

THE ADVOCATE, PEACEMAKER, JUDGE
AND ACTIVIST: A CHRONICLE ON THE
CONTRIBUTIONS OF
JUSTICE JOHANN KRIEGLER
TO SOUTH AFRICAN
CONSTITUTIONAL JURISPRUDENCE

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1 Introduction

In 2003, the General Council of the Bar of South Africa presented Justice Johann Christiaan Kriegler with the *Sydney and Felicia Kentridge Award for Service to Law in Southern Africa*.²⁶⁴ The award is made annually to persons or an institution adjudged to have made an outstanding contribution, worthy of public recognition, to law in Southern Africa. In his tribute to Kriegler, the former General Council of the Bar, Chairperson Willem van der Linde SC, had this to say regarding Kriegler's contribution to law:

I am confident that in time scholarly analysis will show that it was on the Constitutional Court that his full potential as a jurist came to the fore. There he was able to blend his energy, his love of the law, his intellect, and his

264 WHG van der Linde 'Tribute paid to Justice Johann Kriegler at the fourth Sidney and Felicia Kentridge award for service to law in Southern Africa' (2004) 21 *The South African Law Journal* 22.

ingenuity, and then to paste it all together with his remarkable use of language. It is in this respect that Justice Kriegler's contribution to the law was singular. Judges, young and old, quote from his judgments to lend richness to their own.²⁶⁵

During his interview for appointment to the Constitutional Court in 1994, on being asked by Justice Corbett why he thought he was a suitable candidate for appointment to that court, Kriegler politely declared that he did not think he was qualified for appointment, but was fascinated by the challenges likely to face the new institution and was excited to make whatever modest contribution to the Court.²⁶⁶ Fast-forward 22 years later, Kriegler is regarded as one of the finest Justices to ever grace the hallowed corridors of that venerated institution in Braamfontein.²⁶⁷

Despite the many glowing accolades, Kriegler's humility shines throughout his judgments and public speeches. This is despite the general acknowledgement that his major contribution, well known to the South African body politic, is that of peacemaker: the dexterous and skilful way in which he shepherded South Africa through its painful and delicate transition as head of South Africa's electoral body between 1994 and 1999. In that regard, he was lauded for saving the country from the brink of a debilitating racial conflagration and rightfully earned the moniker 'Mr Fix-It'.²⁶⁸ Less known and written about is Kriegler the legal maverick, with a legal career – as advocate, judge and activist – spanning over half a century.

This chapter, through analyses of various interviews conducted with Kriegler, literature and speeches about him by peers, colleagues and academics, his own personal pronouncements in his judgments – principally as a member of the Constitutional Court – public lectures and publications (both academic and non-academic), looks at the judicial path that Kriegler has traversed and the contribution he has made to South African constitutional jurisprudence.

The chapter is divided into three sections. The first section constitutes a non-exhaustive biography of Kriegler which seeks to highlight his career trajectory before and after his appointment to the Constitutional Court. The aim is to ascertain whether and to what extent his prior experience and career trajectory prepared him for the post-1994 Bench. The second section reviews the literature on Kriegler's contribution to our understanding of the Constitution. This section is divided into two parts. The first reviews

265 As above.

266 See 'Interview with Justice Johan [sic] Christiaan Kriegler, Judge of the Appellate Division, 5 October 1994' <http://www.constitutionalcourt.org.za/site/judges/transcripts/johannkriegler.html> (accessed 3 May 2017).

267 Van der Linde (n 264 above) 22.

268 See van der Linde (n 264 above). Senator Ngcuka, Advocate Gordon and Mr Ernstzen acknowledged the use of this moniker in reference to Kriegler during the award ceremony.

literature by third parties on Kriegler's contribution to constitutional jurisprudence and our understanding of the Constitution. The second reviews the literature authored by Kriegler himself in order to provide a more personal understanding of his views on and contribution to the evolution of South Africa's constitutional jurisprudence. The third section considers a number of themes selected from Kriegler's curial and extra-curial pronouncements: transformation in general; the constitution as a transformational document; transformation and the judiciary; the transition to democracy and the role of the Constitutional Court; separation of powers; the independence and accountability of the judiciary; the horizontal application of the Bill of Rights; equality and dignity; reconciliation of criminal procedure with the Bill of Rights; and the utilisation of international and comparative law as an interpretive guide in constitutional adjudication. This thematic focus provides a better and deeper understanding of Kriegler's interpretive approach as well as the extent to which his adjudicative approach advances our understanding of the Constitution. The chapter ends with an account of Kriegler's progressive jurisprudence and a Conclusion.

2 The advocate, peacemaker, judge and activist: A select biography

Kriegler completed his Bachelor of Arts degree in 1954 at the University of Pretoria, after which he proceeded to study for a Bachelor of Laws degree at the University of South Africa. He joined the Johannesburg Bar in 1959, where he practised law for 25 years as an advocate. He took silk in 1973 and chaired the Johannesburg Bar Council in 1977 and 1980.²⁶⁹ Kriegler built an extensive litigation practice at the bar, where he represented some leading societal and political figures. These included Breyten Breytenbach, Mangosuthu Buthelezi, the Church of Scientology, Lucas Mangope, Beyers Naude, Eschel Rhodie, and Eugene Terreblanche. In 1994, Kriegler was appointed a founding Justice of the newly established Constitutional Court of the Republic of South Africa. He completed his term of office in 2002.

Between 1976 and 1983, Kriegler served intermittently as an acting judge and in 1984 was appointed to the Transvaal Provincial Division of the Supreme Court (TPD). At the TPD, he distinguished himself as a highly competent judge and is described as having 'left his indelible mark'.²⁷⁰ Of particular note is that the incredible array of his judgments covered many different areas of the law. These include trademark law, criminal law and procedure, administration of estates, intellectual property law, electoral law, tax law, insurance law, company law, insolvency,

269 Van der Linde (n 264 above) 18.

270 As above, 20.

labour law, and procedural law.²⁷¹ Notably Kriegler is a leading authority on criminal procedure; in 1993, he authored the 5th edition of *Hiemstra's Suid-Afrikaanse strafproses*. Between 1990 and 1993, he acted in the Appellate Division, which at the time was the highest court in the country, and was permanently appointed to its Bench in 1993. As a Justice on the first Bench of the Constitutional Court, in a total of 29 cases in which Kriegler handed down opinions between 1995 and 2003, he wrote 15 unanimous judgments for the Court, wrote five concurring opinions, authored or co-authored a total of five majority judgments and handed down four dissenting opinions.

During the *apartheid* era, Kriegler was involved in establishing various human rights and public interest advocacy bodies. He provided advocacy training with the Black Lawyers' Association from the early 1980s, he was the founding chair of Lawyers for Human Rights (1981), and he was a founding trustee of the Legal Resources Centre (1978). The latter two are amongst the oldest public interest litigation organisations in the country. In December 1993, Kriegler was appointed Chairperson of the Independent Electoral Commission (IEC), whose major task was to manage South Africa's first democratic elections, and was instrumental in establishing the IEC, which he chaired until 1999.

Since retiring from the Bench in 2002, Kriegler has been chiefly engaged in judicial education and the training of public prosecutors and practising advocates. He has also been engaged in various countries across the world in executing mandates from the United Nations, the African Union, the Commonwealth, and various international non-governmental organisations such as the International Bar Association and the International Commission of Jurists. Kriegler has also participated in numerous national and international judicial missions; this has included delivering lectures on judicial and electoral matters in numerous countries throughout the world. He currently sits on the boards of Freedom under Law, which he chairs, and the Centre for Human Rights, and is an Extraordinary Professor in the Faculty of Law at the University of Pretoria. Kriegler is also a trustee of the Nelson Mandela Children's Fund, patron of Advocacy Training for the General Council of the Bar, and Chairperson of the Constitutional Court Trust.

3 What others have said about Justice Kriegler

Van der Linde SC has described Kriegler at the bar as a 'busy junior (when he started off)', indicating that the 'law reports reveal a large number of appearances in various courts throughout the country, and also the then appellate division.'²⁷² Judge Lewis Goldblatt has praised Kriegler's 'sharp

271 As above.

272 As above, 18.

intellect, analytical ability and great felicity of language'.²⁷³ Goldblatt further described Kriegler as 'a man who believed, as he still does, in justice and fairness for every member of our society ... and saw the proper practice of the law as a contribution to this cardinal principle.'²⁷⁴

The poet Breyten Breytenbach, in his book *The true confessions of an albino terrorist*, depicts Kriegler as 'the rarest of all Afrikaners: a completely honest man profoundly inspired by humane principles.'²⁷⁵ On trial for terrorism-related charges in the late 1970s, in which he was defended by Kriegler, Breytenbach declares that 'from the moment he agreed to defend me he never once went back on his ferocious commitment to my cause. I could not have asked for a better defender.'²⁷⁶

Retired President of the Supreme Court of Appeal Judge Craig Howie also noted Kriegler's intellectual and physical energy during his time at the Appellate Division, pointing out that 'at that time he was busy writing his book on criminal procedure.'²⁷⁷ He variously describes Kriegler as a 'great contributor to the law'²⁷⁸ and 'a great promoter for the respect of law.'²⁷⁹ On Kriegler's contribution to constitutional jurisprudence, legal luminaries such as Sir Sidney Kentridge and Lady Felicia Kentridge have described Kriegler's contribution to South African constitutional jurisprudence 'as a monument to the combination of sensitivity and realism which has always marked his approach to law'.²⁸⁰ Kriegler's contribution to South African constitutional jurisprudence will be fully canvassed in the third section of this chapter through an analysis of select themes.

Retired Deputy Chief Justice Dikgang Moseneke, who deputised for Kriegler at the IEC, described him as somebody who 'detested *apartheid* and unfairness'²⁸¹ and was 'unwaveringly committed to a transformed, inclusive and just society.'²⁸² Moseneke further applauded Kriegler for his 'incisive intellect, forthrightness, and deep sincerity' as well as the extraordinary brilliance of his judgments and legal writing.²⁸³

273 As above.

274 Van der Linde (n 264) 20.

275 B Breytenbach *The True Confessions of an Albino Terrorist* (1984); cited in van der Linde (n 264 above) 19-20.

276 As above.

277 Van der Linde (n 264 above) 21.

278 As above.

279 As above.

280 As above, 24.

281 As above, 22.

282 As above.

283 As above.

4 In Justice Kriegler's own words

Kriegler has described himself as a 'vehement opponent of socialism and certainly its extreme form of Marxism ... a human-rights lawyer, an anti-communist human-rights lawyer, with a fairly strong religious background to it, and an experienced judicial officer',²⁸⁴ believing such experience adequately prepared him for the Constitutional Court.

Various interviews have also provided some insights into the formative years of Johann Kriegler which may have influenced his approach to constitutional adjudication. Kriegler has described himself as 'a journeyman lawyer who has done some fifty-five years in the courts of this land and the neighbouring territories, in just about every capacity'.²⁸⁵ He explains that he 'battled with the Nationalist government from [his] student days at Pretoria University, trying to form a Young Communist League at Pretoria University before the Suppression of Communism Act'.²⁸⁶ There is, however, no publicly available information to suggest that Kriegler ever became a communist. In addition to being a 'vehement opponent of socialism ... an anti-communist',²⁸⁷ he has described himself as a 'free market enterprise maverick'.²⁸⁸ It also appears that his belief in human dignity was one of his abiding principles from an early age; he noted in an interview for the Constitution Court Oral History Project (History Project) that:

I do believe and did believe in the immortal spark that every human being possesses as of right, by the very fact that you are a human being, that you're entitled to dignity, to respect, to a say in the affairs of the community in which you live, to express your views, to have your opinions, to have your right to privacy.²⁸⁹

One of the biggest challenges confronting the Constitutional Court in its early years was that it had to develop an interpretative approach suitable for the transformative ethos envisaged in both the 1993 interim and 1996 Constitutions despite the lack of experience in constitutional human rights adjudication of any of the Court's founding Justices. Describing his first experiences at the Court, Kriegler said:

284 University of the Witwatersrand 'Constitutional Court Oral History Project: Interview with Justice Kriegler' 24 November 2011 http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AG3368/AG3368-K40-001-jpeg.pdf (accessed 24 May 2017) 1.

285 J Kriegler 'Can judicial independence survive transformation? – A public lecture delivered by Judge Johann Kriegler at the Wits School of Law on 18 August 2009' <http://constitutionallyspeaking.co.za/can-judicial-independence-survive-transformation-a-public-lecture-delivered-by-judge-johann-kriegler-at-the-wits-school-of-law/> (accessed 25 May 2017).

286 University of the Witwatersrand (n 284 above) 1.

287 As above.

288 N Bohler-Muller 'HSRC Constitutional Justice Project: Interview with Justice Johann Kriegler' (2004) 15 (on file with the author).

289 As above.

I found it stimulating, and in fact it was the first time I really got excited about the possibility of actually serving on this Court. And it then proved to be very exciting indeed to start with a complete blank slate in virtually every respect. We had no rules, we had no principles, we had no background, there was no South African body of constitutional precedent in the context of a predominant Constitution with a Bill of Rights and a testing power for the courts.²⁹⁰

On whether his life trajectory might have prepared him for the Bench, Kriegler explained that he did not think he ‘was prepared for life on the Constitutional Court Bench. I think I grew a great deal in the years that I was privileged to serve on the Constitutional Court.’²⁹¹ He acknowledges, however, that his career as an advocate and a judge in the various courts was invaluable preparation for serving on the newly-minted Court.²⁹²

Regarding his contributions to the initial functioning of the Constitutional Court, Kriegler acknowledges the importance of his skills and experience as an advocate and a judge in different courts which he brought to bear in establishing and stabilising the new Court. He was able to generously impart skills in legal and judgment writing to some of his colleagues who had no prior judicial experience before being appointed to the Constitutional Court. For instance, Kriegler’s judicial experience was to be tapped by the Constitutional Court in one of its most famous decisions, the *Certification of the Constitution of the Republic of South Africa* case.²⁹³ In an interview with the History Project, Kriegler explained that he:

assisted in the administration of the case, and then eventually in writing the judgment, which was a very difficult judgment, and a very lengthy and detailed judgment. I stitched it together. I saw to it that the seams between the various contributions were as invisible as possible, that the style remained the same, that it ran logically, that the sequences were right, that what we said in chapter one was not watered down in chapter three, or contradicted in chapter eight – that kind of managerial judicial skill. I also did a good deal, right at the beginning, in helping colleagues with limited judicial experience on the format of a judgment: how one goes about thinking it through, and how one then goes about putting on paper what you have thought through.²⁹⁴

The next section discusses and evaluates Kriegler’s contribution to our understanding of the Constitution by focusing on select themes as reflected most often in both his curial and extra-curial pronouncements.

290 University of the Witwatersrand (n 284 above) 5.

291 As above, 1.

292 As above.

293 See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), 1996 (‘First Certification judgment’).

294 University of the Witwatersrand (n 284 above) 13.

5 Select themes

5.1 The Constitution as a transformative document

In an often-cited article published in 1998, Karl Klare described the South African Constitution as entailing a project of 'transformative constitutionalism'.²⁹⁵ The notion of transformative constitutionalism has found deep expression in the Constitutional Court's jurisprudence and academic literature.²⁹⁶ However, transformation is often a complex concept, which may mean different things to different people. What is not debatable, though, is that the Constitution was developed within a particular historical and social context. Because of the *apartheid* policies of the National Party government, the black majority had been subjected to systemic deprivation and discrimination in accessing basic services such as water, healthcare, housing, food, education and social security.²⁹⁷ It was also a context of social exclusion, unequal power relations, and material dispossession.²⁹⁸ As a result, the Constitution was designed to redress this legacy. In that regard, the Preamble to the Constitution declares that the purpose of the Constitution is to 'establish a society based on democratic values, social justice and fundamental human rights'.²⁹⁹ It further emphasises, as one of the aims of the Constitution, the need to '[i]mprove the quality of life of all citizens and free the potential of each person'.³⁰⁰

In the Constitutional Court's first case on the interpretation of the socio-economic rights provisions in the Constitution, the case of *Soobramoney v Minister of Health, KwaZulu-Natal (Soobramoney)*,³⁰¹ the Constitutional Court affirmed that 'a commitment ... to transform society ... lies at the heart of our new constitutional order'.

There is, however, vigorous debate as to the nature and pace of the changes to the legal, political and economic systems that must be engendered to give effect to the transformative goals of the Constitution.³⁰² What is particularly noteworthy is that beyond the aspirational ideals articulated in its Preamble, the Constitution neither provides a comprehensive model for a transformed society nor articulates

295 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 150.

296 See S Liebenberg *Socio-economic rights: Adjudication under a transformative Constitution* (2010) 25.

297 K Moyo 'Water as a human right under international human rights law: Implications for the privatisation of water services' unpublished LLD Thesis, Stellenbosch University, 2013 249.

298 D Moseneke 'Transformative adjudication in post-apartheid South Africa – Taking stock after a decade' in PC Osode & G Clover (eds) *Law and transformative justice in post-apartheid South Africa* (2010) 27.

299 'The Constitution of the Republic of South Africa, 1996' (as set out in sec 1(1) of the Citation of constitutional Laws Act 5 of 2005) Preamble.

300 As above.

301 *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) para 8.

302 Liebenberg (n 296 above) 28.

the detailed processes for achieving this.³⁰³ What it does is provide 'a set of institutions, rights and values for guiding and constraining processes of social change.'³⁰⁴

Kriegler has also expressed a view on the transformative nature of the Constitution, noting that:

... the Constitution is indubitably a transformational document. It is ... a bridge. A bridge between the old and the new. It expressly, at the threshold, sets out that we are to heal the wounds of the past, to build a new society, to lay the foundations and to build on them. And that is inherently then transition We negotiated a revolution But to believe that by settling the conflict, we had erased the past would be self-delusory. Of course, the past is still with us and the Constitution tells us to heal those wounds and that is part of the transition in which we are engaged.³⁰⁵

However, Kriegler points out that the word *transformation* is itself an imprecise one and that often 'people give it the content they want to give it'.³⁰⁶ For example, transformation 'means something very, very different to people depending upon whether they were oppressed or oppressors in the past'.³⁰⁷ Nevertheless, Kriegler's view is that transformation as a concept must take its meaning from its context from time to time.³⁰⁸

5.2 Role of the courts in the transformation process

One of the most vexing questions in post-apartheid South Africa centres on a precise articulation of the proper role of courts and the judiciary in a new constitutional democracy, regard being had to the cardinal role courts play in interpreting the law. South Africa's constitutional dispensation provided for a constitutional system in which the Constitution and not Parliament is supreme.³⁰⁹ The pertinent question relates to the role the judiciary should play in the transformation of society in general and the creation of a new order as envisaged in the Constitution.

During his interview for the Bench in 1994, Kriegler had no illusions about the unique role of the Constitutional Court beyond just interpreting black-letter law, noting that the interim Constitution provided the Court with a broader role to play.³¹⁰ This was because the Constitutional Court

303 As above, 29.

304 As above.

305 Kriegler (n 285 above).

306 Bohler-Muller (n 288 above) 5.

307 Kriegler (n 285 above).

308 Bohler-Muller (n 288 above) 5.

309 A Govindjee & M Olivier 'Finding the boundary – The role of the courts in giving effect to socio-economic rights in South Africa' in PC Osode & G Clover (eds) *Law and transformative justice in post-apartheid South Africa* (2010) 79.

310 Kriegler (n 266 above).

would have a final say on societal and political issues of national importance, with inevitable policy implications. These include land redistribution and affirmative action in order to rectify the inequities of the past.³¹¹ Kriegler's view, which is illustrated in his jurisprudential approach as reflected below, was that the new Court's role was 'distinctly different from that of an interpreter of the law pure and simple'.³¹² The role of the Court, as famously put by Kriegler in the case of *Fose v Minister of Safety and Security* (*Fose*),³¹³ would be to 'attempt to synchronise the real world with the ideal construct of a constitutional world created in the image of [the supremacy clause]'. He believed that the Constitutional Court's internationally-lauded socio-economic rights jurisprudence in the area of health and housing had broken new ground in its clear articulation not only of the negative but also of the positive duties of a state in the realisation of such rights.³¹⁴

In the case of *S v Mhlungu and Others* (*Mhlungu*),³¹⁵ one of the earliest cases to be adjudicated by the Constitutional Court under the interim Constitution, Kriegler was quite emphatic about the transformation envisaged under that document, which he christened a 'metamorphosis'.³¹⁶ He pointed to the 'universal consensus that the Constitution ushered in the most fundamental change in the history of our country'.³¹⁷ He further emphasised the new framework in which 'the Constitution is the supreme law of the land and binds all legislative, executive and judicial organs of state'.³¹⁸ In *S v Dlamini and Others* (*Dlamini*),³¹⁹ a decision handed down in March 1999, Kriegler further emphasised the transformative impact of the Bill of Rights on every aspect of South African law, noting that the advent of the Bill of Rights entailed a reappraisal of statutory and common law 'in the light of the new constitutional norms heralded by that transition'.³²⁰

311 As above.

312 University of the Witwatersrand (n 284 above) 25.

313 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 94. In this case, the Constitutional Court had to determine the meaning of 'appropriate relief' as set out in section 7(4) of the interim Constitution as a result of the applicant's claim for 'constitutional damages' for infringement of the right not to be tortured. The Constitutional Court held that the award of monetary damages would be inappropriate relief in the particular circumstances of the case and the appeal was dismissed.

314 Bohler-Muller (n 288 above) 5, 15.

315 *S v Mhlungu and Others* 1995 (3) SA 867. The case involved the proper interpretation of section 241(8) of the interim Constitution, which dealt with criminal proceedings that had commenced before the enactment of the interim Constitution in 1993. The Constitutional Court had to determine the meaning of 'pending' and whether the effect of this provision rendered the Constitution inapplicable to the case in question.

316 As above, para 69.

317 As above.

318 As above.

319 *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC).

320 *Dlamini* (n 319 above) para 2.

These curial declarations by Kriegler display an acute awareness that it was no longer business as usual. The adoption of the new Constitution was analogous to a 'negotiated revolution', the Constitution being 'indubitably a transformative document'.³²¹ This entailed a re-evaluation of all law, including common law, statutory law, court procedures, style and language in light of the new Constitution, and in particular the Bill of Rights.

One of the clearest signals that the Constitution sought a complete and definitive break with the past and ushered in significant changes in how we think about rights was the inclusion of an expansive set of justiciable socio-economic rights. Rather than viewing the constitutionally guaranteed rights contained in the Bill of Rights as a check on democracy, Kriegler's jurisprudential approach showed his appreciation of the significance of the Bill of Rights as a vehicle for enabling broad substantive transformative social change in South Africa. He acknowledged, however, the limitations in effecting social change through law only, emphasising the importance of political will in any transformative endeavour, noting that one cannot change 'societal structures and its essentials solely through court cases. Absent the political will, you really can do very little.'³²² He gave the example of the breakthrough by the Treatment Action Campaign in its access to health care as a 'combination of public opinion, advocacy, public demonstrations, media exposure – and litigation – and the law: working hand-in-hand'.³²³

5.3 Demographic transformation and the judiciary

Linked to the transformation debate is how representative the judiciary is or should be, taking into account the national demographic makeup of a country like South Africa. Kriegler has expressed some views on the hotly contested issue of suitability for appointment to the judiciary, an issue that to date is the subject of considerable debate.³²⁴ Section 174 (1) of the Constitution provides that '[a]ny appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer.' Additionally, section 174(2) of the Constitution enjoins the Judicial Services Commission (JSC) to ensure 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' (emphasis added).

321 Kriegler (n 285 above).

322 Bohler-Muller (n 288 above) 22.

323 As above, 23 (emphasis added).

324 See J Klaaren 'Transformation of the judicial system in South Africa, 2012–2013' 2015 (47) *The George Washington International Law Review* 481; L Siyo and JC Mubangizi 'The independence of South African judges: A constitutional and legislative perspective' 2015 (18) *Potchefstroom Electronic Law Journal* 825; N Ntlama *The transformation of the South African judiciary: A measure to weaken its capacity?* <http://www.nyslawreview.com/wp-content/uploads/sites/16/2014/10/Ntlama.pdf> (accessed 15 May 2017); Kriegler (n 285 above).

During his interview for the Constitutional Court in 1994, and upon being probed on the necessity of judicial experience for aspiring Justices, Kriegler explained that he never thought it essential that all of the members of the Constitutional Court should necessarily have that kind of experience.³²⁵ He pointed out that ultimately it was a 'question of cross-pollination and mutual enrichment on the bench' and that no one should be disqualified if s/he did not have judicial experience, stating that '[i]f you do have that kind of experience it can only be to the good, but I do not regard it as essential.'³²⁶ Relatedly, his view was that the Constitutional Court should be as broad as possible in its composition. This would enable it 'to draw on the widest possible pool of knowledge.'³²⁷ Kriegler did point out, however, that it was never the function of a court to be representative of all the interest groups in a country. Rather,

... the court should be so composed that its members are alert to, aware of sensitive to all of those diverse interests. I think it is, you are looking more at the quality of the person that you are nominating than at the selection or the mix of persons that you put together. I think that you can have in one outstanding judicial officer all of the qualities and all of the sensibilities and you could put together a body of 11 that would have none of them.³²⁸

In a 2009 interview with the *Mail and Guardian* newspaper, Kriegler acknowledged that for historical reasons, the legal profession in the country had traditionally favoured white citizens and that undoubtedly there was a need for radical change.³²⁹ He cautioned, however, against knee-jerk reaction to the issue, emphasising the need to realise that one was dealing with a developmental problem and that 'quick fixes lead to quick problems'³³⁰ and pointing out that the world over, the bar (which traditionally feeds the Bench) was drawn from the middle-class elite.³³¹ Consequently, if one wished to change the system, according to Kriegler, there was a need to positively promote the candidature to the profession from underrepresented groupings.³³²

At a public lecture at the University of the Witwatersrand delivered on 18 August 2009 (Wits lecture), Kriegler acknowledged that it was imprudent to have a judiciary that was 'manifestly unrepresentative of the society which it is supposed to serve',³³³ but proceeded to state that:

The harsh conclusion to which I have come is that the Judicial Service Commission, in adhering too rigidly to its policy of preferring transformation

325 Kriegler (n 266 above).

326 As above.

327 As above.

328 As above.

329 'Kriegler saddles up for rough ride' *Mail & Guardian* 11 September 2009 6.

330 As above.

331 As above.

332 As above.

333 Kriegler (n 285 above).

over appropriate qualification, has not only misapplied its substantive selection power but has done so in a manner that is unacceptable in a society based on human dignity, equality and respect for human rights.³³⁴

He further bemoaned the practice of a 'Judicial Service Commission that is appointing more and more judges on purely political grounds in order to control the judiciary through party hacks and yes-men and deployed cadres.'³³⁵

Kriegler's interpretation of section 174(1) of the Constitution was that it instructs the JSC to appoint people who are appropriately qualified as a precondition, and such a criterion should take precedence over other considerations, such as demographic representation. Although the Constitution explicitly states that the transformational criterion of race and gender balance must be considered in judicial appointments, Kriegler argued that the primary and essential requirement was that appointees had to be appropriately qualified as the main criterion, ahead of the 'race and gender composition' criterion.³³⁶ In his view, '[n]ow these two essential factors, the one absolute (appropriately qualified) and the other discretionary (race and gender composition), have been turned on their heads.'³³⁷ Kriegler further argued that:

... by depriving the High Court Bench of the services of these people the JSC has impoverished the judiciary and the country. In adhering too rigidly to its policy of preferring transformation over appropriate qualification, the JSC has not only misapplied its substantive selection power but has done so in a manner that is unacceptable in a society based on human dignity, equality and respect for human rights. If the independence of the judiciary is to be preserved, this misguided transformation, this stalking horse for racial animosity, will have to be confronted.³³⁸

It is clear from this statement that the nub of Kriegler's interpretation is that the requirement for race and gender balance is a guide, and not a prerequisite for appointment.

The Constitution is clear that the need to ensure race and gender composition is an essential requirement for appointment to the Bench. Kriegler views the race and gender criterion as having opened a loophole for the JSC to appoint 'judges on purely political grounds in order to control the judiciary through party hacks and yes-men.'³³⁹ Kriegler's concerns appear to be predicated on the need to appoint qualified, competent, fit and proper women and men to the courts. Race and gender

334 As above.

335 Bohler-Muller (n 288 above) 24.

336 Kriegler (n 285 above).

337 As above.

338 As above.

339 Bohler-Muller (n 288 above) 24.

balance should therefore not be abused through appointing candidates of questionable competence or ethics.

It is, however, important to note that the requirement to consider race and gender as a criterion in judicial appointments was included in the Constitution precisely to address the grotesque race and gender imbalances in the composition of the country's judiciary. Kriegler's interpretive approach, though understandable, was rightly questioned.³⁴⁰ Since black people and women are previously disadvantaged, section 174(2) of the Constitution cannot be interpreted without due regard to the equality clause enshrined in section 9 of the Constitution as well as to employment equity legislation. The latter seeks to address, through the utilisation of affirmative action measures, the imbalances occasioned by the deliberate exclusion of black people and women in key endeavours of life. It is therefore important for the JSC to ensure that the candidates whom it recommends for appointment to the judiciary are 'appropriately qualified' (minimally, have a law degree) and 'fit and proper' (minimally, do not have a criminal record and are persons of demonstrable integrity) and that consideration is given to race and gender composition, *all criteria weighed equally*, for such an exercise of public power to pass constitutional muster.³⁴¹

5.4 Separation of powers

Schedule 4 of South Africa's 1993 interim Constitution contained thirty-four Constitutional Principles (CPs) with which the text of the final Constitution was required to comply. As a result, and as part of the constitution-making process, the first Bench of the Constitutional Court had to certify that the resultant Constitution adhered to the CPs. CP IV is the key provision that provided for the separation of powers. It stipulated that '[t]here shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.' In the *First Certification Judgment*,³⁴² the Constitutional Court held that CP IV required a separation of powers between the legislature, the executive and judiciary though it did not prescribe what form that separation should take, and in that regard 'the CPs must not be interpreted with technical rigidity.' Practically, this entails that the legislative branch is responsible for enacting legislation, the executive branch for developing and implementing policy and legislation, and the judiciary for interpreting the law. Importantly, mutual control and accountability is established through

340 Siyo & Mubangizi (n 324 above) 825.

341 See section 174(1) and (2) of the Constitution on the criteria for appointment to the judiciary.

342 *First Certification judgment* (n 293 above).

a system of checks and balances, of which judicial review of legislative or executive action is an important component.³⁴³

Given South Africa's tortu(r)ous history and social circumstances, courts are often called upon to adjudicate on highly contentious matters, with significant political and policy implications. An important issue in constitutional adjudication is normally the question of correct interpretation and application of the doctrine of separation of powers, particularly in cases that have significant political and policy implications. The adjudication of socio-economic rights is a case in point, where a variety of polycentric concerns tends to arise.³⁴⁴ The orthodox argument was that judicial adjudication of socio-economic rights would compel the judiciary 'to encroach upon the proper terrain of the legislature and executive', particularly by 'dictating to the government how the budget should be allocated'.³⁴⁵

In the South African context, Kriegler has acknowledged that the 'the interaction between executive and legislature and judiciary has been an acute issue for the Constitutional Court from day one, particularly as we did not have a justiciable bill of rights in the past'.³⁴⁶ He has called for a cautious approach, arguing that it is not the function of the judiciary to descend into detail on issues.³⁴⁷ In his view, the Constitutional Court's function is to ensure that legislative and executive conduct is consistent with constitutional prescripts.³⁴⁸ He further adds that the Constitutional Court is probably more conservative than many of the high courts in other jurisdictions.³⁴⁹ This is reflected in its reluctance to get involved in areas of policy 'that are not the judiciary's job'.³⁵⁰ Kriegler's view is that it should never be part of the remit of a court of law, in particular an apex court, 'to be seen or to aspire to being seen to be activist'.³⁵¹ Commenting on the competence of courts to determine the quantity of water as part of interpreting the right of access to water in the Constitution as adjudicated in the *Mazibuko and Others v City of Johannesburg*³⁵² case, for example, Kriegler argued that it was not part of the Constitutional Court's mandate 'to get down into that kind of nittygritty detail'.³⁵³

343 Liebenberg (n 296 above) 66.

344 See *Soobramoney* (n 301 above) & *Mazibuko and Others v City of Johannesburg and Others* 2010 4 SA 1 (CC).

345 *First certification* judgment (n 293 above).

346 Bohler-Muller (n 288 above) 5-6.

347 As above, 1.

348 As above, 1-2.

349 As above.

350 As above, 5-6.

351 As above.

352 *Mazibuko and Others v City of Johannesburg and Others* 2010 4 SA 1 (CC). The *Mazibuko* case was very significant in that it was the first South African case in the Constitutional Court in which litigants explicitly sought enforcement of their constitutional right of access to sufficient water in terms of section 27(1)(b) of the Constitution.

353 Bohler-Muller (n 288 above) 7.

Kriegler is, however, clear in his view that the practical application of the doctrine should not result in judicial timidity. Ultimately, the standard should be the Constitution. This is because a judicial officer within the South African context derives her or his power from the Constitution. In that regard, the judge's job in terms of the Constitution is to interpret and apply the Constitution. If that brings a judge into confrontation with other branches of the state, 'that is the essence of the separation of powers recognised in our Constitution',³⁵⁴ as he asserts, 'a proper judicial correction prevents the executive or the legislature from making mistakes.'³⁵⁵

On the frequent tension between the different branches of government, in particular the executive and the judiciary, Kriegler has argued that such tension is normal in a constitutional state recognising the separation of powers.³⁵⁶ In his view, such tension is an essential characteristic of separation of powers functioning properly. Nevertheless, '[t]here has to be a give and take, a respect, a deference, a judicial restraint and a protection and respect for the judiciary's independence.'³⁵⁷

In section 7, the Constitution clearly enjoins the state to 'respect, protect, promote and fulfil all the rights in the Bill of Rights.' Additionally, section 3 makes it crystal clear that the Constitution is the supreme law of the Republic; it follows that any law or conduct inconsistent with the Constitution is invalid. The doctrine of constitutional supremacy thus enjoins South African courts to apply the Constitution and the law 'impartially and without fear, favour or prejudice.'³⁵⁸

In *Fose*, as indicated above, Kriegler described the role of courts in crafting remedies for constitutional violations as an 'attempt to synchronise the real world with the ideal construct of a constitutional world created in the image of [the supremacy clause]'.³⁵⁹ The implications are that, in its adjudicative approach, a court is obliged to consider whether the state has complied with its constitutional obligations. This clearly calls into question any interpretation of the separation of powers doctrine predicated on inflexible functional demarcations between the three branches of government. As noted above, the Constitutional Court made it abundantly clear in the *First Certification* judgment that the Constitution does not envisage bright-line boundaries between the three branches of government.³⁶⁰ The standard is therefore the Constitution, under and from which a judge derives her or his power.

354 University of the Witwatersrand (n 284 above) 24.

355 As above.

356 Kriegler (n 285 above).

357 As above.

358 Section 165(2) of the Constitution.

359 *Fose* (n 313 above) para 94.

360 *First Certification* judgment (n 293 above) para 111.

5.5 Independence and accountability of the judiciary

Section 165 of the Constitution vests judicial authority in the courts, rendering them 'independent and subject only to the Constitution and the law'. Interference with the functioning of the courts by other organs of state is expressly prohibited. In *Bernstein v Bester (Bernstein)*,³⁶¹ the Constitutional Court identified the independent authority of the judiciary to enforce the Constitution as a key ingredient of a constitutional state.

The independence of the judiciary is one of the themes about which Kriegler has publicly expressed his views, both in and outside the Court. In the case of *S v Mamabolo (Mamabolo)*,³⁶² Kriegler deliberated on the position of the judiciary in relation to other branches of government. The case involved the issuing of a press release by the Department of Correctional Services in which it publicly stated its disquiet regarding the granting of bail in a case involving the late Eugene Terreblanche. The judge who granted bail then sought an explanation in this regard and convicted and sentenced the applicant for the crime of scandalising the court.³⁶³ Writing for the majority, Kriegler held that while the common law crime of scandalising the court limits freedom of expression, the limitation was justifiable provided that the crime was appropriately and narrowly defined with the aim of preserving confidence in the administration of justice. The Court concluded that the conviction and sentence had violated the accused's rights.³⁶⁴

Related to the independence of the judiciary is the concern about the accountability of judges, a natural corollary of the fact that judges are not subjected to democratic processes such as elections but are appointed. In that regard, Kriegler has forcefully argued for the need for balance between the independence of the judiciary, on one hand, and the imperative for judges to be accountable, on the other, pointing out that:

[Judicial] independence does not mean unaccountability. Without doubt judges, who are paid from the public purse to serve their country and its people, are not free agents, privateers at liberty to do as they wish without being answerable for their actions (or, more often, lack thereof).³⁶⁵

361 *Bernstein v Bester* 1996 (2) SA 751 (CC) para 51. In this case, the Constitutional Court had to determine whether sections 417 and 418 of the then Companies Act 61 of 1973, which provided for the examination of persons and the disclosure of documents as to the affairs of a company, was consistent with sections 8 (right to equality), 11 (right to freedom and security), 13 (right to privacy) and 24 (right to fair administrative action) of the interim Constitution.

362 *S v Mamabolo* 2001 (3) SA 409 (CC).

363 As above.

364 As above, para 16.

365 J Kriegler 'The rule of law in post-colonial Africa: A British legacy? Second international rule of law lecture' *Bar of England and Wales, Gray's Inn Hall* (3 December 2008).

In the process of delivering the majority opinion, Kriegler emphasised the importance of judicial independence, pointing out that the judiciary was 'the arbiter in disputes between organs of state',³⁶⁶ and a 'watchdog over the Constitution and its Bill of Rights'.³⁶⁷ Significantly, he emphasised that '[i]n our constitutional order the judiciary is an independent pillar of state, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially'.³⁶⁸ Kriegler further declared that '[u]nder the doctrine of separation of powers it [the judiciary] stands on an equal footing with the executive and the legislative pillars of state'.³⁶⁹

Kriegler's view is clearly that judicial independence is fundamental to democracy and to a constitutional state such as South Africa. It hardly bears repeating that in the fulfilment of their judicial functions, judges should be in a position to execute their mandate impartially and independently, without undue influence.³⁷⁰ It should be noted that the independence of the judiciary is intertwined with the doctrine of separation of powers, which is an important ingredient of any polity aspiring to the status of a constitutional democracy. The judiciary plays a cardinal role in ensuring that other branches of government fulfil their constitutional and legislative obligations, a role which demands that the courts be immunised from undue influence and interference from the executive, the legislature and powerful private interests.

5.6 Equality and dignity

5.6.1 Equality

Inequality is often cited as the biggest challenge facing development and transformation in post-apartheid South Africa.³⁷¹ Poverty and income inequality in South Africa have strong racial, gender and spatial dimensions. In the light of South Africa's history of systematic discrimination, the importance of the principle of equality in South Africa is reflected in the very first section of the Constitution.³⁷² Additionally, the Constitution provides for a justiciable Bill of Rights. Section 7(1) of the Constitution affirms that the Bill of Rights is 'a cornerstone of democracy in South Africa and affirms the democratic values of human dignity, equality and freedom'. Furthermore, section 39 of the Constitution

366 As above.

367 As above.

368 As above.

369 As above.

370 Sec 165(3) of the Constitution.

371 Section 1 of the Constitution cites the achievement of equality as one of the founding values of the South African state.

372 As above.

expressly requires the courts to promote the constitutional values of human dignity, equality and freedom when interpreting the Bill of Rights.

Kriegler has referred to human dignity, equality and freedom as 'conjoined, reciprocal and covalent values' which are 'foundational' to South Africa.³⁷³ He has also freely expressed his views on equality, which is both a right and a value animating and underpinning all the rights protected under the Constitution. In the case of *President of the Republic of South Africa v Hugo (Hugo)*,³⁷⁴ Kriegler explained that the Constitution 'is primarily and emphatically an egalitarian document'³⁷⁵ and that:

... in the light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution's focus and organising principle. The importance of equality rights in the Constitution, and the role of the right to equality in our emerging democracy, must both be understood in order to analyse properly whether a violation of the right has occurred.³⁷⁶

In *Du Plessis v De Klerk (Du Plessis)*,³⁷⁷ Kriegler observed that '[o]ur constitution aims at establishing freedom and equality in a grossly disparate society'.³⁷⁸ On the relationship between equality and the limitations clause in section 36, Kriegler elaborated in *Hugo* that 'section 36 explicitly requires proportionality. Therefore, the law should impair the right to equality no more than is necessary to accomplish the desired

373 *Mamabolo* (n 362 above) para 41.

374 *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708. In this case, the Constitutional Court had to decide the constitutionality of a presidential pardon in which a number of prisoners were released in terms of the decree, including mothers of minor children under the age of 12. Hugo, a single father of a son below the age of 12, challenged the pardon on the grounds that it unfairly discriminated on the basis of sex and gender. A key issue that the Constitutional Court canvassed was whether a short-term benefit afforded to a historically disadvantaged group – the remission of imprisoned mothers with children under 12 years of age – outweighed the perpetuation of a gender stereotype – that mothers bear more responsibility for child-rearing than fathers in South African society. Although the majority of the Constitutional Court was of the view that such a generalization was one of the chief causes of women's inequality in South African society, it nevertheless found the challenged decree to be justified on the basis that it was aimed at benefiting vulnerable groups which historically had borne the brunt of unfair discrimination. In a dissenting opinion, Kriegler's view was that alleviating the historical burden of a small group of women benefiting from the pardon could not outweigh concerns regarding the long-term effects of judicially endorsing an unjustifiable gender stereotype against all women in the country. Kriegler held that regardless of the veracity of the stereotype, by releasing mothers of minor children based on such a generalisation, the decree was nevertheless perpetuating an unfortunate stereotype which was at the core of women's inequality in society. Kriegler held that the benefits accorded to a few women were outweighed by the serious disadvantage of perpetuating a stereotype to society as a whole and held the presidential pardon to constitute unfair discrimination.

375 As above, para 74.

376 As above.

377 *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC). The case involved a defamation suit against a newspaper's journalists and publishers. One of the key issues the Constitutional Court had to decide concerned the applicability of the Bill of Rights between private parties.

378 As above, para 147.

objective.³⁷⁹ In his view, if there are other, less restrictive measures possible to achieve the same objective, section 36 does not save the violation of the equality clause.³⁸⁰

Kriegler's dissent in the *Hugo* case is worth noting. Like the majority, he held that the President had violated the equality provisions of the Constitution by distinguishing between classes of parents on the basis of their gender.³⁸¹ However, contrary to the majority ruling, he concluded that the presumption of unfairness in 'attaching that distinction has not been rebutted.'³⁸² On considering women as the primary care givers of young children, Kriegler argued that:

[this phenomenon] is a root cause of women's inequality in our society. It is both a result and a cause of prejudice; a societal attitude which relegates women to a subservient, occupationally inferior yet unceasingly onerous role. It is a relic and a feature of the patriarchy which the Constitution so vehemently condemns 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 in its tendency to cramp and stunt the efforts of both men and women to form their identities freely.³⁸³

In his view, '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.'³⁸⁴

Kriegler's dissent in *Hugo* is noteworthy for its emphasis on equality – almost feminist in its tone – as entailing the full and equal enjoyment of all rights and freedoms as defined in section 9(2) of the Constitution. He emphatically rejected the deployment of stereotypes which caricature women as caregivers and mothers, which clearly was an affront to the egalitarian ethos of the Constitution. The intersection between equality and gender is particularly important in the context of transforming the 'patterns of gendered disadvantage and inequality which are deeply inscribed [in] South African society.'³⁸⁵ In particular, the disadvantaged position of women often arises from the perpetuation of certain gendered social roles, as highlighted in Kriegler's dissenting judgment in *Hugo*.

379 *Hugo* (n 374 above) para 74.

380 As above, para 77.

381 As above, para 32.

382 As above.

383 As above, para 80.

384 As above, para 83.

385 Liebenberg (n 296 above) 208.

5.6.2 Dignity

Section 39(1)(a) of the Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum 'must promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. The Constitutional Court, however, has shied away from constructing a hierarchy of values. Nevertheless, there is no doubt that human dignity more often than not serves as a point of reference. Thus, for example in the case of *S v Makwanyane*,³⁸⁶ the Constitutional Court declared that '[r]espect for life and dignity ... are values of the highest order under our Constitution.'³⁸⁷

In the case of *Mamabolo* discussed above, Kriegler further emphasised the importance of the right to dignity as a cardinal right, pointing out that:

The Constitution, in its opening statement and repeatedly thereafter, proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom. With us the right to freedom of expression cannot be said automatically to trump the right to human dignity.³⁸⁸

In *Ex parte Minister of Safety and Security and Others: in Re S v Walters and Another (Walters)*,³⁸⁹ Kriegler held, for a unanimous court, 'that the right to life, to human dignity and to bodily integrity are individually essential and collectively foundational to the value system prescribed by the Constitution.'³⁹⁰ He further added that '[c]ompromise them and the society to which we aspire becomes illusory. It therefore follows that any significant limitation of any of these rights, would for its justification demand a very compelling countervailing public interest.'³⁹¹

Kriegler's interpretive approach outlined above underscores the important role that he attaches to the South African society's founding values of equality and dignity as reflected in the Constitution. His dissent in *Hugo*, in particular, emphasises a substantive, as opposed to a formal, approach to both the right and value of equality, an approach in line with the transformative ethos of the Constitution. Giving meaning and

386 *S v Makwanyane* 1995 (3) SA 391 (CC). In this case, the Constitutional Court was called upon to decide on the constitutionality of the death penalty. The Constitutional Court declared section 277 (1)(a), (c), (d), (e) and (f) of the Criminal Procedure Act 51 of 1977 and all corresponding provisions of other legislation permitting the application of capital punishment as a form of punishment as being inconsistent with the interim Constitution.

387 As above, para 111.

388 *Mamabolo* (n 362 above) para 41.

389 *Ex parte Minister of Safety and Security and Others: in Re S v Walters and Another* 2002 (4) SA 613 (CC).

390 As above, para 28.

391 As above.

substance to the foundational values of equality, freedom and dignity is important if we are to realise the transformative ethos of the Constitution.

5.7 Horizontal application of the Bill of Rights

The horizontal application of human rights is a metaphor used to describe the application of human rights between private individuals *inter se*. The Constitution expressly provides for the horizontal application of the Bill of Rights.³⁹² Section 8(1) provides that the Bill of Rights applies to all law and binds all organs of the state.³⁹³ Section 8(1) further provides a specific description of the circumstances in which the Bill of Rights binds a private party.³⁹⁴ Section 8(2) of the Constitution provides that a provision in the Bill of Rights 'binds a natural and 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.' However, to date, the courts have not been consistent in interpreting, nor has a clear methodology emerged to guide, the horizontal application of the rights in the Bill of Rights.³⁹⁵

During his interview for the Court in 1994, Kriegler foresaw some of the critical issues with which the future Constitutional Court would engage.³⁹⁶ He anticipated that one of the most vexed issues in constitutional interpretation, the horizontal application of the new Bill of Rights, was one such issue. He explained at the time that:

The one issue that I saw at the time when I studied it as being a potential problem, was whether the Bill of Rights is vertical only or horizontal in my terminology, whether it applies only as between State and citizen or whether it applies as between citizens and private bodies and citizens *inter se*.³⁹⁷

The majority decision in *Du Plessis*³⁹⁸ held that the Bill of Rights contained in the interim Constitution was not intended to have a general direct horizontal application. The majority held that the Bill of Rights was only indirectly horizontally applicable. Only Kriegler, with whom Didcott J concurred, held in a dissenting judgment that the Bill of Rights was indeed capable of direct horizontal application.³⁹⁹

392 Liebenberg has defined 'horizontal application of the Bill of Rights' as referring to the applicability of the Bill of Rights in relations between private parties. See Liebenberg, 'Adjudicating socio-economic rights under a transformative constitution' in M Langford (ed) *Socio-economic rights: Emerging trends in international and comparative law* (2009) 78.

393 See D Bilchitz 'Corporate law and the constitution: Towards binding human rights responsibilities for corporations' (2008) 124 *South African Law Journal* 773-783.

394 Liebenberg (n 296 above) 322.

395 Liebenberg (n 296 above) 321.

396 Kriegler (n 266 above).

397 As above.

398 *Du Plessis* (n 377 above).

399 As above.

Kriegler prefaced his dissent by pointing out that '[o]ur past is not merely one of repressive use of state power. It is one of persistent, institutionalized subjugation and exploitation of a voiceless and largely defenceless majority by a determined and privileged minority'.⁴⁰⁰ In that regard, 'when the Preamble speaks of "citizenship in a sovereign democratic constitutional state" the emphasis immediately falls on racial equality.'⁴⁰¹

According to Kriegler, 'the Constitution is elevated to supremacy over all law, and then all organs of state are enjoined to honour and enforce that supremacy'.⁴⁰² Furthermore,

[t]he Constitution promises an 'open and democratic society based on freedom and equality', a radical break with the 'untold suffering and injustice' of the past No one familiar with the stark reality of South Africa and the power relationships in its society can believe that protection of the individual only against the state can possibly bring those benefits.⁴⁰³

Kriegler proceeded to hold that the true debate was not one of verticality versus horizontality.⁴⁰⁴ Rather, the focus should be on the manner of the horizontal application of the Bill of Rights. Hence it did not matter whether such application was direct or indirect.⁴⁰⁵ Relying on the interpretation of section 35(3) of the interim Constitution, he argued that all the courts were enjoined, in interpreting statutory law as well as in applying and developing common law and customary law, to advance the purpose of the Constitution.⁴⁰⁶

It is particularly noteworthy that before the issue was clarified in the 1996 Constitution, Kriegler argued in his dissenting judgment in *Du Plessis* that the Bill of Rights in the interim Constitution was directly applicable to private relationships. It should be noted that liberalisation and privatisation have resulted in the increased provision and management of goods and services such as water, healthcare, social security and assistance, and education by private entities. This has resulted in the concomitant prevalence of private actors in human rights-sensitive goods and services.⁴⁰⁷ The express provision made in the Constitution for the horizontal application of the Bill of Rights, as noted by Liebenberg, no doubt poses a challenge to the public/private divide in South Africa's legal tradition.⁴⁰⁸ The possibility of the horizontal application of rights enshrined in the Bill of Rights 'invites a critical re-examination of the

400 As above, para 125.

401 As above.

402 As above, para 128.

403 As above.

404 As above, para 119.

405 As above.

406 As above, para 147.

407 Moyo (n 297 above) 288.

408 Liebenberg (n 299 above) 61.

network of private law rules and doctrines',⁴⁰⁹ thereby supporting the egalitarian and transformative ethos of the Constitution so eloquently – as correctly articulated by Kriegler in his dissenting judgment in *Du Plessis*.

5.8 Reconciliation of criminal procedure with the Bill of Rights

One of Kriegler's key contributions to our understanding of the Constitution is in the field of criminal procedure, which was one of his areas of expertise even before his appointment to the Bench. He also expressed passionate views on the importance of reconciling criminal procedure with the Bill of Rights, arguing that 'the quality of a society is in the criminal courts where the people are at their most exposed and the vast majority of our citizenry are without the benefit of legal representation.'⁴¹⁰ As a result, 'the fibre, the spirit, the philosophy of the criminal procedure system is of the utmost importance' to any society.⁴¹¹ This reflects the humanistic nature of Kriegler's judgments.

In the case of *Key v Attorney-General, Cape Provincial Division and Another*,⁴¹² Kriegler highlighted the potential tension between the criminal justice system and the Bill of Rights, pointing out that:

In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale.⁴¹³

In his constitutional interpretive approach, Kriegler has emphasised the imperative need to humanise a criminal justice system that had been dehumanised in large measure by virtue of the country's legacy. South Africa's *apartheid* history clearly demonstrates that 'the criminal justice system can be used to impose extra-curial punishments'.⁴¹⁴ These included 'vague statutory crimes which gave the state sweeping scope to investigate, charge and prosecute opponents of the governing party'.⁴¹⁵ The other arsenal used by the *apartheid* state to criminalise people's lives included legislative enactments that allowed attorney-generals to refuse bail as well as to impose invasive bail conditions in cases where bail was granted.⁴¹⁶

409 As above.

410 Kriegler (n 266 above).

411 As above.

412 *Key v Attorney-General, Cape Provincial Division and Another* 1996 (4) SA 187 (CC).

413 As above, para 13.

414 *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para 23.

415 As above.

416 As above.

In *Sanderson v Attorney-General, Eastern Cape (Sanderson)*,⁴¹⁷ Kriegler emphasised three protected interests: liberty; security; and trial-related interests. In his view, the right to a trial within a reasonable time sought to render the criminal justice system fair by reconciling the tension between the presumption of innocence and the publicity of trials.⁴¹⁸ The Constitutional Court acknowledged that although a criminally accused person is presumed innocent, s/he is nevertheless punished before conviction, and in some cases, such as during pre-trial incarceration, the 'punishment' is severe.⁴¹⁹ The constitutional imperative is that a trial must be held within a reasonable time. According to Kriegler, it makes sense that a substantively fair trial would include a provision that minimises non-trial related prejudice suffered by an accused.⁴²⁰

In *Wild v Hoffert (Wild)*⁴²¹ Kriegler held that the state is at all times and in all cases obligated to ensure that accused persons are not exposed to unreasonable delays in the prosecution of the case against them.⁴²² This, in turn, means that both state prosecutors and presiding officers must pay particular regard to their constitutional duty to foreclose any infringement of the right to a speedy trial.⁴²³

The 'fibre, the spirit, the philosophy of the criminal procedure system is of the utmost importance' to any society⁴²⁴ as it is in the criminal courts where the less privileged and more vulnerable members of society are likely to experience the workings of the legal system.

The above jurisprudential analysis clearly shows that Kriegler's adjudicative approach is a practical exhibition that the human rights of dignity, equality, and liberty are designed to protect accused persons against being emasculated of their rights. The transformative ethos ushered in by the core constitutional values of democracy, human dignity, equality, advancement of human rights and freedoms necessitates that such values must animate and undergird trial and non-trial related aspects of criminal trials.

417 As above. This case involved an appeal against the rejection of a contention that the applicant, an accused in criminal proceedings, had not been brought to trial within a reasonable time after having been charged as provided for in terms of section 25(3)(a) of the Interim Constitution.

418 As above, para 24.

419 As above.

420 As above.

421 *Wild and Another v Hoffert NO and Others 1998 (3) SA 695 (CC)*. This case involved an appeal against a judgment of the High Court in which the applicants were refused constitutional relief for unreasonable delay in criminal proceedings. For a unanimous court, Kriegler dismissed the appeal on the basis that the relief prayed for (permanent stay of prosecution) was inappropriate because there was no trial-related prejudice or other extraordinary circumstances present in the case.

422 As above, para 26.

423 As above, para 11.

424 Kriegler (n 266 above).

5.9 Use of comparative international and regional norms, jurisprudence and practice

Section 39(1)(b) of the Constitution requires that, when interpreting the Bill of Rights, a court 'must consider international law'. This provision doubtlessly signals the Constitution's openness to the norms and values of the international community as enshrined in international treaties and customary international law. Furthermore, section 39(1)(c) of the Constitution permits the courts to consider foreign law when interpreting the Bill of Rights. The difficulties of drawing on comparative constitutional law in the interpretation of a national constitution are well known and Kriegler has been at pains to emphasise such dangers in a number of cases.

On whether the Constitutional Court has adequately utilised international and comparative sources in its interpretive approach, Kriegler has pointed out that 'the Court is much more aware ... and taken more note of foreign jurisprudence.'⁴²⁵ Kriegler is, however, sceptical about the spectre of lower courts immersing themselves in comparative law in their adjudication, arguing that the 'heady stuff' should be left to the senior courts.⁴²⁶

In *Du Plessis*,⁴²⁷ Kriegler warned against the uncritical resort to, and transplantation of, foreign law in constitutional interpretation. He counselled that although it is always instructive to see how other countries have arranged their constitutional affairs, nevertheless such an exercise should be conducted with extreme caution.⁴²⁸ Consequently, any survey of comparative law should be 'conducted from the point of vantage afforded by the South African Constitution, constructed on unique foundations, built according to a unique design and intended for unique purposes.'⁴²⁹ It necessarily follows that regard to applicable public international law and comparable law is not a license 'to a wholesale importation of doctrines from foreign jurisdictions.'⁴³⁰

In an earlier case, *Bernstein*,⁴³¹ although careful not to direct his misgivings against fellow Justices, Kriegler, in a minority judgment, railed against what he perceived as the extensive and uncritical use of comparative law made by counsel in argument.⁴³² He pleaded for a more nuanced use of comparative law.⁴³³ Kriegler's view was that 'the subtleties

425 Bohler-Muller (n 288 above) 6-7.

426 As above.

427 *Du Plessis* (n 377 above) para 127.

428 As above.

429 As above.

430 As above, para 144.

431 *Bernstein* (n 361 above) para 133.

432 As above.

433 As above, para 132.

of foreign jurisdictions, their practices and terminology require more intensive study'⁴³⁴ and this rendered 'analogies dangerous without a thorough understanding of the foreign systems.'⁴³⁵ Kriegler's concession to the use of foreign jurisprudence was:

[in cases where] a provision in our Constitution is manifestly modelled on a particular provision in another country's constitution, it would be folly not to ascertain how the jurists of that country have interpreted their precedential provision But that is a far cry from blithe adoption of alien concepts or inapposite precedents.⁴³⁶

In *Fose*,⁴³⁷ the Constitutional Court Justices disagreed about the appropriateness of referring to foreign law. In that case, the plaintiffs, claiming police abuse, had brought an action seeking constitutional damages for infringement of their rights to dignity, freedom and security of the person, privacy, and criminal process. The Constitutional Court, noting that the plaintiffs placed considerable reliance on foreign law, considered how other jurisdictions had adjudicated on similar issues. Justice Ackermann provided lengthy descriptions of the law in the United States, Canada, and the United Kingdom, among others.⁴³⁸ While agreeing with the outcome, Kriegler made known his disquiet with the main judgment's extensive references to foreign law. In his concurring opinion, Kriegler expressed the view that Justice Ackermann had ranged too broadly, declaring that 'I decline to engage in a debate about the merits or otherwise of remedies devised by jurisdictions whose common law relating to remedies for civil wrongs bears no resemblance to ours and whose constitutional provisions have but passing similarity to our [relevant section]'.⁴³⁹

In a case (*Dlamini*) relating to the granting of bail, Kriegler again pointed out that in considering statutory provisions in other jurisdictions, courts must do so cautiously.⁴⁴⁰ This is because each system of criminal justice will vary and the application of legal rules will depend on procedures and practices peculiar to each system.⁴⁴¹ Nevertheless, Kriegler proceeded in that case to consider rules governing bail in the United States, the United Kingdom, Canada and Australia before concluding that bail is not an absolute right in any jurisdiction, and that limitations on the right to bail vary considerably.⁴⁴²

434 As above.

435 As above.

436 As above, para 133.

437 *Fose* (n 313 above).

438 As above, paras 24-37.

439 As above, para 90.

440 *Dlamini* (n 319 above) para 69.

441 As above.

442 As above, paras 70-73.

In *Sanderson*, discussed above, Kriegler repeated his warning regarding the uncritical resort to comparative law, noting that foreign precedent 'requires circumspection and acknowledgment that transplants require careful management.'⁴⁴³ He further added that comparative law is generally valuable when dealing with problems new to our jurisprudence but well developed in mature constitutional democracies.⁴⁴⁴ In *Mamabolo*, Kriegler emphasised the need for a judicious approach to the use of comparative law, counselling that:

before one could subscribe to such a wholesale importation of a foreign product, one needs to be persuaded, not only that it is significantly preferable in principle, but also that its perceived promise is likely to be substantiated in practice in our legal system and in the society it has been developed to serve.⁴⁴⁵

Metcash Trading Limited v Commissioner for the South African Revenue Service and Another,⁴⁴⁶ a case which concerned the constitutional validity of the 'pay now, argue later' tax principle, provided Kriegler with an opportunity to deliberate upon comparative law. In that case, he resorted to comparative law to support his finding about the constitutional validity of the 'pay now, argue later' tax principle, pointing out that 'the principle ... is one which is adopted in many open and democratic societies.'⁴⁴⁷ He proceeded to declare that given the principle's 'prevalence in many other jurisdictions, it suggests that the principle is one which is accepted as reasonable in open and democratic societies based on freedom, dignity and equality as required by section 36.'⁴⁴⁸

Kriegler's cautious approach to the use of comparative sources as an interpretative guide might have been based on the limited access to these materials on the part of counsel. He saw a greater risk in such sources being misunderstood, misconstrued or interpreted out of context. Mistakes might be made inadvertently through the citation of foreign authorities whose reliability might be questionable. Such concerns appear to be based, in part, on the fear that even well-intentioned judges and lawyers may misunderstand foreign authorities.⁴⁴⁹ Kriegler's reticence regarding comparative law also appears to have been informed partly by an acknowledgment that constitutional provisions acquire a distinctive meaning through their operation in particular contexts, including history. Consequently, it becomes a herculean challenge to acquire a

⁴⁴³ *Sanderson* (n 414 above) para 26.

⁴⁴⁴ As above, para 26.

⁴⁴⁵ *Mamabolo* (n 362 above) para 36.

⁴⁴⁶ *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* 2001 (1) SA 1109 (CC).

⁴⁴⁷ As above, para 63.

⁴⁴⁸ As above.

⁴⁴⁹ U Bentele 'Mining for gold: The Constitutional Court of South Africa's experience with comparative constitutional law' *Brooklyn Law School Legal Studies Research Papers Working Paper Series Research Paper No. 113* (1998) 14.

comprehensive understanding of the relevant implications of comparative laws without a proper comprehension of the relevant historical, political or social contexts.⁴⁵⁰

6 Reflections on Kriegler's interpretive approach and contribution to our understanding of the Constitution

Kriegler's interpretive approach appears to have been that the law should strive to ensure equality and should be applied in a humanistic fashion – a thread that permeates his jurisprudence and constitutes perhaps his greatest contribution in the endeavour to use law as a catalyst for social change. Rather than viewing the constitutionally guaranteed rights contained in the Bill of Rights as a check on democracy, as we have seen, Kriegler's jurisprudential approach shows his appreciation of the significance of the Bill of Rights as a vehicle for enabling broad substantive transformative social change in South Africa.

One of the stand-out attributes of Kriegler is that he established himself as a progressive jurist. His dissent in *Hugo* is remarkable for its emphasis on equality as entailing the full and equal enjoyment of human rights. By repudiating the deployment of stereotypes caricaturing women as caregivers and mothers, he inflicted grave damage on the gender stereotypes so prevalent in South African society.

Another illustration of Kriegler's progressive jurisprudence was his dissent in the *Du Plessis* case, where he presciently argued that the Bill of Rights was capable of direct horizontal application. In this, he went against the majority decision, which held that the Bill of Rights contained in the interim Constitution was not intended to have a general direct horizontal application. Today, the direct horizontal applicability of the Bill of Rights in appropriate cases is no longer in question, which shows that Kriegler's interpretive approach on the issue was clearly ahead of its time.

The progressive nature of his jurisprudence is illustrated also in his insistence on equality in the criminal justice system, manifested most perspicaciously in his declaration that 'the quality of a society is in the criminal courts where the people are at their most exposed and the vast majority of our citizenry are without the benefit of legal representation.'⁴⁵¹ Such an approach is an endorsement of the view that the many manifestations of inequality inherited from South Africa's troubled past mean that the constitutional commitment to equality cannot be simply understood as a commitment to a formalistic understanding of equality.

450 Liebenberg (n 299 above) 118.

451 Kriegler (n 266 above).

Rather, the constitutional imperative is to conceptualise equality substantively. This entails an examination of the institutions, norms and the lived social and economic conditions of groups and individuals in order to determine whether the Constitution's commitment to an egalitarian society is being advanced. To borrow from Goldblatt, there is no doubt that Kriegler is 'a man who believed, as he still does, in justice and fairness for every member of our society ... and saw the proper practice of the law as a contribution to this cardinal principle.'⁴⁵²

7 Conclusion

What emerges from the analysis of Kriegler's curial and extra-curial pronouncements in this chapter is an understanding of the sheer brilliance of his judicial approach and his indefatigable belief and passion in driving the transformation agenda envisaged under the Constitution, which he famously christened a 'metamorphosis'.⁴⁵³ Consider his unequivocal assertion in *Du Plessis* that '[o]ur constitution aims at establishing freedom and equality in a grossly disparate society'.⁴⁵⁴ Recall his famous declaration in *Dlamini*, where he emphasised the transformative impact of the Bill of Rights, noting that the advent of the Bill of Rights entailed a reappraisal of statutory and common law 'in the light of the new constitutional norms heralded by that transition'.⁴⁵⁵ Or note his emphatic pronouncement in *Fose* that the role of courts in crafting remedies for constitutional violations is an 'attempt to synchronise the real world with the ideal construct of a constitutional world created in the image of [the supremacy clause]'.⁴⁵⁶

Kriegler's sheer determination to humanise the law relating to criminal procedure as illustrated in a significant number of his judgements, most of which he wrote for a unanimous Constitutional Court, will stand as a monument for generations to come. Rather than viewing the constitutionally guaranteed rights contained in the Bill of Rights as a check on democracy, Kriegler's jurisprudential approach as evidenced in his curial and ex-curial pronouncements discussed under the various themes in this chapter shows his appreciation for the significance of the law as a vehicle for catalysing broad substantive transformative social change in South African society.

452 Van der Linde (n 264 above) 20.

453 *Mhlungu* (n 315 above) para 69.

454 *Du Plessis* (n 377 above) para 147.

455 *Dlamini* (n 319 above) para 2.

456 *Fose* (n 313 above) para 94.

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