamental human rights'.[2] It envisages a deliberative, participatory democracy.[3] Chief Justice Pius Langa argues that

> transformation is an open-ended process rather than a temporary phenomenon that ends when we all have equal access to resources and basic services and when lawyers and judges embrace a culture of justification. Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant. This is perhaps the ultimate vision of a transformative, rather than a transitional Constitution … because it envisions a society that will always be open to change and contestation, a society that will always be defined by transformation.[4]

1 S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 21.
2 Preamble. On the 'constructivist' aspect of the Constitution, see R Teitel 'Transitional jurisprudence: The role of law in political transformation' (1997) 106 *Yale Law Journal* 2009.
3 Liebenberg (n 1 above) 28-34.
4 Pius Langa 'Transformative constitutionalism' (2006) 17 *Stellensbosch Law Review* 351 354.

Elsewhere, Deputy Chief Justice Moseneke asserts that

> one thing is clear; the Constitution is avowedly transformative. It retains from the past only the good and defensible and turns its back firmly on the rest. Many constitutions of the world merely regulate the dispersal and exercise of public power. Others also record justiciable fundamental rights and freedoms. Our Constitution does these things too. But it goes much further than any other Constitution I know around the world.[5]

Karl Klare defined transformative constitutionalism as 'large scale social change through non-violent political processes grounded in law'.[6] The advantage of social change facilitated by and through the law is the likelihood that it will be viewed as legitimate; its main disadvantage is that transformation is likely to be constrained by the inherent conservatism of the liberal legality. Transformative constitutionalism is thus a utopian project perpetually in danger of being frustrated by its medium. Denis Davis argues that the rigid formalism of South African legal culture during apartheid has been a 'major obstacle' to the transformative promise of the Constitution.[7] In a similar vein, Karin van Marle contends that a constitution will be transformative precisely to the extent that it breaks free from traditional understandings of the rule of law.[8] This tension is reflected in the contradictory nature of the rule of law itself, which now provides equal protection to the rights and property of all South Africans, black and white, rich and poor.[9] It is also apparent in the contrast between the progressive early jurisprudence of the Constitutional Court in decisions such as *Grootboom* and TAC and the deferential conservatism and formalism of the *Mazibuko* judgment.[10]

Despite the stirring judicial rhetoric quoted above it is perhaps a little premature to draw definitive conclusions about the transformational impact of the Constitution. One is reminded of Zhou Enlai's response when asked in the early 1970s for his views on the impact of the French Revolution. It was,

5 Liebenberg (n 1 above) 35.

6 KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 150. Klare continues: it is 'a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.' See also Upendra Baxi 'Preliminary notes on transformative constitutionalism' (Chapter 1, above).

7 DM Davis 'South African constitutional jurisprudence: The first fifteen years' (2010) 6 *Annual Review of Law and Social Science* 285 298.

8 K van Marle 'Transformative constitutionalism as/and critique' (2009) 20 *Stellenbosch Law Review* 286 288.

9 I do not mean to suggest that the rule of law does not constitute progress, not least in light of South Africa's history, but rather that it is a means to other ends like social justice. Post-apartheid South Africa demonstrates the extent to which the rule of law is different from and indeed depends upon a culture of legality. On the contradictory nature of the rule of law, see BZ Tamanaha *On the rule of law: History, politics, theory* (2004).

10 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Minister of Health v Treatment Action Campaign (No 1)* 2002 (5) SA 703 (CC). Davis (n 7 above) 287ff, argues that these early cases were relatively easy to decide.

he allegedly responded, too soon to tell. South Africa remains one of the most unequal societies in the world. According to the World Bank, in 2009 the top 10 per cent of the population owned more than half the wealth of the country.[11] Approximately one in four adults are unemployed and protests against poor service delivery are common.[12] The extent to which the Constitution has facilitated the correction of the historical wrongs of apartheid and thereby permanently transformed South African society is thus debatable but the Constitutional Court's jurisprudence has demonstrated some of the possibilities of transformative constitutionalism.

It is nevertheless possible to draw some provisional conclusions. First, the Constitutional Court has rigorously defended the rule of law and promoted the development of a culture of legality in a country beset by crime and corruption, sometimes in the face of ferocious criticism from the ruling African National Congress. Second, it has decisively transformed debates about the nature, justiciability, adjudication and enforcement of socio-economic rights.[13]

Despite continuing but mercifully declining resistance, debates about human rights have been rescued from sterile assertions that socio-economic rights are too different to civil and political rights (to which they are subordinate) to be similarly justiciable. Third, in doing so, the Court has also reshaped debates about the indivisibility and universality of rights whose realisation remains overwhelmingly contingent upon the jurisdiction in which they are claimed. The main focus of this chapter is on the problem of universality and its main argument is that the Constitutional Court's jurisprudence has opened up the transformative possibility that socio-economic rights can be claimed by citizens and foreigners alike.

11 World Bank '?': http://data.worldbank.org/indicat-or/SI.POV.GINI link doesn't exist, please provide a title of document (accessed 28 March 2013). According to official statistics the unemployment rate in the third quarter of 2012 was 25.5% – http://www. statssa.gov.za/keyindicators/keyindicators.asp (accessed 27 March 2013) – but it is widely accepted that the actual figure is far higher. On protests, see for example P de Wet 'Why SA is burning: Power to the people still a pipe dream' *Mail & Guardian* 23 March 2012 http:// mg.co.za/article/2012-03-23-power-to-the-people-still-a-pipe-dream (accessed 25 March 2013).

12 The *Mail & Guardian* published details of a 2006 report on the impoverishment of miners working for Lonmin. 'Lonmin mining communities: A powder keg of inequality' *Mail & Guardian* 27 August 2012 http://mg.co.za/article/2012-08-27-lonmin-mining-communities-a-powder-keg-of-inequality (accessed 28 August 2012). 'Researchers found that as many as 9.6% of the households across all the communities sometimes run out of food, while 7.5% reported that they always lack clean drinking water. A combined 77.3% reported living without cash income "always or sometimes"'. The miners were demanding a wage increase from 4,000 rand (£306) to 12,500 rand a month. In 2011, Lonmin's chief executive earned £1.2 million in pay and bonuses. R Neate 'Lonmin mine in South Africa hit by fresh violence' *The Guardian* 27 August 2012: http://www.guardian.co.uk/business/2012/aug/27/lonmin-mine-south-africa-violence?newsfeed=true (accessed 28 August 2012).

13 See D Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007); M Baderin & R McCorquodale (eds) *Economic, social and cultural rights in action* (2007), M Ssenyonjo *Economic, social and cultural and social rights in international law* (2009); KG Young *Constituting economic and social rights* (2012); and P O'Connell *Vindicating socio-economic rights: International standards and comparative experiences* (2012).

Liberal constitutional theory tends to regard constitutions as settled, stable and, in countries like the United States, as almost sacred. The pouvoir constituant finds its origin and (often retrospective) justification in foundational manifestations of the power of the people to speak law to themselves (jurisdiction) distilled in documents redolent with mythical representations of national aspiration and identity.[14] In reality, the meaning of constitutions is never constatively settled because, as Jacques Derrida points out, it is modified by every decision or iteration. Constitutions may not be absolutely indeterminate but there is an inescapable element of provisionality and undecidability in their performative manifestations as judicial decisions.[15] The possibilities of transformative constitutionalism flows from this characteristic, which is the source of progressive potentialities rather than a problem. It is in this sense that Derrida discerns the possibilities of democracy and justice that are deferred and 'to come' precisely because they are not set in stone. Derrida rejects the idea that the law emerges from a foundational pact and argues that it always exceeds its constitutional origins. The identity of democracy is never present, unrepresentable, uninterpretable, and always to come.[16]

2 International law on socio-economic rights

According to the Vienna Declaration, 'human rights are universal, indivisible and interdependent and interrelated'.[17] Whereas negative civil and political rights are generally viewed as a universal duty (even though they are widely violated), it is commonly accepted that the enforcement of positive socio-economic rights is a state prerogative. For this reason, socio-economic rights are rarely extended to foreigners despite the requirement that they should be applied in a non-discriminatory fashion. The UN Committee on Economic, Social and Cultural Rights (CESR) states that the prohibition on discrimination is an obligation of immediate effect within the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[18] Non-nationals are generally not entitled to the benefit of certain socio-economic rights even

14 See A Kalyvas 'Popular sovereignty, democracy, and the constituent power' (2005) 12 *Constellations* 223.

15 J Derrida 'Declarations of Independence' in J Derrida *Negotiations: Interventions and Interviews, 1971-2001* (2002) 46-54. The fact that this discussion focuses exclusively on adjudication should not be taken as implying that constitutional interpretation is confined to judges since every decision made by a police officer, for example, is also constitutionally performative.

16 G Jacobsohn *Constitutional identity* (2010) argues that a constitutional text is different to a nation's constitution, which includes not only the text but its legal institutions and historical understandings about its legal and political systems.

17 *Vienna Declaration and Programme of Action,* sec 1 para 5, UN General Assembly, 12 July 1993, A/CONF.157/23, available at http://www.unhcr.org/refworld/docid/3ae6b39ec.html (accessed 31 March 2013).

19 GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967). At the time of writing South Africa had signed but not ratified the Covenant. See also the Limburg Principles, Principles 13, 22 and 35-41 (UN doc. E/CN.4/1987/17) and the Maastricht Guidelines, Guidelines 11, 12 and 14(a) which have been

if they have legally recognised permanent residents. The primary reason advanced in support of this distinction is that more state resources are generally required to implement socio-economic rights.[19] However, the European Court of Human Rights has held that national origin is not a sufficient basis for withholding social security and social assistance benefits. In *Gaygusuz v Austria*,[20] the Court decided that treating nationals and non-nationals differently in terms of eligibility for a contributory emergency assistance scheme was discriminatory because it was not based on a reasonable and objective justification. In *Koua Poirrez v France*, the Court held that refusing a non-contributory allowance to a disabled person on the basis of national origin was unjustified, discriminatory and a violation of the right to property.[21]

Such cases are notable for their comparative rareness because courts tend to defer to state assertions that non-nationals should not be eligible for social security benefits.[22] For example, in 2009 Brazil's apex court, the Supreme Federal Tribunal, upheld a *Recurso Extraordinario* (extraordinary appeal) by the National Social Security Institute (INSS) against the judgment of a lower court that foreigners had the right to a Continuous Cash Benefit (BPC-LOAS).[23] Under the basic income law, Brazilian citizens and foreigners resident in the country for at least five years have the right to receive an annual cash benefit, regardless of their socio-economic status. The amount of the benefit must be the same for everyone and sufficient to cover minimum individual expenditure on food, education and healthcare.[24]

The Constitutional provision establishing a small benefit for those who cannot maintain themselves and who are elderly or disabled refers to citizens, but makes no mention of non-nationals. The lower court had decided that the Brazilian Constitution did not restrict the benefit to nationals alone. All that was required under the law was an assessment of the degree of penury suffered by claimants. The INSS interpreted the provision to

extensively used by the CESR to interpret the ICESCR. Article 26 of the International Covenant on Civil and Political Rights makes the equal protection principle applicable to all legislation regardless of its substantive content.

19 Apart from very significant civil and political rights like the right to a fair trial, which presupposes a competent police force, prosecutors, courts and, where necessary, legal aid.

20 (39/1995/545/631) ECHR 23 May 1996.

21 (40892/98) ECHR 30 September 2003 paras 46-50; see also *Gaygusuv* paras 46-52.

22 The following fundamental rights in the Indian Constitution are available to citizens and non-citizens: art 14 (right to equality); art 15(1) (right of non-discrimination on grounds only of religion, race, caste, sex, place of birth or any one of them); art 20 (protection in respect of conviction of offences); art 21 (protection of life and personal liberty); art 22 (protection against arrest and detention); and art 25 (freedom of conscience and the right to profess, practice and propagate religion).

23 Rebound General Report No 586.970-4/SP.

24 T Britto & FV Soares 'Bolsa famÍlia and the citizen's basic income: A misstep?' International Policy Centre for Inclusive Growth (IPC – IG) Working Paper 77, January 2011 5.

exclude foreigners.[25] It argued that nationals and non-nationals are not in similar situations and thus there is no logical reason to extend the benefit to foreigners. In addition, it pronounced that rights that the law guarantees for Brazilian citizens (Article 1 of Law 8.742/93 c/c art. 7 of Decree 6.214/2007) cannot be extended to foreigners. The Tribunal held that the ambit of the right had implications for Brazilian society as a whole and even the international community because of the economic repercussions on the exchequer of the large number of social security benefits.[26] It took the view that Brazil does not have sufficient resources to sustain the needs of Brazilians and foreigners resident in the country. Arguing that the ambit of the right must be determined by the letter of the law rather than judicial discretion, the Supreme Federal Tribunal effectively decided against the universality of the right.

In contrast, in *Khosa v Minister of Social Development* the South African Constitutional Court gave substance to the idea of universality in holding that social assistance should be granted to permanent residents as well as citizens.[27] The applicants were indigent Mozambican citizens permanently resident in South Africa since 1980. They were refused social assistance grants on the basis that the Social Assistance Act[28] limited the entitlement to social grants for the aged to South African citizens and that this precluded the children of non-citizens from claiming any of the childcare grants available to South African children (regardless of the citizenship of the children themselves). The applicants brought the action on behalf of their children and all permanent residents in South Africa. They alleged discrimination on the basis of national origin and contended that the provisions of the act infringed the constitutional right of everyone to social assistance.[29] The applicants were destitute and satisfied the criteria for the benefits apart from citizenship.

Upholding the applicants' claim, the Court rejected the state's argument that the exclusion was temporary because they could apply for citizenship by naturalisation after five years. Writing for the majority, Mokgoro J rejected this as a manifestation of the social contract assumption (or what we might

25 The Brazilian Social Assistance Pension (BPC) was introduced in Article 2 of the Social Assistance Act (LOAS, Act 8.742) in December 1993, consistent with the Constitution promulgated on 5 October 1988 following the military dictatorship. All citizens would be entitled to social security comprising a combination of social provision, social assistance and health protection.

26 I am grateful to my colleague George Meszaros for his assistance in interpreting this judgment which is available at http://www.agu.gov.br/sistemas/site/TemplateTexto.aspx?idConteudo=101479&id_site=1116 (accessed 20 March 2013).

27 *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC).
Liebenberg (n 1 above) 483 argues that 'the classic liberal dichotomy between negative and positive rights and the privileging of negative constitutionalism cannot be sustained given the text and context of the Constitution'. See also 'Writing post-liberal human rights' in Baxi (Chapter 1, 5.2, above).

28 Act 59 of 1992.

29 Section 27(1)(*c*) read with (2) and the right against unfair discrimination (s 9(3)).

term the Westphalian assumption) common in American jurisprudence whereby social benefits and assistance are reserved for citizens. She noted that naturalisation was not a foregone conclusion.[30] She emphasised the interdependence and interconnectedness of rights and observed that the right to equality was implicit in the entitlement of everyone to have access to social security under section 27 of the Constitution:

> Given that the Constitution expressly provides that the Bill of Rights enshrines the rights of 'all people in our country', and in the absence of any indication that the section 27(1) right is to be restricted to citizens as in other provisions in the Bill of Rights, the word 'everyone' in this section cannot be construed as referring only to 'citizens'.[31]

Mokgoro J stated that compliance with other constitutional rights affected by a socio-economic right are important in evaluating whether the measures taken by the state in fulfilling the socio-economic right are reasonable within the meaning of section 27(2). The judgment stated that permanent residents are people who have made their homes in South Africa and become members of its society, and their exclusion from the legislative scheme therefore amounted to unfair discrimination in violation of section 9(3) of the Constitution. It held that the scheme's exclusion of permanent residents did not satisfy the reasonableness test in section 27(2).[32] It decided that the importance of providing access to social assistance to all permanent residents and the negative impact upon life and dignity that a denial of such access would have far outweighed the financial and immigration considerations on which the state relied.[33]

The Court confirmed that the exclusion of children from access to these grants amounted to unfair discrimination on the basis of their parents' nationality and that 'the denial of support in such circumstances to children in need trenches upon their rights under section 28(1)(c)'. It ordered that the relevant legislative provisions be read as though the words 'or permanent resident' appeared after 'citizen'. The Legal Resources Centre, which brought

30 *Khosa* para 57.
31 *Khosa* para 47.
Section 27 provides:
(1) Everyone has the right to have access to –
(a) health care services, including reproductive health care;
(b) sufficient food and water; and
(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
(3) No one may be refused emergency medical treatment.
32 *Khosa* paras 48-49.
33 *Khosa* para 78.

the case, estimated that a quarter of a million people were affected by the judgment.[34]

The rights of non-nationals was also at issue in *Union of Refugee Women v The Director: Private Security Industry Regulatory Authority*, a case which concerned refugees whose registrations as security service providers had been refused or withdrawn by the Private Security Industry Regulatory Authority because they were neither citizens nor permanent residents as required by section 23 of the Private Security Industry Regulation Act 56 of 2001.[35] By six votes to four, the Court rejected the argument that legislation which prevented non-citizens or permanent residents from working in the security industry constituted unfair discrimination against refugees. Writing for the majority, Acting Justice Kondile confirmed that, although refugees are a vulnerable group it was acceptable for the law to place an extra burden on them to demonstrate their trustworthiness. The Court held that the Act was narrowly targeted at the security industry, which could be exempted because public safety was involved, and therefore did not impose a blanket ban on refugees seeking employment and. This did not mean that foreign nationals are inherently less trustworthy than citizens or permanent residents or that the authority does not trust refugees but rather that it is easier for the latter to prove their trustworthiness.

The minority opinion (written by Justices Mokgoro and O'Regan) argued that the effect of the legislation was to send a signal that refugees are less trustworthy than South African citizens or permanent residents and were therefore not entitled to equal concern and respect. They argued that excluding refugees from the right to work as in the private security industry simply because they were refugees could foster a climate of xenophobia that would be harmful to refugees and inconsistent with the overall vision of South Africa's Constitution.[36]

The Court referred to its judgment in *Harksen v Lane NO*, in which it established the criterion subsequently used to evaluate potentially discriminatory measures: That there

34 The legislation at issue in *Khosa* has since been repealed and replaced by the Social Assistance Act of 2004. The new Act does not incorporate the Constitutional Court's 'reading in' of 'permanent residents' in *Khosa* and thus ostensibly reverts to the status quo ante although it incorporates a ministerial discretion which may be employed to bring permanent residents within the protection of the Act.

35 2007 (4) BCLR 339 (CC). The Act precludes the employment of refugees regardless of whether they are in possession of a valid refugee identity document.

36 The minority judgment states that refugees have a status closer to that of permanent residents than that of other non-citizens who are not living permanently in South Africa, such as people holding work permits. Like permanent residents, refugees have an indefinite right to remain in South Africa. They have been formally recognised as refugees and are generally not in a position to return to their countries of origin. The Court stated that although it is true that refugees can work in other industries, there is evidence that the security industry has been a significant source of employment for them because it requires relatively low skills. Exclusion from work in the security industry is therefore not negligible and may have a severe impact on the ability of refugees to earn a livelihood in South Africa (paras 113-114).

> will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.[37]

In that case, the Court held that refugees are a vulnerable group because 'they have had to flee their homeland because of a well-founded fear of persecution or owing to the fact that external aggression or other events have so disrupted their lives that they need to flee'.[38]

The *Union of Refugee Women* case highlighted the difficulties refugees face in verifying qualifications or criminal records and the consequences this has for employment opportunities. In the minority judgment, Sachs J argued that:

> The positive obligation to admit refugees, provide them with asylum and treat them in accordance with specific standards, thus contrasts sharply with the absence of a mandatory obligation to admit foreigners to the state's territory. It would accordingly be inappropriate for the state to act towards refugees in a manner that is consonant with the general discretionary provisions of the regime constructed upon immigration, security, and other municipal priorities, while ignoring the specific obligations that flow from the refugee regime.[39]

He further argued that:

> The culture of providing hospitality to bereft strangers seeking a fresh and secure life for themselves is not something new in our country. As Professor Hammond-Tooke has pointed out,[40] in traditional society – '… the hospitality universally enjoined towards strangers, [is] captured in the Xhosa proverb *Unyawo alunompumlo* (the foot has no nose). Strangers, being isolated from their kin, and thus defenceless, were particularly under the protection of the chief and were accorded special privileges'.[41]

Evoking the concept of *ubuntu*, Sachs J invoked the concept of human interdependence and burden-sharing in relation to catastrophe is associated with the spirit of *ubuntu-botho*, which is

> part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.[42]

37 1997 (11) BCLR 1489 (CC) para 47.
38 Para 113. The relevant international law is the UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol 189, 137, available at: http://www.refworld.org/docid/3be01b964.html (accessed 18 March 2013).
39 Para 136.
40 WD Hammond-Tooke *The roots of black South Africa* (1993) 99.
41 Para 145.
42 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37.

Finally, in *Larbi-Odam v Member of the Executive Council for Education (North-West Province)*, the Constitutional Court considered the equality clause in the Bill of Rights in relation to the terms and conditions of temporary teachers who were non-citizens.[43] The relevant regulation excluded non-citizens from permanent employment as teachers.[44] The significance of the case lies in the way in which the Court interpreted the equality clause, section 8(2). It noted that citizenship was not a listed ground of prohibited discrimination in the Constitution but nevertheless held that distinctions on the basis of citizenship could be discriminatory. It reaffirmed its earlier view that the clause would be breached if discrimination resulted in people being treated differently in ways that impaired their fundamental dignity as human beings. In this case, the disadvantaged group were non-citizens and, since citizenship is not a specified ground, the regulation was not a justifiable limitation of the right to work. Mokgoro J noted that the general lack of control over one's citizenship had particular resonance in South Africa, where citizens had been deprived of rights or benefits on the basis of race and many became second-class citizens or statutory foreigners in their own country under the apartheid regime's Bantustan policy that created the oxymoronic of 'foreign natives' in its vain attempt to dispossess the native population.[45] The resonance of Arendt's analysis of Nazism could hardly be clearer. Employment should be open to permanent residents and South African citizens on an equal basis. The Court did not decide whether the regulation was unfair to temporary residents, whose position in South Africa is precarious. They are not entitled to reside or to work for periods longer than those specified in their residency permits. However, the Court did note that the regulation enabled them to be disadvantaged to a greater degree than was required by their residence permits with respect to job security and other employment benefits. In light of this, the Court invalidated the regulation in its entirety.

The Court stated:

> In terms of socio-economic rights, illegally present immigrants or migrants should not be denied emergency medical treatment nor should their children be punished for the misdeeds of their parents by denying them access to temporary schooling. All other social welfare benefits must be restricted to South African citizens and permanent residents.[46]

How might the reasonable test be applied to the Zimbabwean refugees fleeing the cholera pandemic? How far can the rights under this section be extended beyond permanent residents to those temporarily and illegally in South Africa, and on what basis? Read in juxtaposition with *Khosa*, section 27 implies a constitutional right to emergency medical treatment irrespective of

43 1997 (12) BCLR 1655 (CC).
44 Regulation 2(2) of regulations dealing with the terms and conditions of employment of educators (GN R1743 of November 1995).
45 Para 9.
46 Para 3.2.4.

citizenship that extends beyond humanitarian obligation and the right to hospitality.

Thus far, the stance of the South African Constitutional Court has generally been progressive. Its instinct has been to extend socio-economic rights to non-citizens as *Khosa* demonstrates. Cases like the *Union of Women Refugees* demonstrate the difficulty of balancing the cosmopolitan impulse to extend socio-economic rights to non-citizens with a recognition that liberal constitutionalism requires deference to the state in the distribution of limited resources. As Liebenberg puts it:

> The normative and institutional framework created by the South African Constitution is conducive to creating a legal system which is responsive to social and economic disadvantage and marginalisation. However, the potential of adjudication to support fundamental social and legal reforms based on constitutional rights and values is constrained by the lingering influence of many of the features of classic liberal legal culture …[47]

3 Civic rights, human rights and universality

These cases reaffirm the fact that claims that human rights are universal, empirically untrue and philosophically unsound.[48] The idea that we have human rights by virtue of our humanity and that they are as inherent and inalienable as our genome is attractive but does not satisfactorily explain why such rights are overwhelmingly contingent upon sovereign imprimatur.[49] Socio-economic rights generally require more time and state resources for their progressive realisation but this should not mean that they should be treated as civic rights rather than universal human rights – a viewpoint symptomatic of a narrow, reactionary conception that continues to privilege civil and political rights despite the experiences of Brazil, India and South Africa.[50] The evidence of the justiciability of socio-economic rights in these countries suggests that it is better to conceive human rights as universalisable rather than as *ipso facto* universal. In other words, we might argue that

47 Liebenberg (n 1 above) 483.

48 See J Waldron (ed) *'Nonsense upon stilts': Bentham, Burke and Marx on the Rights of Man* (1987).

49 I address the problem of sovereignty's relationship to human rights at greater length in 'Cosmopolitan sovereignty' in CM Bailliet & K Franko Aas (eds) *Cosmopolitan justice and its discontents* (2011).

50 The United States remains stubbornly antagonistic towards socio-economic rights: 'At best, economic, social and cultural rights are goals that can only be achieved progressively, not guarantees. Therefore, while access to food, health services and quality education are at the top of any list of development goals, to speak of them as rights turns the citizens of developing countries into objects of development rather than subjects in control of their own destiny' Comments submitted by the United States of America, *Report of the Open-Ended Working Group on the Right to Development*, UN ESCOR, Commission on Human Rights, 57th Session, UN doc E/CN.4/2001/26 (2001) para 8. The US is the only developed country that has not ratified the Covenant on Economic, Social and Cultural Rights; see http://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty (accessed 1 April 2013).

human rights comprise a specific set of rights that should apply to all individuals in all places while recognising that this is a goal rather than a description of an existing state of affairs. Moreover, it is precisely the barriers that a sovereign prerogative erects that need to be overcome in order to achieve this.

The principle of sovereignty is so deeply entrenched in the architecture of the contemporary legal and political order and seems so natural and inevitable that its contradictory role in protecting and denying rights is taken as given. Sovereignty was the fundamental organising principle of the international system in the three centuries between the Peace of Westphalia in 1648 and the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. The UDHR paradoxically made sovereign states the guarantors of rights they had regularly and systematically violated but nonetheless proffered the possibility of an alternative, cosmopolitan linchpin to undergird international law. In fact, an unresolved contradiction was locked into place at the centre of the postwar international legal system. In 1945, the UN Charter referred to human rights in passing while reaffirming the centrality of sovereignty; three years later, the UDHR delineated universal human rights in a declaration that acknowledges the central role of sovereign states. Universality is the *sine qua non* of human rights: If they are not universal, they are nothing. However, it is difficult to justify a conception of universality that depends on the willingness of sovereign states to make human rights justiciable and enforceable.

The past 65 years have witnessed halting progress towards protecting human rights by circumscribing sovereign immunity and impunity, from the Nuremberg Tribunal via the Pinochet cases to the increasingly problematic International Criminal Court. Unsurprisingly, sovereignty is more universally adhered to than ostensibly universal human rights, leading Richard Falk to observe that 'the power of rights, although a much more potent reality than would have seemed likely a century ago, is still no match for the rights of power in a variety of settings', not least the sovereign nation state.[51]

As such, sovereign prerogative continues to define the parameters of citizenship, which is necessarily characterised by inclusion in membership of a nation-state or exclusion from it. The continuing imbalance between sovereign power and human rights ensures that the relatively arbitrary category of citizenship is regularly the decisive determinant of a person's rights. Where one is born matters a great deal. The UN Department of Economic and Social Affairs estimated that there were approximately 214 million migrants worldwide in 2010.[52] The 2008-09 South African Police Service annual report suggested that there could be as many as six million

51 R Falk *Achieving human rights* (2009) 25.

53 There were approximately 11.5 illegal immigrants in the United States in 2012, all of whom were rightless to some extent. UN Department of Economic and Social Affairs: http://

undocumented foreigners in the country and the Department for Home Affairs admitted that it had no clear idea of the actual figure.[53]

It is widely if not universally accepted that no one should arbitrarily be deprived of civil and political rights like freedom of speech, conscience, religion or the right to a fair trial regardless of whether they are a citizen of the state in which they are present. A notable exception is the right to vote, but a right so tightly linked to social contract theory and Westphalian sovereignty is being reshaped in countries like Germany, where citizens of other EU member states can vote in local elections in Germany,[54] and the United Kingdom, where citizens of Commonwealth states can vote in local and general elections.[55]

Access to socio-economic rights in the European Union is contingent in the first instance on distinguishing between legally resident non-citizens like permanent residents, and those illegally in a country. In some jurisdictions legal but temporary residents may be entitled to health care and education but not social security, or to housing but not unemployment benefits. The partial enforcement of putatively universal human rights raises the question of what level of hospitality is owed to the stranger in our midst, the alien 'other', the refugee or asylum seeker and the legal denizen? Who is entitled to what rights in which places and on what bases? This question also resonates strongly in South Africa following widespread xenophobia in 2008.[56]

4 Citizenship in flux

Saskia Sassen argues that '[f]ew, if any, modern institutions are as emblematic of rights as citizenship'. It is generally treated as a formal legal institution, but it is a (deliberately) incomplete conception that has changed throughout history, and it is this incompleteness in which the possibility resides 'for a highly-formalised institution to accommodate change – more precisely, to accommodate the possibility of responding to change without sacrificing its formal status'.[57] It is the primary legal mechanism of inclusion

esa.un.org/migration/p2k0data.asp (accessed 27 March 2013); J Preston 'Illegal immigrants number 11.5 million' *New York Times* 24 March 2012 http://www.nytimes.com/2012/03/24/us/illegal-immigrants-number-11-5-million.html?_r=0 (accessed 27 March 2013).

53 'Home affairs in the dark about number of illegal immigrants' *Mail & Guardian* 13 November 2009 http://mg.co.za/article/2009-11-13-home-affairs-in-the-dark-about-number-of-illegal-immigrants (accessed 27 March 2013).

54 S Benhabib *The rights of others: Aliens, residents, and citizens* (2004) 202ff.

55 The 1992 Maastricht Treaty extended reciprocal voting rights that already existed for European elections to local elections.

56 See M Neocosmos *From foreign natives to native foreigners. Explaining xenophobia in post-apartheid South Africa* (2010).

57 S Sassen *Territory, authority, rights: From medieval to global assemblages* (2006) 277. See also S Sassen 'The repositioning of citizenship' in A Brysk & G Shafir (eds) *People out of place: Globalisation, human rights, and the citizenship gap* (2004).

and exclusion,[58] of deciding membership of both actual and what Benedict Anderson described as 'imagined communities' – fictive and fateful communities which, bound up with race or nation, result in genocide, xenophobia and the denial of rights.[59] The form, content and even perhaps the idea of citizenship are in flux as migration increases throughout the world, but the right to grant or withhold it remains a fundamental sovereign right. On the one hand, sovereignty has been viewed as a declining or attenuated power and variously described as being decentred and deterritorialised, disaggregated, split or shared due to the impacts of globalisation and the emergence of regional supranational entities like the European Union.[60] On the other hand, sovereignty has been resurgent since 11 September 2001, with states like China and the United States tenaciously cleaving to Westphalian principles like non-interference in the internal affairs of other sovereign states that have always been empirically dubious. Sovereignty presents us with the conundrum of a power that perdures while in perpetual decay.

States have the sovereign right to determine citizenship under the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws. The idea of citizenship as exclusive allegiance to a territorially delineated entity reached its peak with the consolidation of the modern nation-state in the middle of the nineteenth century and its nadir with the Holocaust. Whereas the racial politics of Nazism were predicated upon the production of otherness that is a precondition for citizenship and unfolded through a series of limitations on it, increasing migration stimulated by capitalist globalisation destabilises citizenship in different and sometimes potentially positive ways.[61] Because rights are largely contingent upon membership of a political community, the 'citizenship gap' identified by Brysk and Shafir means that the rights of non-citizens and 'second class citizens' are almost always at risk. They argue that globalisation creates this gap but also furthers the import and spread of the rights that potentially may close it.[62]

Examining the interrelationships between citizenship, nationality and sovereignty on the one hand and legality and recognition on the other, Sassen argues that citizenship is becoming denationalised.[63] Although it is conceived 'and experienced as a unitary institution, [it] actually describes a number of discrete but connected components in the relation between the individual

58 R Walker 'After the future: Enclosures, connections, politics' in R Falk *et al* (eds) *Reframing the international: Law, culture, politics* (2002) 20.

59 B Anderson *Imagined communities: Reflections on the origin and spread of nationalism* (2006). Race, gender, caste, sexual orientation, religion are other axes of discrimination that undermine the ideal of equal citizenship.

60 See S Sassen *The global city: New York, London, Tokyo* (1991); S Sassen *Losing control? Sovereignty in an age of globalization* (1996); S Sassen *Globalization and its discontents* (1998); S Sassen 'The state and globalization: Denationalized participation' (2004) 25 *Michigan Journal of International Law* 1141.

61 Sassen *Territory, authority, rights* (n 57 above) 283.

62 Brysk & Shafir (n 57 above) 6.

63 Sassen title *Territory, authority, rights* (n 57 above) 294.

and the polity'.[64] Equal citizenship is a relatively recent phenomenon that remains unfulfilled because other forms of discrimination like gender, race and poverty mitigate against full participation. Changes to formal citizenship manifested in multiple interactions between legality and recognition are invariably the result of the struggles of those formally excluded from it.

> One the one hand, we can identify a type of informal citizen who is unauthorised yet recognised, as might be the case with undocumented immigrants who are long-term residents in a community and participate in it as citizens do. On the other hand, we can identify a formal citizen who is fully authorised yet not fully recognised, as might be the case with minoritised citizens and subjects engaging in political work even though they do so not as 'citizens', but as some other kind of subject, for example, as mothers.[65]

In short, citizenship is gradually detached from the territory of sovereign states due to changing patterns of labour markets and migration, the emergence of a global civil society and the aterritoriality of global markets. Citizenship has been conceived as 'legal status, possession of rights, as political activity, and as a form of collective identity and sentiment' or as cultural citizenship or economic citizenship – none of which are necessarily nation state-based.[66] Describing citizenship in formal legal terms is misleading because law cannot adequately capture the significance of identity in post-national citizenship. Sassen discerns the new possibility of formalisations of citizenship status and rights 'that might contribute to a partial denationalising of certain features of citizenship ... changes that might still use the national frame yet are in fact altering the meaning of that frame'.[67]

Since human rights are created in the struggle of the rightless,[68] existing conceptions of citizenship can be challenged and partially transformed by excluded non-citizens as 'the grip of the nation state on questions of identity and membership is weakened by major social, economic, political and subjective trends'.[69] Perceiving migratory flows across their borders as a challenge to their sovereign power to define citizenship through inclusion and exclusion, some states have responded by erecting physical barriers – for example the fence erected by the United States along its border with Mexico. As Wendy Brown contends, immigration policies are seldom untainted by xenophobia, and these barriers are therefore constructed to intercept

> not merely the would-be suicide bomber, but immigrant hordes; not merely violence to the nation, but imagined dilution of national identity through transformed ethnicized or racial demographics; not merely illegal entrance, but

64 Sassen *Territory, authority, rights* (n 57 above) 291.
65 Sassen *Territory, authority, rights* (n 57 above) 294.
66 Sassen *Territory, authority, rights* (n 57 above) 287.
67 Sassen *Territory, authority, rights* (n 57 above) 287-288.
68 On the immanance of human rights, see U Baxi *The future of human rights* 2nd ed (2006) and B de Sousa Santos *Toward a new legal common sense* (2002).
69 Sassen *Territory, authority, rights* (n 57 above) 290.

> unsustainable pressure on national economies that have ceased to be national or on welfare states that have largely abandoned substantive welfare functions.[70]

5 Hospitality

What, then, are the obligations owed to non-citizens and to what extent should such obligations take the form of socio-economic rights? Cosmopolitan thinking is predicated on the idea of global citizenship based on inherent, inalienable and universal rights.[71] Seyla Benhabib's propounds a neo-Kantian argument for the achievement of liberal cosmopolitanism through the gradual incorporation of human rights norms in constitutions or domestic legislation. She postulates a 'project of mediations' or a process of 'democratic iteration' through a 'jurisgenerative politics' that succeeds in turning cosmopolitan norms into positive law.[72] It will thus be possible to construct an international order in which sovereignty will be reconciled with human rights through the gradual subordination of domestic law to the ethically higher form of legality provided by cosmopolitanism. The resultant *nomos* will comprise a superior form of positive law because it will be consistent with Kant's idea of world citizenship in a federation of republican states.[73] Kant viewed hospitality not as altruism, kindness or generosity but as part of the categorical imperative to treat others as ends rather than means. Refusing a right of temporary residence is tantamount to the stranger at the gate. For Benhabib, hospitality refers to all meta-national human rights claims, leading her to argue that it is a right that

> occupies that space between human rights and civil and political rights, between the rights of humanity in our person and the rights that accrue to us insofar as we are citizens of specific republics', a right that 'expresses the dilemmas of a republican cosmopolitan order in a nutshell: how to create quasi-legally-binding obligations through voluntary commitments and in the absence of an overwhelming sovereign power with the ultimate right of enforcement.[74]

She acknowledges sovereignty as the biggest impediment to cosmopolitan citizenship:

> as long as territorially-bounded states are recognised as the sole legitimate units of negotiation and representation, a tension, and at times even a fatal

70 W Brown *Walled states, waning sovereignty* (2010) 82.

71 From the voluminous literature, see for example D Held 'Reframing global governance: Apocalypse soon or reform!' and W Kymlicka 'Citizenship in an era of globalization' in GW Brown & D Held (eds) *The cosmpolitan reader* (2010). On contemporary cosmopolitanism, see R Fine 'Taking the "ism" out of cosmopolitanism: An essay in reconstruction' (2003) 6 *European Journal of Social Theory* 451.

72 S Benhabib *Another cosmopolitanism* (2006) 20.

73 The paradox, if not the aporia, of human rights is that, despite (to paraphrase Kantorowicz's analysis of sovereignty and the king's two bodies) the transcendent whiff of incense in which they are shrouded, they are ultimately entirely immanent and positive, the always provisional outcome of a process of continuous negotiation; and the better for it.

74 Benhabib (n 72 above) 22-23.

> contradiction, is palpable: the modern state system is caught between *sovereignty* and *hospitality*, between the prerogative to choose to be a party to cosmopolitan norms and human rights treaties, and the obligation to extend recognition of these human rights to all'.[75]

She regards this dilemma as more acute for liberal democracies that are trapped between constitutional universalism and territorial sovereignty. There is a latent tension symbolised by the dichotomy denizen-citizen arising from the fact that the former is bound by laws made by representatives whom she has not elected – although resident in the *polis*, she is not part of the *demos*. But the problem of citizenship as inclusion and exclusion is deeper in that membership of the nation-state has been the primary basis on which the foreigner is constructed as other.[76]

For Jacques Derrida, this gives rise to an alien universalism in which

> the foreigner who, inept at speaking the language, always risks being without defence before the law of the country that welcomes or expels him; the foreigner who is first of all foreign to the legal language in which the duty of hospitality is formulated, the right to asylum, its limits, norms, policing, etc. He has to ask for hospitality in a language which by definition is not his own …[77]

To the refugee, sovereign and foreign are two sides of the same coin. Derrida views hospitality as an altogether different beast 'belonging to two, discontinuous and radically heterogeneous orders, conditional and unconditional, whose conflict and asymmetrical necessity render ethical-political life (im)possible'.[78] He argues that if

> the two meanings of hospitality remain mutually irreducible, it is always in the name of pure and hyperbolic hospitality that it is necessary, in order to render it as effective as possible, to invent the best arrangements [dispositions], the least bad conditions, the most just legislation.[79]

Hospitality is haunted by the spectre of its opposite, hostility to the stranger at the gate. Unconditional hospitality implies an open-ended, limitless welcome and giving that ultimately undermines the capacity to host another – it endangers and potentially dispossesses the host as well as the supplicant.[80] Conditional hospitality, acknowledging the finite nature of resources and responds to specific claims, 'belongs to the order of laws, rules and norms – whether ethical, juridical, or political – at a national or international level'.[81] As Honig puts it:

75 Benhabib (n 72 above) 31 (emphasis in original).
76 The classical discussion of the construction of otherness is found in EW Said *Orientalism* (1978).
77 J Derrida *Of hospitality: Anne Dufourmantelle invites Jacques Derrida to respond* (2000) 15.
78 B Honig 'Another cosmopolitanism? Law and politics in the New Europe' in Benhabib (n 72 above) 105.
79 J Derrida *Rogues: Two essays on reason* (2005) 6.
80 Derrida (n 77 above) 25-27.
81 Derrida (n 77 above) 173.

> Those who claim a right to hospitality position their hosts inevitably in an ambiguous and undecidable terrain marked by both hospitality and hostility. The undecideability of host/hostility and its ethico-political implications are erased, not captured, by an analysis like Benhabib's that insistently identifies hostility with one singular principle – ethnos, or republican self-determination, or state nationalism – and hospitality with another that is distinct and apart – Enlightenment universalism.[82]

6 Citizenship rights, human rights and bare life

Benhabib's advocacy of cosmopolitanism is designed to address the problem identified by Hannah Arendt in *The Origins of Totalitarianism*, that the Rights of Man proved chimerical in the moment in which they were most needed: in Nazi Germany. Arendt argued that 'Human dignity needs a new guarantee which can be found only in a new political principle, in a new law on earth, whose validity this time must comprehend the whole of humanity while its power must remain strictly limited, rooted in and controlled by newly defined territorial entities'.[83] She called for an 'unconditional order of rights'[84] in which everyone has the 'right to rights'.[85] As Honig acutely observes, this demand is a double gesture: At once a repudiation of particular orders of rights and a demand that everyone should have the 'right' to belong to such an order.

> A double gesture is necessary because, paradoxically, we need rights because we cannot trust the political communities to which we belong to treat us with dignity and respect; however, we depend for our rights on those very same political communities.[86]

Craven notes Arendt's warning that

> the advancement of human rights might justify processes of exclusion and dispossession at precisely the same moment at which it opposes them, retains considerable force for the contemporary ESC rights project, particularly when the latter is framed in territorial terms.[87]

In the 1930s, fascism's assault on human rights proceeded by declaring its victims to be different, then lesser, and finally so alien that they could not be citizens – resulting in the production of human beings without rights and undermining the idea of universality. It is for this reason that the refugee, the

82 Honig (n 78 above) 106 (emphasis in original).
83 H Arendt *The origins of totalitarianism* (1973) ix.
84 Honig (n 78 above) 107.
85 Space precludes a fuller discussion of this problematic notion which begs rather than resolves the question of rightlessness and sovereignty, citizen and denizen.
86 Honig (n 78) 107.
87 M Craven 'The violence of dispossession: Extra-territoriality and economic, social, and cultural rights' in M Baderin & R McCorquodale (eds) *Economic, social and cultural rights in action* (2007) 72-73.

asylum seeker and the illegal immigrant symbolise rightlessness and lead authors like Žižek to ask:

> Are we then witnessing a rebirth of the old distinction between human rights and *rights of a citizen*? Are there rights of all members of human kind … and the more narrow rights of the citizens (those whose status is legally regulated)? What if, however, a more radical conclusion is to be drawn? What if the true problem is not the fragile status of those excluded, but, rather, the fact that, at the most elementary level, we are all 'excluded' in the sense that our most elementary, 'zero', position is that of an object of biopolitics and that eventual political and citizenship rights are given to us as a secondary status?[88]

Human rights abound with paradoxes. They must be guaranteed, in the form of civic rights, by the institution most responsible for violating them; they are unnecessary when they are protected and absent when required. As Arendt argued,

> [n]o paradox of contemporary politics is filled with more poignant irony than the discrepancy between the efforts of well-meaning idealists who stubbornly insist on regarding as "inalienable" those human rights which are enjoyed only by citizens of the most prosperous and civilised countries, and the situation of the rightless themselves.[89]

The plight of refugees demonstrate that 'the Rights of Man, supposedly inalienable, proved to be unenforceable … whenever people appeared who were no longer citizens of any sovereign state'.[90]

> We became aware of the existence of the right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some organised community only when millions of people emerged who had lost and could not regain these rights because of the new global situation.[91]

As Arendt pointed out long ago, the concept of human rights, which presupposes the existence of a 'human being as such', risks becoming incoherent as soon as it is confronted by rightless beings whose only remained quality is that of being human: the refugee.[92]

> [S]ociety seems unable to decide whether the asylum seeker is the true subject of human rights, which it invites everybody to accept as the most sacred of the sacred, or simply a criminal, a thief, who threatens 'us' with abusing 'our' welfare system. Further, like Simmel's stranger, the refugee is 'both inside and outside', close to and remote from the context in which he 'comes today and stays tomorrow'. As such the refugee is a constant threat to the image of order,

88 S Žižek *Welcome to the desert of the real* (2002) 95 (emphasis in original).
89 Arendt (n 83 above) 279.
90 Arendt (n 83 above) 293.
91 Arendt (n 83 above) 297-98.
92 B Diken 'From refugee camps to gated communities: Biopolitics and the end of the city' (2004) 8 *Citizenship Studies* 83.

> signalling the horrifying impossibility of occupying one pure and distinct position.[93]

For Arendt,[94] refugees are the 'most symptomatic group in contemporary politics'. The refugee is the emblematic figure of rightlessness who nominally has all the rights in the International Bill of Rights but is unable to use them either because she is not granted membership of the polity or because she has been stripped of her citizenship.

For Giorgio Agamben, the refugee embodies bare life, a condition in which the law applies in its inapplicability.[95] This creates the aporia in which human rights must be juridicalised in order to be justiciable but become complicit in their own exclusion as soon as this occurs. For Agamben the originary activity of sovereignty is the production of bare life.[96] This is achieved through the ban, in which the law is used to produce states of exception:

> [T]he relation of the exception is the relation of ban. He who has been banned is not, in fact, simply set outside the law and made indifferent to it but rather abandoned by it, that is, exposed and threatened on the threshold in which life and law, outside and inside, become indistinguishable.[97]

It is not surprising that apartheid law was characterised by banning orders, under which people were abandoned by and to law. And it is perhaps this history that has led the Constitutional Court to contemplate extending the ambit of socio-economic rights to non-citizens.

Agamben views the refugee as 'perhaps the only thinkable figure for the people of our time and the only category in which one may see today – at least until the process of dissolution of the nation-state and of its sovereignty has achieved full completion – the forms and limits of a coming political community.[98] He argues that

> [i]t is time to cease to look at all the declarations of rights from 1789 to the present day as proclamations of eternal metajuridical values aimed at binding the legislator to the respect of such values; it is time, rather, to understand them according to their real function in the modern state. Human rights, in fact, represent first of all the originary figure for the inscription of natural naked life in the political-juridical order of the nation-state.[99]

93 Diken (n 92 above) 83-84, citing G Simmel 'The stranger' in DN Levine (ed) *On individuality and social forms* (1971) 143.
94 Arendt (n 83 above) 277.
95 G Agamben *Homo Sacer: Sovereign power and bare life* (1998) 29.
96 Agamben (n 95 above) 53.
97 Agamben (n 95 above) 23.
98 G Agamben *Means without end: Notes on politics* trans V Binetti & C Casarino (2000) 16.
99 Agamben (n 98 above) 20.

7 Towards a provisional conclusion

The early progressive promise of the judgments in *Grootboom* and *TAC* and then in *Khosa* has been tempered by the Constitutional Court's highly deferential and conservative decision in the 2009 *Mazibuko* case, which concerned the sufficiency of a free basic water supply to the residents of the Phiri township in Johannesburg.[100] The residents claimed that the city's policy of supplying each household with 6 kiloliters of free water per month regardless of income was inflexible, inadequate and violated section 27 of the Constitution, which provides a right of access to sufficient water. The High Court and the Supreme Court[101] had agreed that 'sufficient' meant substantially more water but the Constitutional Court disagreed on the basis that democratic accountability means that the legislature and the executive are 'best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights'. The court held that it

> is institutionally inappropriate for a court to determine what the achievement of a particular socioeconomic right entails and what steps government should take to ensure the progressive realization of the right (para 61).

The rights in the Constitution acquire content through the adoption of 'reasonable and other legislative measures' by the state that are 'subject to the constitutional standard of reasonableness' (para 67). Liebenberg criticises the decision for adopting a

> deferential and normatively thin concept of reasonableness review … [that] weakens the capacity of socio-economic rights jurisprudence to contribute meaningfully to transformative social change. The responsiveness of the Court's jurisprudence to conditions of poverty and social deprivation is further undermined by the formalism pervading its analysis of the equality and procedural fairness rights raised by the *Mazibuko* applicants.[102]

Mazibuko is perhaps an example of Klare's observation that 'jurisprudential conservatism ... may induce a kind of intellectual caution that discourages appropriate constitutional innovation and leads to less generous or innovative interpretations and applications of the Constitution'.[103] Like other institutions in South Africa, the Constitutional Court is judged on its ability to facilitate or inhibit progressive social, political and economic transformation that enables the country to address the legacy of apartheid.[104] Opinions on its record are mixed. In 2010, Davis concluded that 'the Constitution developed by the body of law to date may prove to be insufficiently resilient

100 *Mazibuko v City of* Johannesburg 2010 (4) SA 1 (CC).
101 *Mazibuko v City of Johannesburg* 2008 (4) All SA 471 (W) 81; *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA).
102 Liebenberg (n 1 above) 480.
103 Klare (n 6 above) 157.
104 Klare (n 6 above) 172.

to carry the weight of this transformative promise'.[105] Davis argues South Africa should have emulated India by enforcing socio-economic rights through directive principles because of the difficulties inherent in allowing judges to implement social transformation. It may be possible to concur with Klug's claim that the Constitutional Court has been one of the most successful institutions in post-apartheid South Africa while insisting that it can do better.[106] Liebenberg's magisterial analysis of the Court's jurisprudence leads her to conclude that the Court should develop a more expansive jurisprudence able to encompass adjudication appropriate to socio-economic rights in order to address the contradictions of liberal constitutionalism, and to overcome the historical tendency of South African courts towards conservatism and formalism in order to achieve social justice.

Liebenberg criticises the Court's tendency to reduce its review process to abstract and deferential assessments of the state's justifications for its policies in ways that are disconnected from the content of the right concerned, and thus for failing to adopt transformative interpretations of the Constitution. She believes that a bolder court can facilitate more interactive, dialogic and engaged processes of adjudication between different branches of government and civil society in order to quicken transformation.

Transformative constitutionalism is difficult, and arguably made more in a context framed by government policies that inhibit the realisation of socio-economic rights. In addition, the Constitutional Court adjudicates against the backdrop of liberal constitutional theory that is generally hostile to judicial activism on the one hand and judicial conservatism and formalism on the other. As such, it must preside over the transformation of South African society through the transformation of its jurisprudence. The optimism generated by cases like *Khosa*, which reveal the extent to which an activist and progressive court can shape debates about dignity and rights, must be viewed against the backdrop of *Mazibuko* in which the Court has demonstrated less progressive impulses. We should not overstate the implications of *Khosa*, which decided a relatively narrow in comparison with wider impact of the development of the doctrine of reasonableness in *Mazibuko* in a decision that raises questions about the future of transformative constitutionalism. South Africa's history demonstrated the limits of human rights under apartheid and their revolutionary potential in the struggle against it. Today, under the rule of law, those limits and possibilities are once again present in contradictory manifestations, not least in the jurisprudence of the Constitutional Court. Mark Tushnet has observed that all apex courts go through periods of activism and deference.[107] As Liebenberg argues, the judicial enforcement of socio-economic rights is 'an

105 Davis (n 7 above) 299.
106 H Klug 'Constitutional authority and judicial pragmatism: Politics and law in the evolution of South Africa's Constitutional Court' in D Kapiszewski *et al* (eds) *Consequential courts: Judicial roles in global perspective* (2013) 101.
107 M Tushnet *The new constitutional order* (2003).

inevitably imperfect and flawed attempt to synchronise the real world with the ideal construct of a constitutional world'.[108] Thus, while we should be wary of burdening the Constitution with duties it is not capable of bearing, it is legitimate to expect the Court to adjudicate in accordance the explicit transformative goal of the Constitution. History will ultimately be the judge of South Africa's attempt to achieve social justice through transformative constitutionalism.

108 Liebenberg (n 1 above) 489.

CHAPTER 26

HUMAN RIGHTS BEYOND THE STATE: EXPLORING THE CHALLENGES

David Bilchitz

1 Outlining the problem: Corporate obligations for human rights?[1]

1.1 Introducing the problem: Separate legal personality

The global financial crisis the world is currently facing demonstrates the importance of the sensible regulation of markets and companies. Indeed, it shows the potential impact of faulty financial decision making by a number of financial institutions seeking to maximise their own profits upon the lives and very well-being of millions of individuals. States have been challenged to decide on whether or not to offer bail-out packages essentially for decisions they did not make themselves. Economists who by profession should know how to deal with this situation seem unconvincing in their responses. The economic system seems to have taken on a life of its own, unconnected with the very ends for which economics exist: individual well-being. It is in my view critical that as lawyers concerned with fundamental rights and aware of the influence of economics upon individual lives, we be concerned with how to focus both our local and global economies firmly on the ends for which such economies exist.

1 Some segments of this chapter, particularly from section 3.2-3.4, are drawn from and utilise sections of the following article D Bilchitz 'Corporate law and the Constitution: Towards binding human rights responsibilities for corporations' (2008) 125 *South African Law Journal* 754. I have also subsequently published several articles which develop some of the ideas in this paper in relation to the SRSG's framework which were germinating at the time it was written. They are D Bilchitz 'The Ruggie Framework: An adequate rubric for corporate human rights obligations?' (2010) 12 *SUR-International Journal on Human Rights* 199; D Bilchitz 'Do corporations have positive fundamental rights obligations' (2010) 125 *Theoria* 1 and D Bilchitz 'A chasm between 'is' and 'ought'? A critique of the normative foundations of the SRSG's Framework and the Guiding Principles' in S Deva and D Bilchitz (eds) *Human rights obligations of business: beyond the corporate responsibility to respect?* (2013) 107.

A growing concern in our world is the way in which our societies have set up structures that, in many ways, have taken on a life of their own and become ends in themselves. These structures then cause harm to individuals or impede their realisation of good lives. No structure more exemplifies this problem than the modern corporation. Milton Friedman, in his famous statement concerning the social responsibilities of corporations, states, for instance, that

> there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.[2]

Friedman here reifies the corporation, and suggests that it is somehow apart from other social actors who have wide-ranging social responsibilities.[3]

The major distinctive feature of the corporation has been what is often termed its 'separate legal personality' which allows the company to be the bearer of its own rights and liabilities.[4] This is clearly a construct as the corporation cannot in reality act other than through the individuals who make it up and are the brains behind it. Nevertheless, conceiving of a corporation as a separate legal person has a number of legal advantages, foremost amongst which is the notion of limited liability:[5] The corporate form separates out the shareholders from bearing full responsibility for the fate of the company and thus 'the risk carried by the contributors of capital extends no further than the loss of the amount which they have contributed to the

2 M Friedman *Capitalism and freedom* (1962) 133; see also M Friedman 'The social responsibility of a business is to increase profits' in *New York Times* (Magazine) 13 September 1970 32, 125.

3 The statement could perhaps be defended by pointing out that this narrower view of corporate social responsibilities may in fact have greater social benefits in the long run: Ultimately, this encourages people to take more risk, stimulate innovation and growth. This view of the function of business and corporations is linked to the broader justification concerning the benefits arising from free market capitalism and private property. See, eg, R Nozick *Anarchy, State and utopia* (1972) 177. In relation to the rationale behind limited liability, in particular, see FH Easterbrook & DR Fischel 'Limited liability and the corporation' (1985) 52 *University of Chicago Law Review* 89 93-97. Of course, in recent years, the corporate form has been changed and is often used by non-profit organisations to create a separate legal personality as well. This often occurs to encourage individual involvement in such organisations without the risk of personal liability if things go wrong. The corporate form again assists here as a way of shielding individuals from full liability from problems that may occur with the organisation. The focus of this piece, however, shall be on corporations that are formed for the purposes of conducting business and thus have economic aims at their root.

4 The most important contribution of corporate law has been said to be the creation of a legal person, 'a contracting party distinct from the various individuals who own or manage the firm, or are suppliers or customers of the firm': H Hansmann & R Kraakman 'What is corporate law?' in R Kraakman *et al* (eds) *The anatomy of corporate law: A comparative and functional approach* (2004) 1 7. See also B Stephens 'The amorality of profit: Transnational corporations and human rights' (2002) 20 *Berkeley Journal of International Law* 45 54.

5 R Miller & G Jentz *Fundamentals of business law* 5th ed (2005) 519.

venture as capital'.[6] Corporations also gain the benefit of perpetual succession in that they continue to exist irrespective of changes in their shareholding (or for that matter their staff).[7] What is clear though is that the very purpose of the corporation is to achieve value for its shareholders without imposing full responsibility for its actions upon those very shareholders. Thus some have argued that 'this creates a structure which is pathological in the pursuit of profit'.[8]

Much of corporate law has evolved so as to ensure that the benefits of legal personality are attained whilst ensuring that the economic and governance risks that arise out of the creation of a structure such as the corporation do not materialise.[9] Yet, generally corporate law protections are designed around shareholders and risks of mismanagement by directors. What about the risks that corporate structures will be used to avoid responsibility for the violation of fundamental rights? What if corporate structures themselves help to shield individuals from their responsibilities to help realise fundamental rights?

1.2 The impact of corporations upon fundamental rights

What is immediately evident from a brief analysis is that these concerns are not purely theoretical. Indeed, corporations often have a serious negative impact upon fundamental rights within the regions of all countries with which this book is concerned.[10] On 2-3 December 1984, the city of Bhopal was suffocated by a cloud of toxic gas that came about as a result of a chemical reaction at a nearby pesticide plant run by the Indian subsidiary of the US company Union Carbide. Three thousand people died in the immediate aftermath of the disaster with up to 30 000 dying as a result of contamination caused by the disaster. Fifty thousand people were permanently disabled. The disaster led to litigation against the company initially in the US and later in India itself. The case probably resulted from negligence by the company relating to its safety standards but was never decided and eventually an out-of-court settlement was reached.[11]

In Chile, forestry, road construction and the building of a hydro-electric plant impacted negatively upon the Mapuche people whose traditional way

6 HS Cilliers *et al Entrepreneurial law* (2000) 66. See also Miller & Jentz (n 5 above) at 519. As Stephens (n 4 above) 54-5 points out, limited liability only became widespread in the early nineteenth century in the United States and some 50 years later in England but is currently seen to be a 'core element of the corporate form'.

7 Miller & Jentz (n 5 above); Cilliers (n 6 above).

8 See Corporate Watch Report *What's wrong with corporate social responsibility* (2006) 9.

9 LC Backer 'Multinational corporations, transnational law: The United Nation's norms on the responsibilities of transnational corporations as harbinger of corporate social responsibility in international law' (2005) 37 *Columbia Human Rights Law Review* 287 288 298-300.

10 Human Rights Watch 'On the margins of profit: Rights at risk in the global economy' (2008) available at http://www.hrw.org/en/reports/2008/02/18/margins-profit (accessed 29 November 2013).

11 D Kinley *Civilizing globalisation: Human rights and the global economy* (2009).

of life and land was threatened by this investment. After the people strongly protested and took violent action, millions of dollars of investment was threatened. In response, the police prosecuted perpetrators under counter-terrorism statutes instead of ordinary criminal law which lacked basic due process protections. Indeed, in certain cases, they even brought the people before military tribunals.[12]

Finally, the impact of mining activities all over the world often sustains conflicts over lengthy periods and fuels a number of gross human rights violations. The North-Eastern Democratic Republic of the Congo has seen a bitter war, with local militias committing heinous crimes against individuals. In 2003, Anglo-Gold Ashanti decided to re-enter the Ituri district after being absent for one and a half years and a five year break in mining. The Corporate Affairs Director stated that in their assessment, there was 'an appreciable measure of risk associated with the venture but that it was manageable'.[13] Yet, very soon after they had arrived, they were found to have provided logistical, financial and political support to a group operating in that area that was widely known to be involved in war crimes and crimes against humanity. Indeed, the company admitted to giving US $8 000 to a local militia group that was 'quite obviously inconsistent with our own business principles and commonly accepted conventions for the protection of human rights'.[14] While it defended its actions as being taken in order to protect its staff, its desire to make profits in a war zone led to its having to provide assistance to a local militia group and so indirectly contribute to their crimes.[15]

What is clear from these examples is that corporations have the potential to impact in a most serious way upon the fundamental rights of individuals. If individuals commit such actions, they could more easily be held accountable, either through the civil law or the criminal law. Yet, the very separate legal personality of the company often renders it harder to pin blame upon specific individuals for some of these actions. The 'corporate veil' also helps corporations avoid responsibility for the actions of its sub-contractors or subsidiaries. Adding to these problems is the fact that in most jurisdictions, there is also a lack of clarity as to the exact nature of the human rights responsibilities of corporations and enforcement mechanisms are often weak.

This is not a problem specific to any one country and with the power of multi-national corporations is an issue that now crosses boundaries. Given the global nature of corporate power, there have been attempts to deal with this issue at the international level. I shall in the next section outline briefly the most recent of these initiatives, commonly known as the Ruggie

12 Human Rights Watch Report (n 10 above).
13 P Kapelus *et al* 'Learning from the experience of AngloGold Ashanti in the Democratic Republic of the Congo' in R Hamann *et al The business of sustainable development in Africa* (2008) 122.
14 Kapelus *et al* (n 13 above) 123.
15 Kapelus *et al* (n 13 above) 123-125.

Framework. I will suggest that the framework itself is flawed and that developing countries should co-ordinate efforts to lobby strongly for amendments to the existing framework that will lead to stronger obligations being placed upon corporations.

The weakness of current international solutions leads naturally to a consideration of the legal frameworks in particular countries and how they address the human rights responsibilities of corporations. Given that developing countries are the ones where corporations are most likely to violate rights, it is of great importance to engage in some comparative analysis as to the way in which these questions have been dealt with in differing jurisdictions. I shall focus my analysis here on the legal framework in South Africa which is particularly conducive to the imposition of wider responsibilities upon corporations (though the issue has largely been undeveloped). I shall focus my discussion on three important issues: first, the horizontal application of the Constitution and its implications for the harmonisation of corporate and constitutional law; secondly, the question of extra-territorial application of the Bill of Rights; and, finally, on piercing the corporate veil for purposes of holding companies accountable for human rights violations.

2 Global frameworks: The challenge for developing countries

2.1 From binding norms to voluntarism and back again

Discussion on the human rights responsibilities of transnational corporations began largely in the 1970s as a result of newly-decolonised states seeking to assert their rights to economic independence and prevent interference with their political independence.[16] A United Nations Commission on Transnational Corporations was initially established by the Economic and Social Council after a report was presented to it by a group of experts.[17] The Commission prepared a United Nations Draft Code of Conduct imposing certain responsibilities for human rights upon transnational corporations. However, in 1992, the Code failed to be adopted given major disagreements between industrialised and developing countries.[18]

16 PT Muchlinski 'Attempts to extend the accountability of transnational corporations: The role of UNCTAD' in MT Kamminga & S Zia-Zarifi (eds) *Liability of multinational corporations under international law* (2000) 97 98.

17 ECOSOC Res 1974/1721 of 24 May 1974: The Impact of Multinational Corporations on the Development Process and on International Relations, Report of the Group of Eminent Persons to Study the Role of Multinational Corporations in Development and in International Relations, UN Doc E/5500/Rev.1/Add1 (1974).

18 'The capital exporting states were concerned to use the Code primarily as a means of protecting TNCs (transnational corporations) against discriminatory treatment contrary to international minimum standards accepted by these states. The countries belonging to the Group of 77, supported by the then socialist countries, were concerned to use the Code as

International efforts then shifted from the development of binding obligations upon corporations to focus upon the voluntary adoption by corporations of human rights responsibilities. A range of initiatives have been developed, the most important of which include the OECD Guidelines for Multinational Enterprises,[19] the International Labour Organisation Tripartite Declaration,[20] the United Nations Global Compact[21] as well as company-specific codes of conduct. Whilst these codes may have been seen to develop greater awareness amongst corporations about human rights issues, a number of problems remain. On the conceptual level, they reflect a failure to capture the notion that observance of human rights is not a matter of choice; it is an obligation upon all individuals and structures that exist within our societies. The instruments themselves generally leave the content of corporate human rights obligations vague and there are often different specifications of such obligations between the various instruments. Finally, enforcement and verification mechanisms within these instruments are very weak and generally rely upon corporate goodwill, something which may be lacking particularly from those that regularly abuse human rights.[22]

Recognising the insufficiency of such voluntary initiatives, however, led the UN Sub-Commission on Human Rights in 2003 to adopt a document known as the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.[23] These Norms sought 'definitively to outline the human rights and environmental responsibilities attributable to business'.[24] Those responsibilities were designed to be mandatory obligations imposed upon

a means of subjecting the activities of TNCs to greater regulation …' See Muchlinski (n 16 above) at 100. See also O de Schutter 'The challenge of imposing human rights norms on corporate actors' in O de Schutter (ed) *Transnational corporations and human rights* (2006) 1 2-3.

19 The most recent version of the guidelines can be found at http://www.oecd.org/dataoecd/56/36/1922428.pdf (accessed 29 November 2013).

20 See the declaration at http://www.ilo.org/public/english/employment/multi/download/english.pdf (accessed 29 November 2013).

21 See http://www.unglobalcompact.org/AbouttheGC/index.html (accessed 29 November 2013).

22 Further discussion of these arguments is contained in my article, D Bilchitz 'Corporate law and the Constitution: Towards binding human rights responsibilities for corporations' (2008) 125 *South African Law Journal* 754.

23 UN Economic and Social Council (ECOSOC), Sub-Commission on Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003) available at http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En (accessed 29 November 2013) (hereinafter Norms). Also, see the official commentary on the Norms, ECOSOC, Sub-Commission on the Promotion and Protection of Human Rights, Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/38/Rev.2 (26 August 2003), available at http://www.unhchr.ch/Huridocda/ Huridoca.nsf/ (Symbol)/ E.CN.4.Sub.2.2003.38.Rev.2.En?Opendocument (accessed 29 November 2013) (hereinafter Commentary).

24 J Nolan 'With power comes responsibility: Human rights and corporate accountability' (2005) 28 *University of New South Wales Law Journal* 581.

corporations by international law.[25] The rights which it identifies as being applicable to corporations include a number of unsurprising candidates, such as labour and environmental rights as well as a general catch-all provision that corporations may be responsible for the full range of human rights within their 'sphere of influence'.[26] As such, the Norms went beyond the voluntary initiatives that had until this point been the dominant framework in which corporate responsibility for the realisation of human rights had been articulated.[27]

The reaction to the Norms was mixed. Many international human rights non-governmental organisations (NGOs) endorsed the draft Norms.[28] However, the business community, represented by the International Chamber of Commerce and International Organisation of Employers, was strongly opposed.[29] The Norms were submitted to the Commission on Human Rights where it received a largely hostile reception from a range of states.[30] The Commission eventually declared that the Norms had 'no legal standing' and that the Sub-Commission 'should not perform any monitoring function in this regard'.[31]

Though the Norms were divisive and failed to garner wide-ranging support, many states still felt that the responsibilities of business for the realisation of human rights were important and required further investigation.[32] A year after the resolution on the UN Draft Norms, the UN Human Rights Commission asked that the UN Secretary-General appoint a Special Representative (SRSG) to further investigate some of the outstanding issues relating to business and human rights.[33] The appointee – Prof John Ruggie of Harvard University – has conducted wide-ranging research in this

25 D Weissbrodt & M Kruger 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 *American Journal of International Law* 901 913 explain that the Norms were not simply a 'voluntary initiative of corporate social responsibility' though they recognise that determining the exact source of the legal authority of the Norms is complex. See also J Campagna 'United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The international community asserts binding law on global rule makers' (2003) 37 *John Marshall Law Review* 1205.

26 Draft Norms (n 23 above) para 1.

27 See nn 19-21 above for some of these initiatives.

28 JG Ruggie 'Business and human rights: The evolving international agenda' (2007) 101 *American Journal of International Law* 819 821 (henceforth Ruggie article) 821.

29 International Chamber of Commerce and International Organisation of Employers, Joint Views of the IOE and ICC on the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (March 2004) available at http://www.reports-and-materials.org/IOE-ICC-views-UN-norms-March-2004.doc (accessed 29 November 2013).

30 Backer (n 9 above) at 288.

31 See UN Commission on Human Rights, Report to the Economic and Social Council on the Sixtieth Session of the Commission, Resolution, UN Doc E/CN.4/2004/L.11/Add.7 (2004) available at http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/169143c3c1009015c1256e830058c441/$FILE/G0413976.pdf (accessed 29 November 2013).

32 See Ruggie (n 28 above) at 821.

33 For a fuller description of the process, see Ruggie (n 28 above).

area and released a series of important reports.[34] In April 2008, he made public his proposed framework for the imposition of human rights responsibilities upon corporations (what I shall term the SRSG Framework).[35]

2.2 The SRSG Framework

The SRSG's Framework rests upon what he terms 'differentiated but complementary responsibilities'[36] and comprises three main principles. First, the report emphasises the state's duty to protect individual rights against abuse by non-state actors.[37] To this end, states are encouraged to introduce regulatory measures to strengthen the legal framework governing human rights and business, as well as to provide mechanisms for the enforcement of such obligations.[38]

Secondly, businesses are said to have the responsibility to respect human rights. Instead of focusing on specific rights as the draft Norms do, the report argues that corporate responsibility extends to all internationally-recognised human rights.[39] It also contends that it is necessary to focus on the specific responsibilities of corporations in relation to rights which are not equivalent to those of states. 'To respect rights essentially means not to infringe on the rights of others – put simply to do no harm.'[40] The report proposes a 'due diligence' approach whereby companies are expected to ensure that the impact of their activities does not cause adverse human rights impacts.[41]

34 The central reports under consideration in this article are the following: Special Representative to the Secretary-General on Business and Human Rights, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises,* UN Doc E/CN.4/2006/97 (2006) available at http://www1.umn.edu/humanrts/business/RuggieReport2006.html (hereinafter Interim Ruggie Report); Special Representative to the Secretary-General on Business and Human Rights, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts* A/HRC/4/035 (9 February 2007) available at http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf (hereinafter 2007 Ruggie Report); and Special Representative to the Secretary-General on Business and Human Rights *Protect, Respect and Remedy: A Framework for Business and Human Rights* UN Doc A/HRC/8/5 (2008) available at http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf (hereinafter Ruggie Framework) (all accessed 29 November 2013).

35 See Ruggie Framework (n 34 above).

36 Ruggie Framework (n 34 above) para 9.

37 A good example of the violation of a state duty to protect occurred in Nigeria where the government, apart from actively violating human rights, allowed oil companies to degrade the environment, impacting on the right to health, the right to housing and the right to food of the Ogoni people in this area. This was found to be a violation of Nigeria's duties under the African Charter on Human and Peoples' Rights in *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) paras 31-44.

38 Ruggie Framework (n 34 above) para 18.

39 Ruggie Framework (n 34 above) paras 51-52.

40 Ruggie Framework (n 34 above) para 24.

41 Ruggie Framework (n 34 above) paras 56-64.

Finally, the third principle is that there must be access to remedies.[42] This involves investigation processes where violations are alleged, as well as provisions for redress and punishment where required. The report proposes a variety of judicial and non-judicial mechanisms to improve and strengthen enforcement.[43]

Reactions to his framework have largely been positive in nature thus far.[44] NGOs have, in general, expressed support for the framework,[45] while there has been a mixed reaction from business.[46] The framework also received a warm reception in the Human Rights Commission which extended the SRSG's mandate for another three years to develop the framework.[47] The SRSG has subsequently spent these years seeking to 'operationalise the framework' which culminated in the release of a series of Guiding Principles.[48] However, as it stands, I believe that the Framework and Guiding Principles suffer from a number of defects which will particularly affect individuals in developing countries.[49] The next section elaborates upon this position.

42 Ruggie Framework (n 34 above) paras 26 and 82.

43 Ruggie Framework (n 34 above) paras 83-87.

44 A collection of responses to the framework is available at http://www.business-humanrights.org/Documents/RuggieHRC2008.

45 See, eg, the response of Amnesty International 'Submission to the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises' available at http://www.reports-and-materials.org/Amnesty-submission-to-Ruggie-Jul-2008.doc and a joint statement by a number of NGOs available at http://www.hrw.org/en/news/2008/05/19/joint-ngo-statement-eighth-session-human-rights-council.

46 See the memorandum written in favour of the framework by six leading corporate lawyers by Weil Gotshal & Manges LLP 'Corporate Social Responsibility for Human Rights: Comments on the UN Special Representative's Report Entitled 'Protect, Respect and Remedy: A Framework for Business and Human Rights'' available at http://www.reports-and-materials.org/Weil-Gotshal-legal-commentary-on-Ruggie-report-22-May-2008.pdf. However, see also a report taking a negative attitude towards the framework was also released by Wachtell, Lipton Rosen and Katz 'A United Nations Proposal Defining Corporate Social Responsibility for Human Rights' available at http://amlawdaily.typepad.com/amlawdaily/files/wachtell_lipton_memo_on_global_business_human_rights.pdf.

47 See UN Human Rights Council, 'Mandate of the United Nations Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' Resolution A/HRC/RES/8/7 (18 June 2008) available at http://ap.ohchr.org/documents/E/HRC/resolutions/ A_HRC_RES_8_7.pdf.

48 Human Rights Council 'Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework: Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/17/31 (21 March 2011) (SRSG, '2011 Guiding Principles').

49 I have elaborated upon these problems and developed some of these lines of critique in the articles in 2010 mentioned in n 1. The following article of extends this critique: see D Bilchitz 'Do the SRSG's framework and guiding principles provide an adequate normative foundation for corporate human rights obligations?' in D Bilchitz & S Deva (eds) *Human rights obligations of business: Beyond the corporate responsibility to respect?* (2013).

2.3 Why developing countries should require modifications to the SRSG's Framework

There are three main defects of the SRSG's Framework as it stands that are matters for particular concern in developing countries. First, the framework rests upon the notion that Ruggie adopted early on in his work that international law in fact does not place binding human rights responsibilities upon corporations. This was one of the elements that led to the UN Draft Norms being rejected and is controversial amongst lawyers: Already in his first report Ruggie sided with those who held that corporate human rights responsibilities were a matter of social expectation rather than of binding law.[50] This social expectation model is of particular concern to developing countries as it is likely that, in many of these countries, corporations have a poor track record.[51] As a result, social expectations of corporations may be particularly low in relation to human rights, particularly given a history of exploitation and violation. Social expectations also do not necessarily create binding law: particularly in countries where democratic institutions are weak, it is likely that corporations may not have a lot to lose by violating such expectations, particularly where their markets are overseas.

Secondly, a related point is that Ruggie places the primary emphasis for protecting individuals from corporate human rights violations upon states as part of exercising their duty to protect. Yet, as David Kinley points out, such a framework does not address the fundamental problem where

> states are so weak or unwilling to protect human rights, and corporations so comparatively strong or conveniently transnational to evade human rights responsibilities.[52]

Whilst no doubt emphasis on the state duty to protect is important, often states are not in the position of being able to protect their citizens without compromising other areas of their well-being. Of course, part of the framework for solving this problem may relate to duties on wealthier states to enforce obligations against corporations that have an interest in less powerful states. But, noticeable in Ruggie's framework is the absence of any attempt to establish an international legal regime surrounding corporate responsibility. Ruggie has written that such a regime is 'unlikely to get off the ground',[53] yet the challenge would be for developing countries to convince developed countries of the need for such a regime. Indeed, an international

50 Interim Ruggie Report (n 34 above).

51 The following website monitors corporate activity and violations in this regard: See http://www.corpwatch.org/. See also Human Rights Watch Report (n 10 above).

52 Kinley quoted in Joint Committee on Human Rights, 'Any of our Business? Human Rights and the UK Private Sector' (2009) http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/5i.pdf para 94.

53 J Ruggie *Business and human rights – Treaty road not travelled* Ethical Corporation, 6 May 2008 http://www.ethicalcorp.com/content/john-ruggie-business-and-human-rights-%E2%80%93-treaty-road-not-travelled (accessed 11 December 2013).

instrument could well assist in instances where national regimes prove ineffective. In fact, the very reasons for establishing an international criminal court demonstrates the importance of having an international regime at the global level that deals with international crimes. Similarly, an international regime dealing with global human rights responsibilities of business would mean that corporations could not hide behind the difficulty of litigation in home states, for instance, to avoid their responsibilities in this regard. In fact, part of the motivation for the SRSG framework involves a recognition of 'governance gaps' in relation to corporations and human rights. Yet, some of the strongest gaps lie in the problem of corporate violations falling between the cracks of different states and legal regimes. Establishing international standards as well as some form of enforcement mechanism would help to close these gaps.

Finally, and perhaps most importantly for developing countries, is Ruggie's minimalist specification of corporate human rights obligations. For Ruggie, the baseline responsibility of corporations is to 'respect human rights'. If we contrast this to the specification of such obligations in the UN Draft Norms, we see that the latter place an obligation upon corporations (within their sphere of influence) to 'promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognised in international as well as national law'.[54] Once we recognise that the obligations to respect, promote and fulfil have technical meanings in international law, it is more evident as to the distinction between Ruggie's approach and that of the Norms. When the Norms refer to obligations upon corporations to respect, protect and fulfil rights, they are indicating that the full range of obligations for the realisation of human rights may fall upon corporations with the proviso that the extent of their responsibility will depend upon their sphere of activity or influence. These obligations would involve both obligations to avoid harm to fundamental rights but also obligations to assist in their realisation. In contrast, the specification in Ruggie's framework that corporations only have a responsibility to respect would appear *prima facie* to involve a severe contraction of the obligations that corporations may be required to perform in comparison to those imposed by the Norms.[55] These obligations would be largely confined to the 'negative ones' of avoiding harm.[56]

54 UN Draft Norms (n 23 above) Preamble.

55 Indeed, Ruggie seems actively to support such a reduction in the range of duties and sees this as a virtue of his framework: See Ruggie (n 28 above) at 825-827. See also SR Ratner 'Corporations and human rights: A theory of legal responsibility' (2001) 111 *Yale Law Journal* 446 517-518 (arguing for a limitation of corporate responsibility to negative obligations to avoid harm).

56 Ruggie does make provision for some positive duties to be placed upon corporations: These are usually in fulfilment of their duty to avoid harm ('non-discrimination' and the adoption of positive measures to guard against them) or alternatively in certain context-specific situations. See Ruggie Framework (n 34 above) paras 24 and 55 and Ruggie 2009 Report (n 34 above) paras 59-60.

While more developed countries may largely be satisfied with corporations having a duty to avoid causing harm to its citizens, this is manifestly inadequate in the case of developing countries. In order to deal with the poverty and inequality in such countries, the power and capacity of the private sector needs to be harnessed to assist in improving the quality of lives of individuals. Mining companies, for instance, often as part of their activities, can be required to develop hospitals and schools for individuals in their areas. Pharmaceutical companies can be required to operate on condition they make life-saving drugs available to those who cannot afford them. Publishing houses may need to provide books for school learners and university students where they are unable to have access to them. These are just some examples of the ways in which corporations can positively assist in the realisation of fundamental rights. It is important though to recognise that such assistance is not simply a matter of charity; it is part of their obligations to assist in the realisation of fundamental rights.

The UN Draft Norms recognised in its Preamble that

> transnational corporations and other business enterprises have the capacity to foster economic well-being, development, technological improvement, and wealth as well as the capacity to cause deleterious human rights impacts on the lives of individuals.[57]

Similarly, the Norms also acknowledge

> the universality, indivisibility, interdependence and interrelatedness of human rights, including the right to development that entitles every human person and all peoples to participate in; contribute to; and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realised.[58]

The Norms thus recognised the capacity of corporations to do good and actively promote the realisation of human rights rather than simply defensively avoid harming individuals.

To adopt Ruggie's view is to allow for a very serious reduction in the very framework as to what we can expect of corporations. As has been mentioned, these can be of particular importance in developing countries and areas where active contribution is needed and indeed, in respect of a world suffering from severe economic inequality and deprivation, this can impact on the human rights and well-being of millions of individuals. It is thus important for human rights advocates, and developing countries in particular, strongly to contest the claim that corporations only have a responsibility to respect. It is necessary for obligations to protect and fulfil also to form part of corporate responsibility.

57 See UN Draft Norms (n 23 above) Preamble.
58 As above.

Given the lack of clarity as to the legal obligations upon corporations for the realisation of human rights at international law and inadequacy of current initiatives, it is important to consider the extent to which domestic laws adequately make provision for these obligations. The next section seeks to outline a framework for comparative analysis in this area and then considers the legal framework in South Africa to indicate how these issues have been treated thus far within its jurisdiction.

3 Developing human rights responsibilities of corporations in domestic law

3.1 A framework for comparative analysis

Recognising the impact that corporations may have on the realisation of fundamental rights means that legal systems which take human rights seriously cannot be content only to regulate the relationship between the individual and the state – the so-called 'vertical relationship' – which has been the traditional focus of domestic human rights protections. The first important issue thus concerns the extent to which a domestic system is favourable towards the recognition that the bill of rights applies 'horizontally' – between individuals themselves. Of course, the question concerning the application of a bill of rights to corporations also requires consideration of the extent to which any such 'horizontal' provisions apply to corporations, in other words, whether corporations themselves are recognised as individuals or 'legal persons' who have rights and responsibilities in terms of the bill of rights. In most countries, the bill of rights would be contained in the constitution and thus the application of the bill of rights to corporations would signal a very fundamental recognition in law that such entities are bound by the overarching social contract in a society.

Even if a constitution does apply horizontally, there is a question as to the extent to which the provisions of the constitution and judicial interpretation have clarified the exact nature of corporate responsibility for the realisation of fundamental rights. This is an area that has generally been under-developed and may offer the opportunity for sharing knowledge between jurisdictions.

The next important issue concerns the way in which the more abstract bill of rights provisions get translated into specific legal rules in statutes and the common law. Of course, it is also possible that a bill of rights may only apply vertically but that statutory or common law provisions govern the obligations of corporations in relation to fundamental rights. In this area, it is of particular importance to consider the extent to which corporate law is harmonised with constitutional law and human rights or whether they are seen to be completely separate areas. Comparative analysis may shed light on the possibilities for creating novel and innovative legal provisions in this

regard. Of course, accountability for the violation of fundamental rights may also exist in civil and criminal provisions within different countries. There may also be merit in comparing the relevant principles of liability to glean whether certain particular provisions hold out greater possibilities for holding corporations accountable where they violate rights. An overarching theme that would cut across analysis of the legal provisions in particular countries is the extent to which the 'corporate veil' or separate legal personality of a corporation can be pierced in order to hold such an entity accountable for the realisation of fundamental rights. In particular here, it is important to consider the approaches of different courts to 'piercing the veil' where a principal company's subsidiaries and/or sub-contractors violate rights. The liability of directors who effectively manage the company's operations is also critical as they are the individuals who literally control the operations of a corporation.

Given the global reach of many multi-national corporations, an important issue in determining the accountability of corporations involves considering whether provisions in a particular legal order (such as the bill of rights or other statutory provisions) that place obligations upon corporations for the realisation of fundamental rights apply beyond the borders of a particular state. If corporations registered within a particular state with a strong legal system can be sued in that state for violations of rights in countries with weaker legal systems, it is likely that this will promote greater observance of fundamental rights amongst corporations. Having laid out some of the issues that may benefit from a comparative analysis between different legal system, I now turn to a case study of South Africa where I outline the position in relation to some of the issues highlighted in this section.

3.2 South African constitutional law

The foundation of all law in South Africa is the Constitution passed in 1996.[59] The application clause of the Bill of Rights begins by asserting the 'vertical' protection that a bill of rights traditionally grants to individuals against the state.[60] However, the Constitution goes beyond this to assert a degree of 'direct horizontal application' between individuals and other individuals. Significantly, this includes legal persons.[61] Thus, section 8(2) of the Constitution provides that 'a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'. Section 8(4) expressly provides that 'a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of that juristic

59 Constitution of the Republic of South Africa, 1996.
60 I Currie & J de Waal *The Bill of Rights handbook* (2005) 33.
61 This is different from the position that applied with the interim Constitution where the Bill of Rights only had 'indirect horizontal application'. See *Du Plessis v De Klerk* 1996 (3) SA 850 (CC).

person'.[62] The next sections seek to draw out the implications of these provisions for corporations.

Section 8(2) of the Constitution thus envisages three sets of circumstances: On the one hand, a right may be of no application to private persons; a right may apply fully to private persons; and a right may only be applicable to a certain 'extent'. Thus, the mere existence of the right in the Bill of Rights does not determine its application to private persons such as corporations. In order to determine whether the right imposes binding obligations, something further is required. These elements are specified in section 8(2) which outlines two factors that determine the applicability of a right to private actors: the 'nature of the right' and the 'nature of any duty imposed by the right'.

The problem is that without any further specification, these two factors are almost entirely unhelpful as the most critical question is which *features* render such rights or duties applicable to private parties. In the absence of such specification, the courts, when deciding whether to apply a right to persons in a particular case, will have to provide an understanding of the features of the rights that render them applicable to private persons.

The Constitutional Court has only once addressed section 8(2) and the question of direct horizontal application, in its decision in *Khumalo v Holomisa*.[63] The case concerned the publication by a newspaper of allegations that a high-profile opposition politician was a member of a gang of bank robbers. The politician sued the newspaper for defamation without alleging in his court papers that the allegations were false. The newspaper responded by claiming that the common law of defamation was in violation of the right to free speech and therefore unconstitutional to the extent that it did not require a litigant to plead that defamatory allegations that were published by a newspaper in the public interest were in fact false. Since the litigation occurred between two private parties, the applicants effectively asserted that the right to freedom of expression was of horizontal application in the dispute and could be applied directly to the law of defamation.

62 I shall not consider in any detail the rights that corporations have within South Africa as the focus is upon their obligations. Briefly, in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2001 (1) SA 545 (CC) para 17, the court held that '[t]he right to privacy is applicable, where appropriate, to a juristic person'. Yet, since juristic persons are not the bearers of human dignity, '[t]heir privacy rights can never be as intense as those of human beings' (para 18). Similarly, the court has held in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 45 that a juristic person may enjoy the right to property. This seemed to be on the basis that the 'property rights of natural persons can only be fully and properly realised if such rights are afforded to companies as well as to natural persons'. This is an important statement as it recognises that the interests of natural persons are primary in the protection of fundamental rights. The attribution of rights to corporations is essentially derivative in that it is necessary in order to protect the rights of natural persons effectively.

63 2002 (5) SA 401 (CC).

In applying section 8(2), the Court outlined three *features* of the right to freedom of expression that rendered it capable of direct horizontal application in this case. First, the Court referred to the 'intensity of the right'. The meaning of this phrase is unclear, but it suggests that the *importance* of the right is a factor determining whether it should be of direct horizontal application.[64] This is a strange criterion upon which to decide the application question: A right such as the right to citizenship is very important, but clearly does not apply between private parties because its essential features render it incapable of such application.

Secondly, the Court referred to the potential invasion of the right in question that could be occasioned by persons other than the state or organs of state. This factor looks more promising in determining the application question as it refers to the impact that private parties may have on the exercise of a particular right. If private parties have a large degree of impact upon the right, then it is more likely that it will be of application in the horizontal sphere. This is of particular importance in the context of companies given that the increasing power of corporations provides them with the potential to have a large impact upon fundamental rights. Nevertheless, this factor lacks specificity: Is it only potential impact that determines whether the right is of application or does there have to be an actual impact? Moreover, is any form of impact sufficient or does it have to be a severe impact?

Thirdly, the Court referred to the *nature* of the parties before it and whether the right had a particular importance to them. The *role* of the private party within the broader society could also be considered. Thus, given that freedom of expression is of critical importance to the media and that the media plays a fundamental role in South African democracy, the Court found that this right applied directly to the dispute.

What we see happening in a rudimentary fashion in *Khumalo* is the Constitutional Court beginning to grapple with the principled features that may lead rights to be of application between private parties. This is precisely the question that is being asked at the international level in trying to make sense of the notion of 'sphere of influence'.[65]

It seems that one of the major unanswered questions currently in relation to corporations and human rights is to find a clear method to determine the application of human rights responsibilities to non-state actors

64 Currie & De Waal (n 57 above) 52 suggest that this phrase refers to perhaps the force or strength of the right and that this may be determined by its importance in the constitutional order as its outlined by the court in several paragraphs previously in the judgment.

65 See, eg, the interesting contribution written by two of Ruggie's researchers, A Lehr & B Jenkins 'By invitation: Business and human rights – Beyond corporate spheres of influence' available at http://www.ethicalcorp.com/content/business-and-human-rights-%E2%80%93-beyond-corporate-spheres-influence (accessed 13 December 2013).

and in particular to corporations. In the absence of such a method, it is submitted that there are two main factors which can assist in determining this responsibility:

First, from the perspective of those who find themselves subject to human rights violations or potentially subject to them, the impact or potential impact of corporations on the enjoyment of rights by natural persons must be considered. Secondly, from the perspective of the corporations themselves, their own capacities, capabilities and functions are the critical concern for determining the range of their responsibilities.

Both of these principles require further development. Nevertheless, they can provide preliminary guidance when considering in particular instances where corporations have responsibilities for the realisation of particular rights.

3.3 Harmonising corporate and constitutional law

Traditionally, there has been little interaction between corporate law and constitutional law in South Africa and both have continued to be regarded largely as separate disciplines with very limited areas of overlap.[66] The traditional understanding of the purpose of business, and of corporations in particular, was of course the maximisation of profit. Their duties were regarded as being fundamentally owed to their shareholders who benefited from the limited liability of corporations through being shielded from much of the risk of conducting business. Corporate law was largely set up to protect the interests of shareholders and to ensure that the risks attendant upon the corporate structure did not materialise. Some have argued that 'this creates a structure which is pathological in the pursuit of profit'.[67]

In South Africa, the Constitution, however, in my view fundamentally alters the nature of the corporate structure. In order to understand why, it is important to recognise that, in 1994, South Africa adopted a system of constitutional supremacy whereby the Constitution regulates the very foundations of South African society and ensures that all exercises of public power are subject to the constraints of the Constitution.[68]

The same is true of private bodies, whose actions are equally constrained by the Constitution. Section 8(2) makes it clear that private bodies must conform to the Bill of Rights to the extent that it is applicable to them. Consequently, private bodies cannot be conceived of as having powers that

66 A review of South African writing on company law and constitutional law found very limited references to corporate *obligations* for the realisation of human rights. A rare exception that only offers a short treatment of the subject is M Havenga 'The company, the Constitution and the stakeholders (1997) 5 *Juta's Business Law* 134.

67 See Corporate Watch Report (n 8 above) 9.

68 Corporate Watch Report (n 8 above) paras 51 and 85ff.

directly conflict with their responsibilities in terms of the Constitution, which is the founding source of all legal authority in South Africa.

This legal principle has important implications for corporations. Since all law now derives from the Constitution, and structures cannot be created that are in conflict with the Constitution, the structures established by the Companies Act 61 of 1973 must conform with constitutional constraints. This means that the notion of creating a structure which can pursue profit at the expense of human rights is no longer legally tenable. The applicability of the Bill of Rights to corporations, in other words, goes beyond purely imposing obligations upon them: It changes the very nature of the corporation in South Africa.

Thus, a corporation can no longer claim that corporate social responsibility is voluntary. Rather, the exercise of corporate power is only allowed to the extent that it does not violate the human rights of others. The radical nature of this change has not always been noticed, but it is a logical outcome of the direct horizontal application of the Bill of Rights to corporations (and private actors more generally).

These considerations seem pretty abstract but in my view require certain fundamental changes within South African company law. These changes would be of relevance to other countries grappling with similar issues and thus I elaborate upon them. First, in order to recognise the changed nature of the corporate structure in a constitutional order, it seems important that the company itself be required in its founding documents to recognise the fact that it is bound by human rights principles. This would make the realisation of rights one of the prime constraints on the activities of the company.

Secondly, and perhaps most importantly, it is critical to place legal requirements upon the directors of a corporation – ultimately the managing agents behind a corporation – to ensure that the obligations in relation to fundamental rights are realised. In South African law, the responsibilities of directors have been captured by what are referred to as a fiduciary duty of good faith to act in the best interests of the company as well as a duty to conduct the affairs of the company with care and skill.[69] Of course, the question arises as to what are the best interests of the company. An influential report on corporate governance in South Africa – the King III Report – rejects the notion that this is equivalent to a focus on the interests of shareholders alone and construes the company's interests to embrace wider societal concerns. Nevertheless, it is clear that the desire for profitability may clash with the social responsibilities of a company and the

69 See JT Pretorius *et al Hahlo's South African company law through the cases: A source book* 6th ed (1999) 278; and *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W) 163-165.

very nature of a company renders it likely to favour the interests of the shareholders.[70] Also,

> since anything and everything is capable of being interpreted as being in the interests of the company, the duty to act in the best interest of the company may be difficult to monitor and directors may abuse their powers with ease.[71]

Consequently, in my view, it is important explicitly to place a fiduciary duty upon directors to act with due care and skill to ensure that company activities conform with their obligations to realise fundamental rights in the Constitution to the extent they are required to. This again explicitly recognises that corporations must function within the constraints of the Constitution. A precedent for such a measure has recently been adopted by the United Kingdom in its revised Companies Act of 2006. Directors now explicitly have a 'duty to promote the success of the company as a whole' and this includes having regard to 'the impact of the company's operations on the community and the environment'.[72] Such a duty is wider than a fiduciary duty to ensure conformity with human rights but surely includes the latter.

This statutory fiduciary duty could also be supported by the recognition that directors may also be held personally liable (whether civil or criminal) for violations of human rights which would ensure that these considerations are taken account of at the heart of corporate decision making. Given that they are in fact the practical decision makers in a company, it is important not to allow directors to shield themselves behind the separate legal personality of the company. For the sake of fairness, it may be necessary to limit such liability to directors that have knowledge of or a direct link to the actual violation of rights that takes place rather than imposing such liability upon the whole board of a corporation.

Thirdly, as has already been indicated, corporate legal personality can be used as a means to avoid responsibility. This is not a new insight but one that has been recognised by company lawyers since the inception of the company. In order to avoid a corporate form being used to avoid liability for a range of practices, the courts have long recognised that there are circumstances in which the 'corporate veil' should be pierced to establish the true nature of transactions. The problem, however, has been that, if the veil is pierced too readily, then the benefits of separate legal personality disappear.[73] Two

70 Some have attempted to argue that there is a business case for corporations to respect human rights and wider social responsibilities: See S Greathead 'The multinational and the "new stakeholder": Examining the business case for human rights' (2002) 35 *Vanderbilt Journal of Transnational Law* 719. The evidence for this, however, is inconclusive: See JD Margolis & HA Elfenbein 'Do well by doing good? Don't count on it' (2008) *Harvard Business Review* 19.

71 T Mongalo *Corporate law and corporate governance: A global picture of business undertakings in South Africa* (2003) 212.

72 See sec 172(1)(d) of the United Kingdom's Companies Act (2006) available at http://www.opsi.gov.uk/ACTS/acts2006/pdf/ukpga_20060046_en.pdf (accessed 29 November 2013).

73 *Cape Pacific Ltd v Lubner Controlling Investment (Pty) Ltd* 1995 (4) SA 790 (A) 803-804.

methods in particular have been used by companies to disavow their responsibility. First, a principal may claim to be separate from a subsidiary and thus not responsible for its actions. Secondly, a company may disavow responsibility for the actions of suppliers or sub-contractors. Courts need to establish legal principles as to when they will hold one company responsible for the actions of another. In particular, it is perhaps important that a parent company be held responsible for the actions of a subsidiary or sub-contractor where it reasonably should have known or enquired into its activities.

Finally, the Companies Act generally establishes financial reporting obligations on the part of companies.[74] Instead of leaving this to the discretion of companies, provisions for non-financial reporting should be included within the duties a company has to fulfil. This need not be an overly onerous requirement, but would indicate that the legislature and executive are serious about the shift required by the constitutional order in relation to corporate obligations. A compliance office within the Registrar of Companies could be set up to establish expertise in monitoring and verifying non-financial reporting.

The new Companies Act 71 of 2008 disappointingly fails to enact these specific provisions that indicate the shift in company law required by the horizontal application of the Bill of Rights to juristic persons. One of the purposes of the Act is nevertheless stated to be in section 7(a) to 'promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law'. Short of further legislative amendments, it is to be hoped that this provision will encourage the judiciary to adopt interpretations of the Act that over time recognise the shift required in company law by the advent of the constitutional order.[75]

These are just some of the possibilities for law reform arising out of the horizontality of the Bill of Rights that would ensure that human rights compliance becomes a part of corporate activity in South Africa.

3.4 Extra-territoriality of the Bill of Rights

One of the most important areas to consider in relation to the obligations of corporations under the Constitution is whether the Bill of Rights applies to corporations where they are based in South Africa but operate beyond South Africa's borders. Some corporations meet their obligations to respect

74 The reporting requirements for both public and private companies involve preparing financial statements that must be presented at the annual general meeting of the company (sec 286 of the Companies Act). These statements must be distributed to members and debenture holders not less than 21 days before the annual general meeting (secs 286 and 288). In the case of a public company, these statements must also be sent to the Registrar of Companies (sec 302 of the Companies Act). See Cilliers *et al* (n 6 above) 236-237.

75 For a discussion of what this provision requires, see J Katzew 'Crossing the Divide Between the Business of Corporations and the Imperatives of Human Rights – the Impact of Section 7 of the Companies Act 71 of 2008' (2011) 128 *South African Law Journal* 686.

fundamental rights within South Africa's borders. Yet, when such corporations operate beyond the borders of South Africa, where human rights protection is often weaker, they may adopt a different approach and be prepared to violate human rights, or possibly only comply with a lower threshold of protection that these countries offer. South Africa is a major source of investment in the rest of Africa. Similar issues may be raised in relation to Brazil and India, both important economies in their region with the capacity to impact upon other areas. It is thus important to consider whether the South African Bill of Rights binds corporations beyond South African borders.

In the case of *Kaunda*,[76] the Constitutional Court was approached by 69 South African citizens who were being held on charges relating to mercenary activities. They wanted the Court to direct the South African government to seek the release and extradition of these citizens from Zimbabwe and Equatorial Guinea back to South Africa or, alternatively, more limited orders seeking assurance that the governments in these places would ensure that the death penalty was not imposed and a fair trial conducted. The majority of the Court refused to grant the orders, for two main reasons. First, it held that '[t]he bearers of the rights are people *in* South Africa. Nothing suggests that it [the Bill of Rights] is to have general application beyond our borders'.[77] Secondly, it relied upon the principle of state sovereignty to recognise that the laws of a state ordinarily apply only within its territory.[78]

The holding of the Court does not rule out all extra-territorial application but is limited to the proposition that the Bill of Rights does not have extra-territorial effect where this would involve a violation of the principle of state sovereignty.[79] It is not exactly clear when a court will hold that the extra-territorial effect of the Bill of Rights involves a violation of state sovereignty. Nevertheless, the limitation of the ruling is important and allows for extra-territorial application in relation at least to certain state activities.[80]

A similar point applies to section 8(2) and the actions of private actors beyond South Africa's borders. It is possible to see the extra-territorial application of the Bill of Rights to companies not as a violation of state sovereignty but as a requirement of South African domestic law that binds South Africans wherever they may be, for several reasons.[81]

76 *Kaunda v President of the Republic of South Africa* 2004 (10) BCLR 1009 (CC).
77 *Kaunda* para 37.
78 *Kaunda* para 38.
79 *Kaunda* para 45.
80 S Woolman 'Application' in S Woolman *et al Constitutional law of South Africa* (2007) 31-118.
81 Much of the discussion has been influenced by S Deva 'Acting extraterritorially to tame multinational corporations for human rights violations: Who should 'bell the cat'?' (2004) 5 *Melbourne Journal of International Law* 37 47.

First, the logic of human rights protection does not allow for the prioritisation of only those within particular borders. If the fundamental interests of human beings deserve protection, then it is all human beings with those interests that qualify for that protection.[82]

Secondly, the regulation of private actors only occurs where they have a particular nexus to the concerned state. Thus, where a parent company with *de facto* control of another company exists in a particular state, then obligations may be imposed upon the parent company. Thus, extra-territorial regulation is not being suggested for companies with no link to South Africa; rather, the claim is that if one wishes to do business in South Africa, then one is required to observe the fundamental norms of South African society both here and abroad.

Thirdly, human rights are no longer considered merely an internal matter of domestic law, partly as a result of the South African struggle against apartheid. Developments in international law have recognised limitations on state sovereignty for purposes of human rights protection.

Finally, all states have a duty to ensure respect for human rights that includes a duty to ensure that the entities within their sovereign territory respect human rights. By enacting an extra-territorial law, home states have the ability to help host states enforce their human rights obligations against corporations. Extra-territoriality can thus be seen as a 'matter of co-operation amongst states rather than a source of conflict and friction'.[83]

The question then arises as to why the home state of a corporation should regulate compliance with human rights where such regulation does not exist in the state where the actual violation is taking place (the host state). In fact, there are several reasons. First, the home state is often in a much stronger position to enforce human rights legislation than weaker states that lack bargaining power with major corporations. Often the choice will be to waive the application of these laws or to lose significant investment. Secondly, the home state model allows for regulation of the parent corporation, which is almost always more effective than regulating subsidiaries. Thirdly, home states often have more developed legal systems and a greater availability of legal resources to ensure that challenges are made when violations occur. Finally, home states often have higher standards of human rights protection.[84]

The use of the United States Alien Tort Claims Act provides an example of the importance of extra-territorial jurisdiction. Despite the fact that no claim has been decided on its merits, this Act has led to a number of settlements in cases of major human rights violations. It has also led to high-profile

82 See D Bilchitz *Poverty and fundamental rights* (2007) 69-71.
83 Deva (n 81 above) 49.
84 These reasons are contained in Deva (n 81 above) 50-51.

litigation, with the companies concerned seriously worried about the reputational damage such litigation inflicts. A significant settlement occurred in the case concerning Shell's alleged violation of the rights of the Ogoni people and its complicity with the Abacha regime in the deaths of several human rights activists. The settlement in this case was for US $15.5 million. The mere existence of the legislation encourages a culture of corporate responsibility and ensures the enforceability of binding human rights obligations. Unfortunately, a majority of the United States Court of Appeals Second Circuit rejected the extra-territorial applicability of the ATCA to torts involving corporate violations of fundamental rights.[85] The Supreme Court on appeal also largely rejected the extra-territorial applicability of the ATCA,[86] thus severely restricting this avenue for holding corporations to account for severe human rights violations committed outside the United States.

For all these reasons it makes sense for South Africa to enact a statute to give the courts jurisdiction over the actions of South African companies in countries beyond South Africa's borders. Such jurisdiction could involve criminal sanctions for international crimes and delictual liability for other human rights violations. Such a statute would have a major impact on corporate actions beyond South Africa's borders: A culture of impunity would be prevented from taking root and an enduring commitment to the horizontal application of the Bill of Rights would be solidified.

4 Conclusion

This article has sought to consider a matter that is of particular importance for developing countries, namely, the fact that the realisation of human rights is not the responsibility of the state alone. The focus has been upon corporate obligations for the realisation of rights and recent international and domestic developments in this regard. At the global level, it has been suggested that developing countries should be concerned to co-operate in ensuring that the development of standards that govern the obligations of corporations take into account their own needs and interests. The Ruggie Framework was criticised for failing to adequately articulate an international legal framework and a conception of corporate obligations. Importantly, this failure is both concerning for its normative inadequacy but also its practical incapacity to meet the needs of developing countries. In relation to domestic law, I sought to outline a range of issues which may usefully be illuminated by comparative analysis. In seeking to encourage further discussion and contribute in this regard, I outlined the current position in South Africa with regard to corporate responsibility for the realisation of fundamental rights. Whilst the

85 See *Kiobel v Royal Dutch Petroleum Company* 621 F.3d 111 (2d Cir. 2010).

86 *Kiobel v Royal Dutch Petroleum Company* 133 SCt 1659. I have analysed the impact of this judgment in more detail in D Bilchitz 'Human rights accountability in domestic courts: Does the *Kiobel* case increase the global governance gap?' (2013) 120 *South African Law Journal* 794.

Constitution itself is favourable towards the development of such obligations, the jurisprudence here is largely underdeveloped. Statutory and common law have also not in many ways enshrined particular legal rules that would give concrete legal expression to the shift in the corporate structure brought about by the constitutional order. In the course of this discussion, I proposed a number of law reforms that are of importance in order to harmonise corporate and constitutional law and raised some of the normative and institutional questions which remain in this area. Other countries may be less or more advanced in this respect than South Africa, and thus it is to be hoped that a comparative analysis may highlight the ways in which the law could develop. Either way, in whatever country we live in, and given the prevailing economic system, it is unlikely that the a focus on the state alone will be sufficient if we are to take the realisation of rights seriously. The challenge posed by this article is to articulate an adequate conception of corporate legal obligations for the realisation of rights whilst also developing the law to instantiate this conception. Dialogue between legal systems may help in both tasks and it is to be hoped that in this way our world will come to instantiate a substantively fair allocation of obligations between states, corporations, other non-state actors and individuals.

PART E: JUDICIAL PERSPECTIVE

CHAPTER 27 REFLECTIONS OF A RETIRED JUDGE

Justice ZM Yacoob

1 Introduction

I have had the privilege of attending two fascinating seminars, one in India and one in South Africa, at which aspects of the constitutional jurisprudence of Brazil, India and South Africa were under the spotlight. The rich exchange was rewarding indeed. And it is that exchange which has resulted in the production of this book. I have been asked to give my own reflections arising out of the process and from a reading of this book.

Essentially, a large number of creative and imaginative academics examined closely the judgments of the highest courts in all three countries and expressed, somewhat predictably diverse and wide-ranging opinions on issues such as whether the judgments were, in the view of the academic concerned, right or constitutionally appropriate in the circumstances, what motivated the judgments concerned, whether particular judgments were perhaps too deferential to the executive arm, the impact of the judgment concerned on jurisprudence generally and whether social movements or the circumstances in the country at a particular time had an effect on the nature of the judgment ultimately delivered. From my perspective, most of the discussions were ultimately about judges and judging and I thought it would be best for me to share with the readers some thoughts on judging and on the judgment process from the point of view of a judge in the Constitutional Court of South Africa. The contents of this chapter reflect my views and mine alone. I would caution that it would be dangerous to draw any conclusions about judges generally from what I have to say.

2 International and foreign law

I thought I should begin by saying a word on the relevance and importance of international law and foreign law. As has been pointed out already, the South African Constitution requires our courts to consider international law and

authorises reference to foreign law. To my mind, there can be no debate about whether or not international and foreign law should be referred to and considered by judges in the process of adjudicating cases within their own countries. The more relevant thoughts and ideas we consider in the process of deciding a case, the greater the possibility that the judgment would reach the correct conclusion. I do of course emphasise that the material considered must be relevant and that the differing circumstances pertaining to the country in which judgment is given would loom large in the process of determining applicability of any principle derived from a source not our own. There is, in my view, no need to justify to any great degree reference to international and foreign law.

It follows from what I have said that engagement in comparative constitutional law is almost always a worthwhile exercise; and the more similar the countries whose constitutions and jurisprudence are compared, the greater the likelihood that the comparison will yield useful results. The similarities of the history, constitutions, social and economic circumstances and systems of justice have made the BISA comparison relevant, important, interesting and exciting. In my view, this book will in all probability be a valuable tool in the process of constitutional enforcement, development, analysis and evaluation. I now say something about judging in the highest courts.

3 Judging in the constitutional era

In effect, judges universally have almost always been required to be independent and impartial and to judge without fear, favour or prejudice. There is a tendency to equate or confuse independence and impartiality with concepts of absolute objectivity, neutrality and isolation. So it is thought in some circles that judges should continue to live in their so-called ivory towers, must strive to be absolutely objective and must be neutral umpires in the judging process.

We must all understand that the notion that any human being can ever be absolutely objective is an impossibility, a myth to be dispelled at the earliest opportunity. We are all, judges or not, vulnerable human beings at our core and we have a subjective side to us that cannot be denied. Subjectivity in the judging process is not only inevitable, it is also positive and good. Judging is not a mechanical process and in most cases, our judgments are about human beings and have an impact on human beings either directly or indirectly. As Cardozo J said:[1]

> There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action.

1 As cited in *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC) para 42.

> Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them - inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs ... In this mental background every problem finds it[s] setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.

Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether [she or he] be litigant or judge.

Most of the judges that I know are acutely aware of their own subjective element and that to pretend absolute objectivity is counter-productive in the sense that it could result in a judicial officer being unduly subjective in the judging process without knowing it. One of the most difficult things in the judging process is to exercise the right balance between the subjective and the objective. The question always concerns an assessment of how much subjectivity is appropriate in a particular circumstance.

Nor is judicial isolation necessarily consistent with good judging. Because we judge human beings, an acute awareness and understanding of the human condition are essential. This understanding and awareness can ordinarily be enhanced by human experience and interaction. I would say that limited human interaction and the consequent limited awareness and understanding of the human condition are not helpful to the judging process.

It follows that absolute neutrality too is both unnecessary and impossible to achieve.

4 The changing dynamic

Adjudication became necessary in society because of the need to enforce the social compact, a compact to which human beings agree to be bound. Courts traditionally resolved disputes about what a particular aspect of the social compact meant, whether a person has complied with the social compact in a particular circumstance and, if not, what the remedy should be. Courts were not ordinarily involved in the process of ensuring justice in the relationship between government and subject except perhaps in the field of criminal law in which it is the state which normally alleges that someone has done something or failed to do something that requires criminal sanction. Be that as it may, both criminal and civil law cases were about whether a person has complied with the rules by which all human beings are bound. They were hardly ever about whether the government has complied. Courts generally aimed at ensuring that order was preserved and that the spectre of people in society taking the law into their own hands and resorting to self-help would be avoided.

Courts in the constitutional era have an additional, arguably more important function. It is necessary for us all to understand that judges have a special responsibility in countries in which the Constitution is supreme. In these countries obligations are imposed upon the legislature and the executive in relation to the citizens of the country concerned. This necessitates a mechanism to determine whether the legislature and the executive have complied with the Bill of Rights or, to put it differently, ensured that the rights in the Bill of Rights were respected and protected. The supremacy of the Constitution brings with it the consequence (often not fully understood) that neither Parliament nor the Government is supreme. Because constitutionalism is a relatively new phenomenon there is the real possibility that judges will determine cases without giving full weight to the fact that the legislature and the executive are not supreme. I have always had to guard against this attitude because the absence of appropriate vigilance might result in the beginnings of a slippery and inevitable slide from constitutional supremacy to parliamentary supremacy.

5 Dynamics of constitutional interpretation

Ideally, we should not in constitutional adjudication and in the interpretation of the Constitution, in particular, be governed by a determination of the intention of the makers of the Constitution. In the first place it is difficult to know what the intention of the makers of the Constitution was. The same words often mean different things to different people. The result is that is not inconceivable that the hundreds of constitution-makers who voted for the constitutional clause in question thought that these words meant different things and intended different outcomes. Moreover, harking back to original intent means that the Constitution is stuck to the values that were prevalent at the time it was made. The Constitution of the United States of America for example was made at a time of rampant slavery, great inequality, sex and gender bias and the almost unconditional acceptance of the death penalty as valid and appropriate. Many of us therefore now speak of the purpose of the Constitution. We regard the Constitution as a living document and a dynamic instrument into which a court should breathe more life. The original intent thesis contributes to rendering the Constitution a static document. We would therefore prefer a context driven interpretation of our Constitution. This further complicates the process of judging in a constitutional democracy.

The context includes historical context, public opinion as well as the setting in which the constitutional provision concerned appears. As to history Chaskalson P said:[2]

> We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access

2 See *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) para 8.

> to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.

The limited relevance of public opinion was described by Chaskalson P in the following terms:[3]

> 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. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.

Courts are also obliged as I have already said to have reference to international and foreign law. In addition, in South Africa, courts must interpret the Constitution in accordance with the spirit, purport and objects of the Bill of Rights.[4]

6 What does this all mean?

I have so far emphasised the importance and the inevitability of the subjective or human element in the judging process, the implications of constitutionalism and the importance of context, international law, foreign

3 See *S v Makwanyane* 1995 (3) SA 391 (CC) para 88.

4 Section 39 of the Constitution which provides:
'39. Interpretation of Bill of Rights.
(1) When interpreting the Bill of Rights, a court, tribunal or forum—
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.
(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'

law and constitutional values. It should be clear by now that constitutional interpretation and adjudication is a complex and difficult process which has to be undertaken with due regard to a variety of factors with a greater or lesser emphasis on each. It is therefore quite impossible for all judges acting honestly to reach the same conclusion in every case. If that had been the case, I would have considered the judiciary suspect indeed. It is precisely because that judges are bound to differ that democratic judicial systems allow for appeals to higher courts where their cases are heard by more than one judicial officer. This is also the reason why in our country the Constitutional Court has eleven members all of whom sit *en banc*. The quorum of judges for the Constitutional Court is eight. Each of the judges who sit in a case and decide it finally in the highest court of our country has a different background, a separate history, unique life experience and his or her own value system all of which have given shape to their particular humanity. We understand that there is no single interpretation of a constitutional provision which can be said to be undoubtedly correct. The corollary is that there ordinarily is no single interpretation of any constitutional provision that can be said to be undoubtedly wrong. Nevertheless, our constitutional thesis is that a judgment on which the majority of the members of the Constitutional Court, sitting together, decide is binding.

This does not mean that the majority judgment is right. And it is for this reason that academic discussion of any judgment of any court is a valuable resource in the process of the development of an efficient, caring, and sensitive judiciary.

I do have some difficulties though with the idea that court decisions are, in the normal course, affected by extraneous factors and the conclusion that certain judges deliberately decide cases in a particular way on account of the operation of some or other external factor. In my view, most judges do their best to perform the complex and delicate exercise honestly and in their best understanding. Academic criticism is vital to increasing this understanding. Academics too would differ from each other but this difference too adds to the richness of the debate.

7 Social and economic rights

I must say a word about the discussion about social and economic rights. The inclusion of these rights in our Constitution demonstrates a growing universal understanding that the distinction between three generations of rights – civil and political, social and economic and environmental – no longer holds. Rights are inter-related and indivisible. It is irrelevant and bizarre to talk about the exercise of civil and political rights by a person who has no food, no water, no clothes and no house. The improvement of the quality of lives of people in the BISA countries is an absolute prerequisite for the reasonable and informed enjoyment of all rights. It is the inclusion of these rights in our

Constitution and the commitment of the Constitution to substantive equality and reconstruction that renders our Constitution transformative and creates a framework for the greater realisation of a better quality of life.

The inclusion of social and economic rights in our Constitution has had a significant impact on the question of separation of powers. Indeed, we must all accept that there is no mechanical or universal definition of precisely where the power of the judiciary ends and the power of the executive and the legislature begins. The determination of the shape and positioning of this line must differ depending on the terms of a particular Constitution. In our constitutional order the inclusion of socio-economic rights has a drastic effect on the separation of powers configuration and imposes upon courts the duty to determine in an appropriate case whether the state has complied with its obligations.

We have not gone much beyond the starting post in the effort to render these rights realisable. A few principles have been established and a few tentative steps have been taken in the process of establishing a careful and workable jurisprudence. Yet, much more work needs to be done. For me the most exhilarating prospect for the development of constitutional jurisprudence in our country lies in the field of social and economic rights. The challenges are many and we as practising lawyers should not leave it to judges alone to do all the work. Creative lawyering is essential. May I say that the job of creative academics and practising lawyers in the field of social and economic rights should not be limited to debates on whether a particular judgment on social and economic rights is right or wrong. This is because even in judgments that are perceived to be wrong can be found the statements of principle or the seeds of an idea which, if properly nurtured and developed, could contribute towards the socio-economic rights jurisprudence and the improvement of the quality of life of human beings. It is important that these principles and ideas be identified, isolated and developed positively. We must also remember that sometimes judgments do not tell the full story. We have an adversarial judicial system in our country and much of what is said in a judgment is determined by the nature of the argument and surrounding facts and the concessions made by counsel. For example, there are many who say that the Constitutional Court did not go far enough in *Grootboom*[5] and that Mrs Grootboom died without getting a house and that the Constitutional Court should have made a specific order in relation to the claimants in that case. But this criticism ignores the fact that the actual case between the claimants concerned and the Government had been settled and that the Court did make an order in favour of that community by consent providing for the construction of toilets, the provision of water and the availability of waterproofing building material.[6]

5 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).
6 *Grootboom v Government of the Republic of South Africa - Constitutional Court Order* (CCT38/00) [2000] ZACC 14 (21 September 2000).

8 The limited role of the courts

The point is made in the introduction to this book how limited the role of the Court is in effecting transformation and achieving the order contemplated by our Constitution. I think it is important to elaborate on how very limited and sometimes irrelevant court decisions are to the achievement of real social transformation. Our Constitution provides for the achievement of equality, for the prohibition of racial discrimination; for the elimination of discrimination against women, gay and lesbian people, older people, and people with disability. Courts in all BISA countries have made some progress in so far as their judgments are concerned which tend to emphasise appropriate personal values and which ensures that the legislature and the executive do not go against these rights.

One of the first judgments given by our Constitutional Court in relation to gay and lesbian equality was that the criminalisation of consensual homosexual conduct was deeply unconstitutional.[7] Nevertheless, the majority of heterosexual people still believe (and firmly so) that this kind of homosexual conduct is unnatural and that people who participate in this activity should go to jail for it. In addition, religious objection by the majority continue to abound in relation to the decision of the Constitutional Court that gay and lesbian people are allowed to marry.[8] Except for some democratic lawyers (I emphasise not all) and for some so-called progressive people who belong to the elite club, the majority of white people discriminate against black people, the vast majority of men continue to exploit and oppress women causing them undue suffering almost as of right and the majority still believe that there is no smoke without fire and that the presumption of innocence improperly aims at the protection of accused people. Majority religions still believe that they are right and that minority religions are wrong. Our society remains steeped in the attainment of material values.

Courts are virtually irrelevant to the achievement of the social transformation which is essential to the survival of constitutional values and constitutional morality. All of us have an obligation in all three countries to develop and grow social movements that will aim at instilling constitutional values in the hearts and minds of ordinary people. If we do not achieve this soon our Constitutions will fall down and die.

I trust that the debates going forward in the world discourse would recognise and confront this problem in all our societies and determine effective ways and means of overcoming them. The richness of debates is only increased if those debates contribute in practise to the essential social transformation of our society.

7 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).
8 *Fourie v Minister of Home Affairs* 2003 (5) SA 301 (CC).

PART F: CONCLUSIONS

CHAPTER 28 SOME CONCLUDING THOUGHTS ON AN IDEAL, MACHINERY AND METHOD

Oscar Vilhena, Upendra Baxi and Frans Viljoen

This book is about a constitutional ideal, a mechanism and a method. It seeks to debate, through the application of methodological approach involving a horizontal South-South comparison, the ideal of transformative constitutionalism in Brazil, India and South Africa (BISA countries), three countries in which apex courts constitute a powerful part of the constitutional machinery to vindicate rights.

In these brief concluding thoughts, the editors seek to present an overview of the three elements of this book, namely: the transformative ideal, the court-centred machinery and the horizontal approach to comparative constitutional law, in this order. The editors argue that transformative constitutionalism, as presented in this book, challenges the redistribution/recognition dichotomy, that it creates political space for social mobilisation, and, finally, that it represents a globalised concept. The analysis of the machinery of apex courts in this book focuses on how to characterise the enormous power of those courts in contrast with the practical and political obstacles they have faced. This conclusion ends with a cautious, yet hopeful, reflexion on comparativism in the BISA countries.

1 The ideal: A new political and moral foundation?

In the introduction, the editors argued that the Constitutions of Brazil, India and South Africa are aimed not only at *regulating power* (or what Gargarella recently called the 'engine room'[1] of the constitution) and defining individual rights, but also that those constitutions aspire to establish a *new political and moral foundation* for each of those societies. While this is quite a bold claim, the authors' contributions to the present volume illustrate the nuances inherently related to this ideal.

1 R Gargarella *Latin American constitutionalism, 1810-2010: The engine room of the Constitution* (2013).

If there is a concept that embraces the ideal of constitutions as society's new political and moral foundation, this concept is transformative constitutionalism.[2] Such a concept (bearing in mind particularly the Baxi/ Roux debate in this book) exposes one of the core tensions of contemporary constitutionalism, namely the tension between a liberal and a post-liberal reading of constitutions.

On the one hand, Baxi defines the transformative nature of BISA Constitutions as a 'redemptive' project which seeks, by looking backward, to restructure 'memory and forgetfulness' and, when looking forward, to effectively implement human rights, in particular socio-economic rights. For that endeavour, Baxi's argument continues, a space of mediation 'among the ruling classes, the state, and the ruled classes' is constitutionally enabled. Accordingly, Baxi's reading of BISA Constitutions is to be located within a post-liberal tradition, which, instead of stressing sharp divisions between law and politics, exposes the political and social struggles, marked by historical processes of insurgency, resistance, and multitude, at the heart of the constitutional project in each of these countries.

On the other hand, Roux, in a brief reply to Baxi and generally to the idea of transformative constitutionalism, further elaborated elsewhere,[3] argues instead for a liberal reading of the transformative nature of the South African Constitution (and arguably, by extension, also of the Brazilian and Indian Constitutions). For Roux, this Constitution is not a sharp rupture from liberal constitutionalism (seen as a rigid commitment to the law/politics division, including particularly in terms of separation of powers and judicial impartiality), but rather a contextualisation of such liberal ideal in light of the historical particularities of South Africa (and by extension, we argue, of the other two countries as well). Importantly, such a 'historical-institutionalist approach'[4] to constitutionalism reminds advocates of transformative constitutionalism of the evolving nature of liberal constitutionalism.

Such tension creates the dialogical space or ideological battlefield for the wide range of contributions to this book, at the very least along three axes: the material/symbolic aspects of transformative constitutionalism; the political space created by constitutions and occupied by civil society; and finally constitutional openness to international human rights law. Those are the main features of transformative constitutionalism as a political and moral foundation of BISA societies.

First, transformative constitutionalism as an ideal debated in this book encompasses both matters of material redistribution (for example socio-

2 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

3 T Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?' (2009) 20 *Stellenbosch Law Review* 258.

4 T Roux *The politics of principle: The first South African Constitutional Court, 1995-2005* (2013).

economic rights, such as rights to health and land) and issues related to symbolic recognition (for example sexual orientation and gender identity). Furthermore, transformative constitutionalism, as presented by the authors of this book, has even questioned the very boundaries of such sharp albeit artificial distinction between recognition and redistribution.

In this book, such reassessment of the recognition/redistribution debate is clear in that the contributions related to gender jurisprudence in Brazil, India and South Africa, by Ikawa, Jaising and Fredman. From the gender-based indirect discrimination and judicial interference in social security schemes in Brazil; through India's judicial reluctance in tackling gender discrimination in the private domain; to a critique of the liberal-oriented self-imposed judicial restraint on cases related to gender in South Africa, all three contributions highlight the nexus between material and symbolic inequalities in the realm of transformative constitutionalism. These contributions therefore enrich the Baxi/Roux debate by pointing out ways in which gender jurisprudence interconnects with material and immaterial inequalities.

Furthermore, the moral aspect of transformative constitutionalism is also present in the contributions to this book. Take, for instance, Narrain's proposition of a 'constitutional morality' in his analysis of the sodomy cases in India. Similarly, consider the debate on constitutional morality and heteronormativity in South Africa and in Brazil, in Barnard-Naudé's, and Friedman and Amparo's pieces. All those contributions present the moral dimension of constitutionalism, analysing the potential and limits of seeing the constitution as a moral foundation of society.

Second, transformations in constitutional jurisprudence in the BISA countries have often occurred, as the book's contributors reveal, because of the influence of civil society organisations and social movements, and their interaction with apex courts. For instance, Jaichand, in his piece on the right to land in the three BISA countries, reveals that demands for land redistribution have been kept alive in the public debate largely due to pressures of peasants' movements and other groups.

Furthermore, in this book, such participatory views of transformative constitutionalism are confirmed in the chapters specifically dedicated to analysis of the relation between apex courts and social movements in Brazil, South Africa and India, developed by Vieira and Annenberg; and Madlingozi and Thiruvengadam. Those contributions highlight the law/politics division referred to by Baxi and Roux. While Vieira and Annenberg emphasise participatory mechanisms before the apex court in Brazil, such as *amici curiae* and public hearings, they also warn about the technical or legalistic nature of those interventions. Highlighting the inclination of pro-poor social movements in South Africa to approach the apex court, Madlingozi indicates that such a trend is part of a larger project of reviving social demands of a political nature, in particular against the background of neoliberal policies. In

other words, for those movements, law is not an end in itself but a means to revive political struggles.

In this sense, those analyses described above confirm one of the key tenets of transformative constitutionalism: the use of law in order to promote social change, not only through courts, but also via political spaces opened up by apex courts under pressure of social movements and civil society organisations. In other words, the law/politics separation provides a legitimate space in which apex courts are able to enforce transformative constitutional provisions (such as the 'sexual orientation' anti-discrimination clause, as Barnard-Naudé recalls in his piece) because it constitutes *law*. Yet, at the same time, such (legal) enforcement in fact opens the political (and moral) space for otherwise marginalised social groups to advance their causes.

Third, some authors of this book remind us that transformative constitutionalism is a global concept, in that it is an ideal which extends itself way beyond the boundaries of national states. From the perspective of dialogue between constitutional courts, Mendes defends a political ideal of a 'global constitution of rights', namely a pluralist, cosmopolitan reconstruction of constitutional norms from the lens of their moral authority in promoting universal notions of individual emancipation. The present book, due to the dialogue it promotes, might be seen as an attempt to promote such a 'global constitution of rights'.

Beyond the dialogue between courts, this book takes the global aspect of transformative constitutionalism even further in relation to two other issues attached to globalisation studies, namely: citizenship and the responsibility of non-state actors, as developed in this book by Adelman and Bilchitz. Jointly, both contributions point out that transformative constitutionalism ought to question limited notions of citizenship, both in terms of who the right-holders are (illustrated by Adelman's debate on extending social rights to non-citizens in South Africa), as well as well as who the duty-bearers are (exemplified by Bilchitz's argument in favour of on binding obligations of corporations within and beyond South Africa's borders).

In summary, the contributions in this book challenge (but do not necessarily prevent) attempts to confine transformative constitutionalism to a particular comprehensive doctrine. Both liberal constitutionalism – as an evolving law-based limitation to politics – and transformative constitutionalism – as enabling societal changes, in particular of a material or economic nature – in their own way bring about features of BISA Constitutions which are considered dear to the contributors of this book. Consider, in this regard, in this book, the debate on religious freedom in Brazil, India and South Africa, presented by Almeida, Shankar and Mhango, and the legal limitations one's concept of secularism entails. Such debate is presented in terms of constitutional constraints, neutral principles and other themes aligned with the liberal tradition of constitutionalism.

In so far as transformative constitutionalism is an ideal that challenges the redistribution/recognition division, that creates a political space of constitutional contestation led by social movements and other groups, and finally extends beyond national borders, contributions in this book certainly seek to explore new dimensions.

2 The machinery: A new worldwide wave of constitutional adjudication?

Transformative constitutionalism does not live on as an ideal alone. In the introduction, the editors suggested that BISA Constitutions champion a new worldwide wave of constitutional adjudication. However, it does not mean that BISA apex courts are immune from criticism, as illustrated by the contributions to this book. These courts have a central role to play: To wait for the implementation of generous constitutional rights, without the machinery to enforce them, is as futile as waiting in vain for the appearance of Godot. In sharp contrast with part of the US literature which qualifies judiciary-oriented approaches to social change as a 'hollow hope,[5] the contributions to this book in general take a positive yet critical stance in favour of the transformative (yet constantly unfulfilled) potential of apex courts, at least in the countries here analysed.

BISA Constitutions are often qualified as ambitious or, in the word of one of the editors, 'generous',[6] in that they contain a wide range of rights. The generosity of those Constitutions is all the more striking when one contrasts their transformative language (for example, Adelman recalls that transformation is an explicit goal of the South African Constitution) with the striking material and symbolic inequalities prevailing in those countries. Accordingly, generous or ambitious are relative and context-related concepts, whose vibrant colours derive from the disparity between lack of implementation of rights in reality and their rhetorical transformative promises.

Amid this scenario, in the countries analysed in this book, the apex courts have struggled (yet sometimes refused) to enforce rights established in the BISA Constitutions, as evidenced by the descriptions in this book of the Brazilian, Indian and South African apex courts by Vieira, Shankar and le Roux, respectively. To be sure, as these editors argued in the introduction, apex courts in the BISA countries are relevant because they make final binding judgments about rights issues, thus occupying the position of highest institution of appeal in the judicial branch, with the competence to constraint the legislative and executive branches.

5 GN Rosenberg *The hollow hope: Can courts bring about social change* 2nd ed (2008).
6 OV Vieira 'Public interest law: A Brazilian perspective' (2008) 13 *UCLA Journal of International Law and Foregn Affairs* 219 231.

Yet, while the apex courts might be seen as institutions of participatory democracy (as le Roux argues in relation to South Africa) or a prominent forum of debate between political actors on constitutional rights (as Vieira calls to mind in the case of Brazil), contributions to this book also remind us that apex courts play different roles. Sometimes (as Shankar recalls in the case of India), they are negotiators of a fine balance between accountability and support to government. On other occasions, as in the case of Brazil, they may become overburdened decision-making forums for minor governmental issues due to their concomitant mandate as courts of appeal ((as Vieira explains).

The specific debate on socio-economic rights (with a focus on the right to health) in Brazil, India and South Africa, by Ferraz, Dhanda and Brand, illustrates the dilemma of how apex courts exercise their considerable power in the BISA countries. Besides debating the right to health per se, those contributions struggle over the best way to characterise the power of apex courts in relation to enforcing socio-economic rights. Based on the experience of South Africa and Brazil, Ferraz frames the debate in terms of usurpation and abdication. In Brazil, on the one hand, the role of the courts is associated with usurpation, in that the individually-enforceable right to health is often invoked to coax benefits from the executive. In South African, on the other hand, the court's application of a reasonableness test to assess policy, rather than to adjudicate on individual claims, has been viewed as overly deferential to the executive. In contrast, Dhanda disagrees with such a sharp dichotomy, thus placing the Indian apex court jurisprudence on the right to health within a 'continuum of activism and restraint' in the wide range of health cases. Brand locates this debate within a larger substantive framework of 'livelihood rights', provided for under the South African Bill of Rights. He notes a judicial tendency to avoid ordering structural relief, in contrast with the position in India, and also criticises the lack of an overall judicial vision as to the scope of livelihood rights.

Accordingly, the contributions highlighted above have shown that, although transformative constitutionalism places apex courts in a prominent role, which is also largely a consequence of the historical process in the BISA countries, the jurisprudence of those apex courts are still subjected, amongst practitioners and activists, to criticism on how such enormous power is exercised and, amongst scholars, to criticism about how such power ought to be qualified and thus understood.

3 The method: Explorations along a South-South axis

Lastly, one of the most relevant contributions of this book is that of providing innovative thinking on how comparative constitutionalism should be conducted, particularly in the case of BISA Constitutions. As mentioned earlier, this volume aims to provide a South-South horizontal comparison on a wide range of rights guaranteed in BISA Constitutions. As such, this book

already represents a novel approach compared to the more traditional work mostly containing North-South analyses (often comparing the countries of the Global South with the US, Canada and Germany). Furthermore, this book aims to include horizontal comparisons, with contributions which in general seek to engage, whenever possible, with each other, rather than just analysing the legal position in a particular country.

However, such South-South horizontal comparison is not the only innovative contribution of this book: This volume also contains a specific debate (between Mendes and Botha) on the method of comparative constitutional law itself. In each of those pieces, the authors ponder over the questions of why and how to compare. Unlike the US jurisprudence, which Jacobsohn has – with a few exceptions – recently qualified as 'a jurisprudence of insularity',[7] in BISA countries there is relative openness to foreign and international law. This book seeks to contribute to this dialogue.

Mendes shows that we compare so as to promote 'self-understanding', 'self-improvement' and 'mutual co-operation'. Adopting an elegant turn of phrase, he warns against being context-insensitive ('descriptive myopia') as well as against overlooking how abstractive principles apply to concrete situations ('normative naiveté'). Such dangers also play out in a specific geopolitical scenario, where one should be mindful of the power struggles behind comparison.

Accordingly, the comparative approach adopted in this book, with inevitable limitations, seeks to live up to this ideal of a cosmopolitan and horizontal comparative method, which seeks to improve our own self-understanding by comprehending others. Yet, as Botha recalls in relation to South Africa, we must be very careful while doing, so as not to just promote engagement with foreign law simply to 'confirm to us who we already think we are'. In this sense, any comparative account of transformative constitutionalism in the BISA countries ought to avoid being, in a vainglorious way, self-centred and sure of its own importance. If oppression, in all its forms, is what transformative constitutionalism seeks to change, its methods ought to be similarly aligned.

4 Limitations

As has been mentioned earlier, in the 'Introduction' to this book, a number of limitations guide this book's aims and should inform the expectations of its readers. First, this is not a comparative 'text book', providing a comprehensive comparative analysis of the three legal systems under review. Rather, it aims to reflect core approaches and discuss selected aspects potentially informing comparative insights, such as gender, socio-economic

7 GJ Jacobsohn *Constitutional identity* (2010) x.

rights, land rights and the role of civil society. The volume of essays aims to provide starting points for the deepening of a South-South-South trialogue along the axis of the BISA countries. Second, the contributions in the book are not necessarily updated to cover the most recent developments in a particular country or thematic field. Most of the contributions published here were initially prepared as conference papers, and were delivered a few years ago. Even if these papers were subsequently reworked, they have not necessarily been updated to incorporate the most recent relevant developments. A primary example is the discussion of constitutional challenges to the anti-sodomy laws (section 377 of the Indian Penal Code, 1860) in India. The decision of the Indian Supreme Court in the *Naz* case, delivered on 11 December 2013, not only overturned the position that formed the basis for Nairran's optimistic discussion,[8] but refocuses efforts in India away from the courts, towards political advocacy and the possibility of legislative amendment.

Beyond the limitations linked to and arising from the contributions to this book, a few more deep seated obstacles to exploring the full potential of comparing the role of apex courts in the three countries may be mentioned. For one thing, language remains a potentially divisive and isolating factor: Although English is increasingly being understood and spoken in Brazil, its use is still quite limited; also, few lawyers or legal academics in India and South Africa have any mastery of Portuguese. This factor not only constrained the contributors' 'horizontal' research efforts, but will be a factor impeding comparative research in the future, at least as long as case law is not translated into Portuguese and English, respectively. For another, the legal systems and the legal cultures in which the three countries' courts decide cases differ significantly, inviting misunderstanding and misreading.

Notwithstanding these limitations and obstacles, we trust that this volume of essays will inspire further efforts to overcome these impediments, and signify a step towards exploring the largely hidden potential of comparative constitutional law research in the countries of the Global South – in particular Brazil, South Africa and India.

8 *Suresh Kumar Koushal and another v NAZ Foundation and others*, Civil Appeal No 10972 of 2013, Indian Supreme Court, 11 December 2013, judgment by GS Singhvi, J, http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070 (21 December 2013).

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