

## South Africa

### 1 Introduction

Constitutional provisions – including those protecting rights – have to be interpreted within the context of the Constitution as a whole. No provision may be interpreted in isolation, and no right protected and enforced without regard to other rights. Especially the exercise of one constitutional right may often have to be balanced against another. Courts are regularly called upon to do so thoughtfully and candidly. To a considerable extent, this is what constitutional adjudication is about.<sup>1</sup>

While it is true that foundational values play a role in the interpretation of the Bill of Rights, their role is limited to illuminating the language of a particular provision of the Bill. Those values cannot be used to replace that language with something different. Our jurisprudence places a premium on fidelity to the language chosen by the framers of our Constitution.<sup>2</sup>

As the quotes above illustrate, interpretation is an integral part of constitutional-law discourse in South Africa. The Constitution's 'substantive and transformative goals'<sup>3</sup> inherently demand that judges make difficult choices to right the injustices of the past to build a non-racial, non-sexist and egalitarian society.<sup>4</sup> Over the last three decades, the South African Constitutional Court (the Court) has become a centre of gravity where centripetal and centrifugal forces<sup>5</sup> vie with each other in

1 *South African Police Service v Solidarity obo Barnard* 2014 (35) SA 2981 (CC) para 161 (van der Westhuizen J concurring opinion).

2 *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC) para 164 (Jafta J concurring opinion).

3 M Bishop & J Brickhill 'In the beginning was the word': The role of text in the interpretation of statutes' (2012) 129 *South African Law Journal* 696.

4 *South African Police Service* (n 1) para 164 (van der Westhuizen J concurring opinion). See also S Ellmann *Arthur Chaskalson: A life dedicated to justice for all* (2019) 696; D Mosenke *My own liberator: A memoir* (2016) 338.

5 Whilst centrifugal forces encompass individual litigants who resort to courts to tame political powers and ensure equality in the society, centripetal forces are those that believe the Constitutional Court should not deal with certain sensitive political questions and advocate for the Constitution to be 'taken away from the courts.' For an appropriate conceptualisation of the two movements, see R Hirschl

ensuring that post-apartheid constitutional promises are delivered upon.<sup>6</sup> These pressures for transformative constitutionalism guide scholars and courts' debates over appropriate approaches, canons or methods for interpreting the Bill of Rights.<sup>7</sup> Over its 32 years of existence, the Court has developed its interpretive road and built a valuable human rights jurisprudence<sup>8</sup> that has earned it respect<sup>9</sup> and, occasionally, harsh

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*Constitutional theocracy* (2010); R Hirschl *Towards juristocracy: The origins and consequences of the new constitutionalism* (2007); M Tushnet *Taking the constitution away from the courts* (2000).

- 6 M le Roux & D Davis *Lawfare: Judging politics in South Africa* (2019) 4-14. See also JP Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 352.
- 7 L du Plessis 'Theoretical (dis-)position and strategic leitmotifs in constitutional interpretation in South Africa' (2015) 18 *PER: Potchefstroomse Elektroniese Regsblad* 1332-1333.
- 8 See generally 'South Africa: Constitutional Court' 27 June 2025 <https://www.saflii.org/za/cases/ZACC/> (accessed 1 July 2025). See also T Kathi and others 'Constitutional Court statistics for the 2018 term' (2020) 36 *South African Journal on Human Rights* 112; A Chagopa and others 'Constitutional Court statistics for the 2017 term' (2019) 35 *South African Journal on Human Rights* 237; A Makuwa and others 'Constitutional Court statistics for the 2016 term' (2018) 34 *South African Journal on Human Rights* 122; T Kathi and others 'Constitutional court statistics for the 2015 term' (2017) 33 *South African Journal on Human Rights* 335; S Swemmer and others 'Constitutional Court statistics for the 2014 term' (2016) 32 *South African Journal on Human Rights* 556; M Wentzel and others 'Constitutional Court statistics for the 2013 term' (2016) 32 *South African Journal on Human Rights* 184; G Tungay and others 'Constitutional Court statistics for the 2012 term' (2015) 31 *South African Journal on Human Rights* 410; J Viljoen and others 'Constitutional Court statistics for the 2011 term' (2015) 31 *South African Journal on Human Rights* 219; I Magaya and others 'Constitutional Court statistics for the 2010 term' (2015) 31 *South African Journal on Human Rights* 205; JP Ongeso and others 'Constitutional Court statistics for the 2009 term' (2014) 30 *South African Journal on Human Rights* 572; S Brener and others 'Constitutional Court statistics for the 2008 term' (2011) 27 *South African Journal on Human Rights* 566; M Bishop, L Chamberlain & S Kazee 'Constitutional Court statistics for the 2007 term' (2010) 26 *South African Journal on Human Rights* 571; M Bishop and others 'Constitutional Court statistics for the 2006 term' (2007) 23 *South African Journal on Human Rights* 386; M Bishop and others 'Constitutional Court statistics for the 2005 term' (2006) 22 *South African Journal on Human Rights* 518; J Klaaren and others 'Constitutional Court statistics for the 2003 term' (2004) 20 *South African Journal on Human Rights* 491; J Klaaren and others 'Constitutional Court statistics for the 2002 term' (2003) 19 *South African Journal on Human Rights* 506; S Teichner and others 'Constitutional Court statistics for the 2001 term' (2002) 18 *South African Journal on Human Rights* 463; S Budlender and others 'Constitutional Court statistics for the 2000 term' (2001) 17 *South African Journal on Human Rights* 277; A Leuta and others

criticism that it has gone far from the strictures of the Constitution and did not deliver the much-needed transformation.<sup>10</sup>

In this chapter, I examine the way the Constitutional Court has chosen and applied methods of constitutional interpretation in equality and non-discrimination,<sup>11</sup> political rights<sup>12</sup> and fair-trial or due-process-of-law cases.<sup>13</sup> I provide some explanation of the way the Court's interpretation has furthered a human rights culture and the constitutional project as a whole.<sup>14</sup> I first start by noting how competitive is the interpretation of the Constitution within the South African judiciary.

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'Constitutional Court statistics for the 1999 term' (2000) 16 *South African Journal on Human Rights* 364; J Klaaren and others 'Constitutional Court statistics for the 1998 term' (1999) 15 *South African Journal on Human Rights* 256; J Klaaren 'Constitutional Court statistics for the 1997 term' (1998) 14 *South African Journal on Human Rights* 277; J Klaaren 'Constitutional Court statistics for the 1996 term' (1997) 13 *South African Journal on Human Rights* 208; J Klaaren 'Constitutional Court statistics for the 1995 term' (1996) 12 *South African Journal on Human Rights* 39.

- 9 C Rautenbach & L Du Plessis 'The Constitutional Court of South Africa' in A Jakab, A Deyve & G Itzcovich (eds) *Comparative constitutional reasoning* (2017) 560.
- 10 T Roux *The politics of principle: The first South African Constitutional Court, 1995-2005* (2013) 377-383; 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; T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism' (2017) 28 *Stellenbosch Law Review* 123-145; J Modiri 'The crises in legal education' 46(3) *Acta Academica* 2-18; Roux & Davis (n 6) 16-19.
- 11 Sec 9 of the 1996 South African Constitution.
- 12 Sec 19 of the 1996 South African Constitution.
- 13 Sec 35(3) of the 1996 South African Constitution.
- 14 My conclusions are essentially based on the following cases: *African Christian Democratic Party v Electoral Commission and Others (ACDP)* 2006 (3) SA 305 (CC); *August and Another v Electoral Commission and Others* 1999 (4) SA (CC); *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC); *Bogaards v S* 2012 (12) BCLR 1261 (CC); *Bothma v Els and Others* 2010 (2) SA 622 (CC); *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC); *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC); *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); *New Nation Movement* (n 2); *Ramakatsa and Others v Magashule and Others* 2013 (2) BCLR 202 (CC); *Ramubovhi and Others v President of the Republic of South Africa and Others* 2018 (2) SA 1 (CC); *Richter v The Minister for Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae)* 2009 (3) SA 615 (CC); *S v Mhlangu and Others* 1995 (3) SA 867 (CC); *S v Molimi* 2008 (3) SA 608 (CC); *S v Zuma and Others* 1995 (2) SA 642 (CC); *South African Police Service* (n 1). Arguments made in this chapter are based on an extensive examination of the 17 cases. This is a limited number of cases compared to the total number of cases the Constitutional Court

## 2 Pressures, competition and complementarity in bill-of-rights interpretation

Institutional, legal, social, economic and political factors influence the choice and application of methods of constitutional interpretation.<sup>15</sup> Within a legal system, one needs to understand the ontology of constitutional interpreters, the nature of those who demand interpretation, and those against whom they approach the Court. Competition within and outside the judiciary characterises the enforcement and interpretation of the South African Bill of Rights. This competition acts as pressure from within and without that impacts positively on the quality of bill-of-rights interpretation.

### 2.1 The multiplicity of judicial interpreters of the Bill of Rights

The multiplicity of interpreters of the Bill of Rights results from powers the Constitution confers on ordinary and specialised courts within the South African legal system to interpret the Bill of Rights.<sup>16</sup> Multiple courts of equal and different rank within the judiciary construe the meaning of the Constitution. The existence of one text (the Constitution) and numerous interpreters increases the quality of argumentation on relevant constitutional provisions, given that various courts can adjudicate one case and shed light on relevant yet contested constitutional issues.<sup>17</sup> This enhances internal argumentation, interpretive practice and judicial transparency in that judges write individual separate or dissenting opinions to persuade their peers,<sup>18</sup> litigants and the interpretive community about alternative approaches or outcomes.<sup>19</sup> The potential for disagreement within the Court (lateral or horizontal disagreements)

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has decided. Readers should be alerted that the conclusions drawn here are limited to the cases studied.

15 D Feldman 'Factors affecting the choice of techniques of constitutional interpretation' in F Mélin-Soucramanien (ed) *L'interprétation constitutionnelle* (2005) 134.

16 Sec 165 of the 1996 South African Constitution.

17 *South African Police Service* (n 1) paras 18-24.

18 E Cameron 'Foreword' in D Mosenke *All rise: A judicial memoir* (2020) ix.

19 D Bilchitz 'Humility, dissent and community: Exploring Chief Justice Langa's political and judicial philosophy' in A Price & M Bishop (eds) *A transformative justice: Essays in honour of Pius Langa* 92-102; A Spies 'The importance of minority judgments in judicial decision-making: An analysis of *Minister of Justice and Constitutional Development v Prince*' (2019) 35 *South African Journal on Human Rights* 429-440; GP Fletcher 'Comparative law as a subversive discipline' (1998)

ensures that judges seek appropriate interpretive approaches, carry out stringent research, and provide balanced and reasoned justifications.<sup>20</sup> Disagreements can also be vertical (between the Court and another superior court hierarchically inferior to it). The latter are multiple and include ordinary (superior) courts<sup>21</sup> – the High Court of South Africa in its 14 provincial divisions,<sup>22</sup> the Supreme Court of Appeal, and specialised courts.<sup>23</sup> However, as South Africa has adopted the common law judicial structure, there is unity among these courts: they form one order of jurisdiction with a single apex court.<sup>24</sup> Bill-of-rights proceedings commence at the lower level of superior courts – the High Court of South Africa – and follow the standard hierarchy when litigants seek to appeal (from there to the Supreme Court of Appeal and the Constitutional Court). Nonetheless, requirements for justice in ‘constitutional matters’ can warrant that litigants approach the Constitutional Court directly.<sup>25</sup> In any event, interpretation is as central to deciding whether litigants can approach the Court directly as it is to solving disagreements among courts and judges.

Several mechanisms foster judicial accountability, mutual institutional collaboration, and jurisprudential dialogue among courts for settling the disagreements that can arise among them.<sup>26</sup> These mechanisms increase harmony and diffuse tension. The availability of an appeal procedure against high courts and the Supreme Court of Appeal reassures litigants

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46 *American Journal of Comparative Law* 699; G Christie *Philosopher Kings? The adjudication of conflicting human rights and social values* (2011) 27-28.

20 See debates among judges who dissented or concurred in the following cases: *S v Mhlungu and Others* (n 14); *South African Police Service* (n 1); *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC); *ACDP* (n 14); *New Nation Movement* (n 2).

21 Sec 165 (n 16).

22 Eastern Cape High Court (Bhisho) Free State High Court (Bloemfontein) Western Cape High Court (Cape Town) Eastern Cape High Court (Grahamstown) South Gauteng High Court (Johannesburg) Northern Cape High Court (Kimberley) KwaZulu-Natal High Court (Pietermaritzburg) KwaZulu-Natal High Court (Durban) Eastern Cape High Court (Port Elizabeth) North Gauteng High Court (Pretoria) Limpopo High Court (Thohoyandou) Eastern Cape High Court (Mthatha) North West High Court, Mafikeng (Mmabatho) and Polokwane Circuit Court of the North Gauteng High Court, Pretoria.

23 Competition Appeal Court, Electoral Court, Labour Court, Labour Appeal Court and Land Court.

24 The Constitutional Court since 2013.

25 Sec 167(6) of the 1996 Constitution.

26 For criticism of the French style, see M Lasser *Judicial deliberations: A comparative analysis of transparency and legitimacy* (2009) 31-33.

that a differently constituted court can hear their cases. Procedural subsidiarity offers lower courts and specialised (administrative) bodies<sup>27</sup> the opportunity to adjudicate a matter before the Constitutional Court makes the final determination.<sup>28</sup> It also enables the Court to benefit from arguments and submissions parties make before the Court *a quo*. Had the Constitutional Court adjudicated or interpreted the Bill of Rights as a first and last instance court, neither could it gain insight from the high courts and the Supreme Court of Appeal, nor could litigants have the opportunity to hear more than one court's opinion.

Furthermore, the Constitutional Court's power to confirm an order of invalidity by the high courts and the Supreme Court of Appeal strengthens interpretive harmony within the legal system.<sup>29</sup> It avails litigants with various opinions on similar issues. Broadly, confirmation process assures the legislature and the executive that, while inferior courts can invalidate legislation and administrative action thus threatening the separation of powers principle, the possibility for the apex court to confirm the invalidity accords them an additional chance to adduce arguments in support of their case and obtain reasoned opinions from a court constituted differently.<sup>30</sup>

Be that as it may, the multiplicity of interpreters of the Bill of Rights is not sufficient on its own to improve the quality of interpretation and buttress human rights protection. Litigants must approach courts – courts do not look for but await cases<sup>31</sup> – and make reasoned and not superficial decisions. Equally, respondents must interact with the Court and make proper submissions.

In the following section, I explain how these dialectical interactions support South African courts' interpretive tasks.

## 2.2 Nature and quality of demand for bill-of-rights interpretation

The longstanding culture of litigation in South Africa is a blessing for courts' interpretive and human rights protection mandates since the

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27 *Koyabe and Others v Minister for Home Affairs and Others* 2010 (4) SA 327 (CC) paras 34–40.

28 *Ramakatsa* (n 14) paras 29–30; Rautenbach & Du Plessis (n 9) 62.

29 Sec 8 of the Constitutional Court Complementary Act, 1995, amended in 1997.

30 Rautenbach & Du Plessis (n 9) 56.

31 Moseneke (n 18) 261.

number of contestations litigants bring, the diversity of contestants,<sup>32</sup> and the quality of submissions<sup>33</sup> require strong justifications in response. Before and during apartheid, citizens and non-governmental organisations used courts and the law to challenge apartheid and government policies in the quest for an egalitarian and accountable political society.<sup>34</sup> The litigation tradition migrated into the ‘new’ South Africa with new demands, actors and normative frameworks. The advent of new independent institutions dubbed ‘Chapter 9 institutions’<sup>35</sup> expanded the circle of demanders for human rights justice, given that their broader approach to standing empowers institutions such as the South African Human Rights Commission and the Office of Public Protector to approach courts in demand or support of claims brought before courts.<sup>36</sup>

The increasing role that courts play in regulating private and politically related questions at the behest of, and sometimes against, nationals, non-nationals, political activists or parties, and state institutions shows how the human rights culture which the country’s constitutional and political transformation in 1994 bequeathed is evolving.<sup>37</sup> The multinational and polyethnic<sup>38</sup> nature of South Africa predisposes it to an increased

32 Non-governmental organisations, independent institutions, education institutions, private individuals (sexual minorities, refugees, foreign nationals) and foreign governments. See A Sachs *We, the people: Insights of an activist judge* (2016).

33 See Mogkoro J in *Koyabe* (n 27) para 80. She stated: ‘*Amici curiae* have made and continue to make and continue to make an invaluable contribution to this Court’s jurisprudence ... [I]n so far as amici introduce additional, new and relevant perspectives, leading to more nuanced judicial decisions, their participation in litigation is to be welcomed and encouraged.’

34 H Corder & C Hoexter “Lawfare” in South Africa and its effects on the judiciary’ (2017) 10 *African Journal of Legal Studies* 107-111.

35 Sec 181 of the 1996 South African Constitution. See C Fombad ‘The diffusion of South African-style institutions? A study in comparative constitutionalism’ in R Dixon & T Roux (eds) *Constitutional triumphs, constitutional disappointments: A critical assessment of the 1996 South African Constitution’s local and international influence* (2018) 359-385.

36 See generally M Ebadolahi ‘Using structural interdicts and the South African Human Rights Commission to achieve judicial enforcement of economic and social rights in South Africa’ (2008) 83 *New York University Law Review* 1565.

37 Taking COVID-19 as an illustration, the Southern Africa Legal Information Institute surveyed, by October 2020, over 340 petitions/litigations relating to the Novel Coronavirus Disease 2019 litigants brought before 24 different courts in South Africa. See <http://www.saflii.org/cgi-bin/sinosrch-adw.cgi?query=COVID-19%20or%20coronavirus%20;submit=Search;view=database-natural;offset=0> (accessed 22 October 2020).

38 W Kymlicka *Multicultural citizenship: A liberal theory of minority rights* (1996) 6.

need for litigation owing to the types of conflict<sup>39</sup> – language policy,<sup>40</sup> resource (re)distribution, protection of minorities – such societies harbour. The law and courts are much needed to protect minorities and the marginalised<sup>41</sup> (foreigners, refugees, women, whites, opposition political parties, sexual minorities) who cannot always and successfully voice their concerns through effective democratic channels where the majority can impose its choice democratically. Van der Westhuizen points out that a country where the dominant party rules for decades reassured that it cannot lose power could witness increasing use of courts as counter-majoritarian devices by those who cannot air their concerns through representative institutions.<sup>42</sup> Between 1995 and 2020, the rate at which the government lost cases before the Constitutional Court stood at an average of 46.11 per cent of cases,<sup>43</sup> thus incentivising individuals to bring more cases before the Court.

South Africa's heterogeneity and settler-colonial background lead to contestation of numerous kinds as compared to countries with a homogenous population.<sup>44</sup> Besides, there is an increasingly strong constitutional culture, with individuals and civil society groups little likely to condone human rights violations. The readiness of state organs, political parties and private entities to defend themselves in the Court against adverse findings allows the Court to develop manifold opinions on the contested issues. The dialectic between demands for justice and defence against adverse findings is thus an invaluable asset for the Court's interpretive or argumentative mission.<sup>45</sup>

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39 C Meier & C Hartell 'Handling cultural diversity in education in South Africa' (2009) 6 *SA-eDUC Journal* 180-190.

40 *AfriForum and Another v University of the Free State* 2018 (2) SA 185 (CC).

41 W le Roux 'Migration, street democracy and expatriate voting rights' in S Woolman & D Bilchitz (eds) *Is this seat taken? Conversations at the bar, the bench and the academy about the South African Constitution* (2012) 142-143.

42 J van der Westhuizen, Presentation at the Webinar organised by the Centre for Human Rights, Faculty of Law, University of Pretoria on 22 July 2020 entitled 'Mandela talks: Webinar on COVID-19 and whether we are getting the balance right'. See examples in Corder & Hoexter (n 34) 111-116.

43 Personal estimation from statistics provided in footnote 8.

44 See for example J Laband *The land wars: The dispossession of the Khoisan and AmaXhosa in the Cape Colony* (2020) 1-7.

45 KE Whittington, DR Kelemen & GA Caldeira 'The study of law and politics' in KE Whittington, DR Kelemen & GA Caldeira (eds) *The Oxford handbook of law and politics* (2008) 10.

### 3 The Constitutional Court's methods of interpretation

The Bill of Rights institutes a special legal regime applicable to rights interpretation in contrast to interpretation of non-rights provisions.<sup>46</sup> Although section 39 does not prescribe a particular method that any 'court, tribunal or forum' must employ, it lays the foundation for a discursive, value-laden and political-ethical approach to the interpretation of the Bill of Rights that excludes some forms of formalism.<sup>47</sup> The explicit inclusion of an interpretation clause, not common among African common law constitutions,<sup>48</sup> discourages judges' rigid literalism and recognises the critical role the Bill of Rights plays in shaping the new constitutional democracy and furthering a human rights culture.<sup>49</sup> The provision establishes a normative hierarchy through the obligation imposed on legislation, common law and customary law to be consistent with the 'spirit, purport and objects of the Bill of Rights'. In between lies international law as an additional source of interpretation in South Africa and an integral part of this normative system.<sup>50</sup> Human dignity, equality and freedom are both rights and values.<sup>51</sup> These rights and values serve as benchmarks to evaluate the extent of compliance and realisation of individual rights or whether restrictions are reasonable and justified.

Operational constitutional provisions provide the textual context within which rights are interpreted and serve to guide courts. They include

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46 Sec 39 of the South African Constitution reads as follows: '(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.'

47 A Singh & M Bhero 'Judicial law-making: Unlocking the creative powers of judges in terms of sec 39(2) of the Constitution' (2016) *PER: Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 9; L du Plessis 'Interpretation' in S Woolman & M Bishop (eds) *Constitutional law of South Africa* (2013) 32-2; Bishop and Brickhill (n 3) 685.

48 Even in South Africa, judges critiqued the relevance of an interpretation clause. See Du Plessis (n 47) 32-5.

49 W le Roux 'Directory provisions, sec 39(2) of the Constitution and the ontology of statutory law' (2006) 21 *SA Public Law* 382; Du Plessis (n 47) 32-2.

50 See the discussion in sec 3.2 below.

51 As it transpires in specific provisions; sec 1, sec 36 (limitation of rights) sec 39 (interpretation of Bill of Rights).

section 1 (founding values), section 7 (rights), section 8 (application of rights), section 36 (limitation of rights),<sup>52</sup> section 38 (enforcements of rights), section 150 (interpretation of conflicts), section 232 (status of customary international law) and section 233 (the role of international law in statutory interpretation). Interpretation is no longer simply 'a question of common sense based on judicial experience'<sup>53</sup> but a tool to realise fundamental rights and contribute to the transformation of South African law and society through the court's choice and application of various methods, approaches and techniques of judicial or constitutional reasoning.<sup>54</sup>

In this section, I review the general interpretive methods the Constitutional Court applied in cases under study and the role that international law, judicial precedents and (South) African indigenous values play. Legal scholarship plays an equally essential role inasmuch as it examines the context in which framers of the Constitution included specific rights in the Bill of Rights,<sup>55</sup> provides statistical data on various practices, and undertakes philosophical and theoretical analysis of perennial societal issues. The synergy between these tools allows litigants to understand the nature and the scope of their rights and of state organs' duties.

### 3.1 General interpretive methods

The Constitutional Court's multiple and combined methods of interpretation of constitutional rights and statutory provisions offer it possibilities to strengthen rights protection. The Court has applied textual, contextual (structural/systemic, historical), purposive and generous methods to provide a holistic view of rights and state obligations. Whilst the textual method serves to ascertain the language of the right, statutory provisions and fidelity to the text, the Court does not use it separately in interpretation to avoid absurd outcomes.<sup>56</sup> There is an assumption that courts must give a substantive, value-laden, generous and

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52 See the discussion in sec 5 of this chapter.

53 Du Plessis (n 47) 32-5.

54 KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 168; Du Plessis (n 47) 32-5; Langa (n 6) 356-359.

55 L du Plessis 'A background to drafting the chapter on fundamental rights' in B de Villiers (ed) *Birth of a constitution* (1994) 100.

56 *ACDP* (n 14); *S v Mhlungu and Others* (n 14).

liberal construction to rights.<sup>57</sup> The controversy that emerged within and outside the Court<sup>58</sup> due to the use of generous approach to interpretation illustrates the importance of adequate reasons and justification. If one is to agree with Lasser that the legitimacy of certain common law courts derives essentially from arguments and reason-giving,<sup>59</sup> the choice of non-textual methods requires more argumentation to persuade the legal profession and political community.<sup>60</sup> Contextual approaches, both internal (legal) and external (historical, social, political, cultural or economic), supplement the textual approach.

The internal legal context enables the Court to place equality, political and fair trial rights within their respective textual positions. The Court looks at other rights, constitutional provisions, and subsidiary legislation implementing constitutional rights as elements of context. It includes international law and the case-law of other jurisdictions.<sup>61</sup> The external historical, social, political, cultural or economic context provides the Court with sufficient grasp of historical and other conditions that led to the inclusion of specific rights or conditions within which the Bill of Rights and legislation continue to operate or will operate.<sup>62</sup> Such consideration reveals the mischief the right aimed to address and its purpose. There are different types of purpose.<sup>63</sup> However, instances of clashes between purposes are possible.<sup>64</sup> The generous approach – the interpretation of rights in favour of the individual – enables the Court to enhance citizens' right to vote and right to stand for political office as well as specific fair trial rights.<sup>65</sup> This method is not unconstrained since the interpretation the Court provides must not put too much a strain

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57 CJ Botha *Statutory interpretation: An introduction for students* (2012) 143; Du Plessis (n 47) 32-9 to 32-10.

58 *New Nation Movement* (n 2); *S v Mhlungu and Others* (n 14); *South African Police Service* (n 1).

59 Lasser (n 26) 312.

60 L Epstein, J Knight & O Shvetsova 'The role of constitutional courts in the establishment and maintenance of democratic systems of government' (2001) *Law and Society Review* 117; Roux (n 10).

61 R Sullivan *Statutory interpretation* (2007) 115. 'When a legislature adopts language from an existing Act, whether domestic or foreign, it is presumed to be aware of any case law interpreting that language.'

62 Sullivan (n 61) 130.

63 These purposes include: the purpose of the right, of a constitutional provision or values, an offence, an institution, or constitutional democracy.

64 *ACDP* (n 14) para 58.

65 *ACDP* (n 14); *August and Another* (n 14); *Richter v The Minister for Home Affairs* (n 14); *S v Mhlungu and Others* (n 14); *S v Molimi* (n 14).

on the text.<sup>66</sup> It sometimes imposes a reading which is antithetical to the ordinary meaning of the words or language of constitutional or statutory provisions.<sup>67</sup>

Whilst the Court does not adhere to a hierarchy among various methods of constitutional interpretation, the choice, application and preference of one over another hinge on factors such as the relevance and importance of the rights at stake, possible outcomes of the decisions, and the need to construct an ‘emerging national sense of justice’.<sup>68</sup> The multiplicity of methods and synergy between them is evidence of the fact that constitutional (human rights) law is open and continuously being constructed to respond to societal needs.

### 3.2 A flexible approach to international law as an aid to interpretation

The proliferation of international (human rights) law treaties, treaty monitoring bodies and courts at the sub-regional,<sup>69</sup> regional,<sup>70</sup> and global<sup>71</sup> levels offers a variety of normative standards that the South African Constitution and Constitutional Court recognise as valuable tools to provide context to constitutional rights.<sup>72</sup> There is no indication, however, of when the Court should resort to international law, which

66 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) para 24.

67 See *ACDP* (n 14); *S v Mhlungu and Others* (n 14).

68 FI Michelman ‘A constitutional conversation with Professor Frank Michelman’ (1995) 11 *South African Journal on Human Rights* 483. He argued that approaches ‘cannot be alternatives, among which a judge chooses; they are multiple poles in a complex field of forces, among which judges navigate and negotiate. I do not believe that any responsible constitutional adjudicator will end up, over any interesting run of cases ignoring any of the factors: perceived verbal significations, perceived concrete intentions, perceived general purposes, perceived and evaluated social consequences, perceived and intuited normative theories or unifying visions.’

69 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA (30) (CC) ST Ebobrah ‘Litigating human rights before sub-regional courts in Africa: Prospects and challenges’ (2009) 17 *African Journal of International and Comparative Law* 79-101. Examples include the Southern African Development Community Tribunals, Economic Community of West African States Court and the East African Court of Justice.

70 African Human Rights System, European Human Rights System and the Inter-American Human Rights System.

71 The United Nations Human Rights Treaties and Treaty/Charter based organs.

72 E de Wet ‘The “friendly but cautious” reception of international law in the jurisprudence of the South African Constitutional Court: Some critical remarks’ (2004) 28 *Fordham International Law Journal* 1531.

'international law'<sup>73</sup> the Court should apply<sup>74</sup> and how it should apply it in litigation. The absence of methodology allows individual judges to decide when the resort to international law is necessary. To grasp how relevant it has been in the construction of rights under study, I describe in this section the methodology used in regard to international law as it emerges from the cases analysed.

The Court has used international law to clarify the contested scope of a right,<sup>75</sup> to underscore the relevance of a constitutional right,<sup>76</sup> to confirm state obligations in respect of or to combat an unconstitutional practice,<sup>77</sup> and to indicate a trend in favour of the protection of a right<sup>78</sup> or the criminalisation or reprehension of a practice.<sup>79</sup> The Court may refer to international law in response to party submissions relying on international law,<sup>80</sup> but generally it does so of its own accord.<sup>81</sup> In the *Fourie* case, the Court simply analysed international instruments the state invoked and did not go beyond this analysis. Whilst the Court applies treaties South Africa has ratified,<sup>82</sup> it considers additional elements such as similarity in wording between the treaty and the Constitution.<sup>83</sup> In the *New Nation Movement* case, the Court relies on a decision of the African Court on Human and Peoples' Rights (African Court). This is justified by the fact that, in this decision, the African Court interprets a provision of a treaty binding on South Africa.<sup>84</sup> However, the resort to case law of

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73 Conventional International Law and Customary International Law or *Jus Cogens* norms. On the latter, see SB Traoré 'Peremptory norms and interpretation in international law' in D Tladi (ed) *Peremptory norms of general international law (Jus Cogens): Disquisitions and disputations* (2021) 132.

74 *De Wet* (n 72) 1535-1536.

75 *New Nation Movement* (n 2) paras 29;40.

76 *Bhe* (n 14) para 57.

77 *My Vote Counts NPC* (n 14) paras 49-50.

78 *S v Mhlungu and Others* (n 14) para 8.

79 *Bothma* (n 14) paras 54-55.

80 *Minister of Home Affairs and Another* (n 14) paras 99-105.

81 *New Nation Movement* (n 2) para 29.

82 The African Charter on Human and Peoples' Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the African Charter on the Rights and Welfare of the Child, the African Union Convention on Preventing and Combatting Corruption, the United Nations Convention Against Corruption, the International Covenant on Civil and Political Rights. The Court also applies the UDHR frequently.

83 *New Nation Movement* (n 2) para 42.

84 *New Nation Movement* (n 2) para 38.

the European Court of Human Rights is frequent, and the Court relies on it as the foreign law or practices of an ‘open and democratic society.’<sup>85</sup>

The flexibility with which the Court approaches international law sources, and the multiplicity of sources used, provides it with regional and global perspectives on the right at issue. A court reluctant to apply international law might lack these perspectives.<sup>86</sup> However, its approach needs clarification to avoid selective resort to and application of international law norms. The emergence of robust case law from the African Court and the African Commission on Human and Peoples’ Rights is yet to be reflected in the Court’s jurisprudence. This case law is crucial, as it interprets obligations binding on South Africa and provides evidence of the significance of protecting individual rights and condemning behaviour inimical to human rights.

### 3.3 Precedent-based arguments or interpretation

The *stare decisis* principle is the hallmark of common law judicial decision-making.<sup>87</sup> The development of robust jurisprudence on various rights has enabled the Court to lay down principles and guidelines that it can follow when it adjudicates similar cases. It uses precedents for various purposes: to apply underlying principles to the interpretation of individual rights,<sup>88</sup> to balance justification and reasons provided, to confirm the relevance of constitutional values,<sup>89</sup> or to sketch the Court’s understanding of the bill-of-rights interpretation.<sup>90</sup>

The *Fourie* case<sup>91</sup> illustrates the role precedents play in laying the foundation for the protection of rights. The Court relied on four preceding decisions on sexual minorities’ rights in order to demonstrate

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85 *S v Zuma and Others* (n 14) para 19.

86 P Alston ‘A framework for the comparative analysis of Bills of Rights’ in P Alston (ed) *Promoting human rights through bills of rights: Comparative perspectives* (2000) 12.

87 D Kleyn and others *Beginner’s guide for law students* (2018) 83; R Leckey *Bills of rights in the common law* (2015) 12; A Barak *The Judge in a democracy* (2008) xiv-xv. For a critic, see FM Githiru ‘Transformative constitutionalism, legal culture and the judiciary under the 2010 Constitution of Kenya’ (2015) unpublished doctoral thesis, 199-202.

88 *South African Police Service* (n 1) para 142.

89 *ACDP* (n 14) para 22.

90 *National Coalition for Gay and Lesbian Equality* (n 14) para 14; *S v Zuma and Others* (n 14) para 14.

91 See discussion in sec 4.1.2.

a growing trend within the judiciary to protect sexual minorities in South Africa.<sup>92</sup> Previous cases dealt with the validity of sodomy laws,<sup>93</sup> pension for same-sex partners,<sup>94</sup> adoption by same-sex couples,<sup>95</sup> the rights of same-sex parents to children in instances of the insemination of one of the parents, and the protection of same-sex foreigner married to South Africans.<sup>96</sup> By building on what preceding judges stated and leaving other judges with the opportunity to develop other aspects of the rights,<sup>97</sup> the judges contribute to building a human rights culture in unison.

Methodologically, the Court resorted to precedents when they constituted the legal basis for the approach inferior courts adopted,<sup>98</sup> when invoked by parties or *amicus curiae* in their submissions, or of its own accord. The precedents may emanate from inferior courts or foreign courts, but generally the Court resorts to its own previous cases. Whilst there is steady reliance on the decisions of African domestic courts (Zimbabwe, Botswana, Namibia),<sup>99</sup> the bulk of foreign decisions emanate from the United States, Canada, New Zealand, Australia, Germany, and the United Kingdom.

### 3.4 The place and relevance of (South) African indigenous values

African indigenous values – that is, values stemming from the laws or customs of Africans<sup>100</sup> – are law, and courts can apply them subject to their consistency with the Constitution.<sup>101</sup> In constitutional litigation, specific indigenous values serve as contextual elements which enable constitutional interpreters to grasp the meaning of constitutional rights placed in their African cultural, traditional and historical context.<sup>102</sup>

92 *Minister of Home Affairs and Another* (n 14) para 51.

93 *National Coalition for Gay and Lesbian Equality* (n 14).

94 *Satchwell v President of Republic of South Africa and Another* 2002 (6) SA 1 (CC).

95 *Du Toit and Another v Minister of Welfare and Population Development and Others* 2003 (2) SA 198 (CC).

96 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC).

97 *Minister of Home Affairs and Another* (n 14) para 160. See generally R Dworkin *Law's empire* (2011) 229.

98 *National Coalition for Gay and Lesbian Equality* (n 14) para 11.

99 *Bothma* (n 14) 56-57.

100 Sec 1 of the Law of Evidence Amendment Act 45 of 1988.

101 Sec 39 of the South Africa Constitution.

102 L Ackermann *Human dignity: Lodestar for equality in South Africa* (2012) 77; N Bohler-Muller & T Zikhali 'Infusing the Constitution with "an ethic of

These values, translated through African proverbs, provide alternative accounts of rights in language devoid of the dominant human rights narrative influenced by an individualistic Western understanding of rights based on notions such as individual (abstract) autonomy, will, responsibility, freedom and consciousness found in Kant's jurisprudence.<sup>103</sup>

African indigenous values act as a meta-theory of contextual interpretation, for example, to emphasise the relevance of an interpretation that furthers 'social harmony, love, togetherness and tolerance' and shared responsibility in ensuring the well-being of community members.<sup>104</sup> A legal system's openness to these thoughts not encapsulated in the Constitution can enable litigants to understand the way judicial decisions reflect their philosophy of life.<sup>105</sup> However, in the absence of unanimity on the content of certain African concepts,<sup>106</sup> the latter's application can be eclectic at times<sup>107</sup> or lead to varying outcomes in similar cases.<sup>108</sup>

The 17 cases under study show paucity in the resort to indigenous African thoughts in the construction of fundamental rights.<sup>109</sup> In

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care": The humane jurisprudence of Justice Albie Sachs' in N Bohler-Muller, M Cosser & G Pienaar (eds) *Making the road by walking: The evolution of the South African Constitution* (2018) 174.

103 B Dupret *Droit et sciences sociales* (2006) 10-11.

104 Bohler-Muller & Zikhali (n 102) 172.

105 N Ndlovu & M Omino 'The functional constitutionalism of Justice Thembele Skweyiya' in Bohler-Muller, Cosser & Pienaar (n 102) 186; Dupret (n 103) 21.

106 It was suggested that English could not appropriately capture the fundamentals of African indigenous thoughts without losing their essence; see SD Kamga 'Cultural values as a source of law: Emerging trends of *ubuntu* jurisprudence in South Africa' (2018) 18 *African Human Rights Law Journal* 627; Bohler-Muller & Zikhali (n 102) 172.

107 H Klug 'South Africa: From Constitutional promise to social transformation' in J Goldsworthy (ed) *Interpreting constitutions: A Comparative Study* (2006) 316.

108 Compare the conclusion Mokgoro & Sachs JJs reached in *Dikoko v Mokbatla* 2006 (6) SA 235 (CC). See for discussion N Bohler-Muller, M Wentzel & J Viljoen 'Breaking the chains of discrimination and forging new bonds: The extraordinary journey of Justice Yvonne Mokgoro' in Bohler-Muller, Cosser & Pienaar (n 102) 115.

109 On *ubuntu* in the South African jurisprudence, see Kamga (n 106); F Mnyongani 'De-linking ubuntu: Towards a unique South African jurisprudence' (2010) 31 *Obiter* 134; D Cornell & KV Marle 'Exploring ubuntu: Tentative reflections' (2005) 5 *African Human Rights Law Journal* 195; I Keevy 'The Constitutional Court and ubuntu's "inseparable trinity"' (2009) 34 *Journal for Juridical Science* 61; DD Ndima 'Reconceiving African jurisprudence in a post-imperial society: The role of ubuntu in constitutional adjudication' (2015) 48 *Comparative and International Law Journal of Southern Africa* 359; SB Radebe & MR Phooko

*Barnard*, Van der Westhuizen J in his concurrent judgment resorted to *ubuntu* to justify the collective nature of dignity and foreground his finding that the refusal to appoint the applicant did not violate her dignity.<sup>110</sup> The view that members of the community are sometimes required to suffer discrimination for others to be better off epitomises *ubuntu's* communitarianism. Furthermore, Sachs J's application of the popular saying in Setswana (*Molato ga o bole*) or its isiZulu equivalent (*ical'aliboli*) to mean that 'there are some crimes that do not go away'<sup>111</sup> buttressed criminal law principles of prescription and paved the way for the prosecution of a child-rape offence committed 39 years previously. Richness of interpretive tools is thus a blessing for the Court's interpretive methods.

#### 4 Choice of methods of interpretation of substantive rights

So far, I have demonstrated in this chapter the plurality of aids to constitutional interpretation and their positive impact in enhancing quality of interpretation. The Constitution directs judges to use them (international law and foreign law) when construing the Bill of Rights but does not clarify how judges should apply them and whether courts need to resort to them in every instance of interpretation of the Bill of Rights. In this section, I take the examination further and analyse the choice and application of methods of constitutional interpretation in equality, fair trial and political rights litigations. The analysis shows that the Court combines literal, contextual, historical, systemic, purposive and generous methods in the interpretation of rights. The Court often does not explain when and how it can use and apply each method.<sup>112</sup> This

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'Ubuntu and the law in South Africa: Exploring and understanding the substantive content of ubuntu' (2017) 36 *South African Journal of Philosophy* 239; N Muvangua & D Cornell *Ubuntu and the Law: African ideals and postapartheid jurisprudence* (2012); T Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Law Journal* 532; I Keevy 'Ubuntu versus the core values of the South African Constitution' (2009) 34 *Journal for Juridical Science* 19; TW Bennett 'Ubuntu: An African equity' (2011) 14 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*.

110 *South African Police Service* (n 1) para 174. See also the use of *ubuntu* in *New Nation Movement* (n 2) para 25.

111 *Bothma* (n 14) para 77.

112 See the methodology Sachs J laid down in *S v Mblungu and Others* (n 14) para 127.

has not prevented it from giving rights a comprehensive and generous interpretation.

#### 4.1 The right to equality and non-discrimination

The judiciary plays an important role alongside the legislature and executive in addressing the injustices of colonialism, racial segregation and apartheid.<sup>113</sup> Section 8 of the 1993 Interim Constitution and section 9 of the Final Constitution cemented the societal and governmental commitment to substantive equality. As part of the South African transformative project, courts are generally called on to translate such commitment into reality during adjudication.<sup>114</sup>

This subsection contains three parts: the scope of the right to equality and non-discrimination; the choice and the application of methods of constitutional interpretation; and the implications for equality and non-discrimination.

##### 4.1.1 *Constitutional protection of the right to equality and non-discrimination*

The Constitution couches the equality clause in legal, ethical and moral terms that warrant a creative interpretation and justice-seeking approach in adjudication to address pregnant societal conundrums.<sup>115</sup>

The reading of section 9 indicates that the recognition and protection of equality has five features. First, it is recognised as a value upon which the new South Africa is based. Coupled with its intra-textual position alongside other values such as human dignity and freedom, equality has significant normative power in the South African legal system. Courts can assess compliance with the Constitution based on the extent to which measures adopted by the executive, the legislature and the judiciary contribute to achieving equality or whether limitations are constitutionally valid.<sup>116</sup> The absence of an adequate definition of the

113 C Albertyn & B Goldblatt 'Equality' in Woolman & Bishop (n 47) 35-2.

114 Langa (n 6); Klare (n 54).

115 J Rubinfeld 'Legitimacy and interpretation' in LA Alexander (ed) *Constitutionalism: Philosophical foundations* (2001) 226; L Sager 'The domain of constitutional justice' in LA Alexander (ed) *Constitutionalism: Philosophical foundations* (2001) 235; L Alexander 'Introduction' in LA Alexander (ed) *Constitutionalism: Philosophical foundations* (2001) 9-10.

116 Sec 36 of the 1996 South African Constitution.

concept of 'equality'<sup>117</sup> and its moral connotations suggests that courts cannot define equality by simply resorting to its dictionary meaning but have to consider the function that equality as a value and right aims to perform in South Africa.<sup>118</sup> Section 9 contains 'morally' worded concepts and adverbs such as 'unfairly' and 'fair', the open-endedness of which requires more than just a single approach to meaning construction.<sup>119</sup>

Secondly, the provision is inclusive of both nationals and non-nationals through the use of the pronoun 'everyone'.<sup>120</sup> Thirdly, the explicit obligation to address inequality through 'affirmative action' or 'restitutionary measures' points to a non-formalistic approach to equality and discrimination in favour of substantive equality.<sup>121</sup> Discrimination is fair when it aims to dismantle 'systemic inequalities' and eradicate 'poverty and disadvantage'.<sup>122</sup> Fourth, the broad, open-ended and far-reaching grounds for discrimination are enshrined. They go beyond the grounds for discrimination recognised under international law.<sup>123</sup> Last, the Constitution requires Parliament to adopt legislation for the implementation of the right and provision of additional remedies beyond those provided under the Constitution.<sup>124</sup>

#### 4.1.2 *Overview of cases under discussion*

The adjudication of the right to equality helped achieve several societal goals: combat the marginalisation of women in marriages, contribute to the establishment of an egalitarian society through affirmative or restitutionary measures and protect the right of voiceless sexual minorities.

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117 S Fredman *Discrimination law* (2011) 8-9.

118 R Dworkin *Justice for hedgehogs* (2013) 3.

119 Albertyn & Goldblatt (n 113) 35-7.

120 *Union of Refugee Women* (n 20).

121 Albertyn & Goldblatt (n 113) 35-7.

122 Langa (n 6); Albertyn & Goldblatt (n 113) 35-7.

123 Sec 9(3) of the 1996 South African Constitution compare and contrast with art 2(1) of the International Covenant on Civil and Political Rights and art 2 of the African Charter on Human and Peoples' Rights.

124 Sec 9(4) of the 1996 South African Constitution. The Promotion of Equality and Prevention of Discrimination Act 4 of 2000 was subsequently enacted.

*Combatting the marginalisation of women in marriages*

*Bhe and Others v The Magistrate, Kayelitsha and Others* (the *Bhe* case) is a case where applicants challenged section 23 of the Black Administration Act (BAA) that instituted a specific legal regime applicable to the succession of black Africans. They also challenged the rule of 'male primogeniture' that excluded women and male children of the deceased from inheriting.<sup>125</sup> Male primogeniture empowers 'the eldest male descendant of the deceased' to succeed the deceased.<sup>126</sup> Whilst the first contention is linked to the apartheid legacy of discriminatory legislation, the second is a direct challenge to African customs that are in tension with modernity and the contemporary configuration of South Africa.<sup>127</sup>

The Court held that customary law rules as enshrined in official texts – official customary law – ought to evolve with changing conditions in modern African societies (living customary law). It invalidated the male primogeniture principle.<sup>128</sup> Regulations 2 promulgated based on section 23 of the BAA further entrenched discrimination and marginalisation, as the state could distribute the property of blacks who died without a valid will as if the black deceased were European or according to 'black law or custom'.<sup>129</sup> The Court also invalidated Regulations 2.

Thirteen years after *Bhe*, Ramuhovhi and two others approached the Court to confirm the validity of an order the High Court sitting in Limpopo made which declared section 7(1) of the 1998 Customary Marriage Recognition Act invalid.<sup>130</sup> The Act treated differently property rights of women in polygamous marriages concluded before its commencement and those concluded after the Act. Whilst in post-Act polygamous marriages, property rights are regulated out of community of property, where husbands and spouses share equal rights, the Court ruled that excluding pre-Act polygamous marriages from such a protection was unconstitutional.<sup>131</sup> The applicants could not inherit

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125 *Bhe* (n 14) paras 3; 139.

126 *Bhe* (n 14) para 174.

127 SM Weeks 'Customary succession and the development of customary law: The *Bhe* legacy' in A Price & M Bishop (eds) *A transformative justice: Essays in honour of Pius Langa* (2015) 248-255.

128 *Bhe* (n 14) para 136(4).

129 *Bhe* (n 14) para 39.

130 *Ramuhovhi* (n 14) para 2.

131 *Ramuhovhi* (n 14) para 71(3).

their mother's shares since as per Venda customary law she could not own property.<sup>132</sup>

The ruling of the Court in this case epitomised the connection between equality among spouses in a polygamous marriage and dignity of women in pre-Act polygamous marriages and found the violation of equality and human dignity. *Bhe* and *Ramuhovhi* illustrate the continuous de-patriarchisation of customary norms and the infusion of Bill of Rights rules and ideals in the regulation of relationships among individuals.<sup>133</sup>

### *In search of an egalitarian society through affirmative action*

The substantive transformation of society and the pursuit of 'social justice' may require some level of inequality against individuals or groups that benefited from discriminatory measures to address injustices that marginalised races and genders suffered.<sup>134</sup> Whilst this is both a moral and constitutional imperative for the new South Africa, two cases – *Minister of Finance and The Political Office Bearers Pension Fund v Frederik Jacobus Van Heerden* (2004) (*Van Heerden* case) and *South African Police Service v Solidarity Abo Barnard* (2014) (*Barnard* case) – illustrate how hard such a path can be to follow owing to the adverse impacts it can have on the enjoyment of equality. *Van Heerden* considered for the first time the validity of affirmative action. It arose out of a challenge to a pension plan where former parliamentarians (mostly those from the last apartheid parliament and whites) received 10 per cent pension contribution against 17 per cent and 20 per cent allocated to parliamentarians.

The High Court upheld the challenge, arguing that the government had not established how the plan promoted equality. It thus amounted to unfair discrimination.<sup>135</sup> The Constitutional Court, under Moseneke J, reversed this ruling and upheld the plan based on section 9(2), and not section 9(5), as a form of 'restitutionary measures' for the benefit of marginalised groups.<sup>136</sup> The Court reasoned that the use of section 9(5) in the assessment of affirmative actions might render them illusory. It creatively laid down criteria that courts could use to assess further

132 *Ramuhovhi* (n 14) para 1.

133 For a limited practical impact, see Weeks (n 127) 248-255.

134 *South African Police Service* (n 1) paras 125-128.

135 *Van Heerden* (n 14) para 3.

136 *Van Heerden* (n 14) para 32.

restitutionary measures. Judges who shared Moseneke's outcome also emphasised the relevance of appropriately crafting a proper 'affirmative action' test, as beneficiaries of the measures in *Van Heerden* included individuals not marginalised in the past.<sup>137</sup>

Ten years later, a similar affirmative-action challenge reached the docket of the Court as an application for leave to appeal against a Supreme Court of Appeal decision.<sup>138</sup> Ms Barnard challenged the National Commissioner of Police's refusal to appoint her despite the recommendation that the latter appoints her to the position of superintendent in the South African Police Service after two successful interviews.<sup>139</sup> She regarded the decision as a violation of section 9 of the Constitution and section 6 of the 1998 Employment Equity Act. The National Commissioner based his refusal on the grounds that her appointment would not promote racial representativity at salary level nine (9) where whites outnumber other races and that the position was not critical to service delivery.<sup>140</sup>

A reading of *Barnard* shows the existence of tensions between different constitutional imperatives, the tension between individual equality and equality of members of the society as a whole, the intersectional tension between overlapping disadvantaged groups, Ms Barnard being both a 'woman' (historically marginalised) and white (historically privileged).<sup>141</sup> The Court overturned the Supreme Court of Appeal ruling on the grounds that it misconceived the issue before it: the measure not to appoint Ms Barnard is an affirmative action and could thus not be assessed based on section 9(3). The Court ruled that not promoting Ms Barnard did not violate the Constitution.

*Van Heerden* and *Barnard* cases are important as they illustrate the richness and the complexity of section 9 interpretation. The different components of the right to equality under section 9 seek to achieve different goals, each fraught with moral overtones. Whilst judges can

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137 *Van Heerden* (n 14) para 37. See MS Kende *Constitutional rights in two worlds: South Africa and the United States* (2009) 168-169.

138 *South African Police Service* (n 1) para 1.

139 *South African Police Service* (n 1) paras 7-17. See the discussion in S Vice 'Dignity and equality in *Barnard*: Affirmative action' (2015) 7 *Constitutional Court Review* 135.

140 *South African Police Service* (n 1) para 62.

141 *South African Police Service* (n 1) paras 114; 152.

understand these goals and agree upon it, the applicable test to reach the outcome seems to be one over which they disagreed.

*The Court as a voice for voiceless sexual minorities*

The Court's sexual minorities jurisprudence inaugurated the 'right to be different'<sup>142</sup> by accepting 'difference in an increasingly open and pluralistic South Africa'. Two cases – *National Coalition for Gay and Lesbian Equality and The South African Human Rights Commission v Minister of Justice and 2 Others* (1998) and *Minister of Home Affairs and Director-General of Home Affairs v Marié Adriaana Fourie and Another (Doctor for Life International and two Others Amicus Curiae)* – are perhaps the best illustrations of the concretisation of the right to be different.<sup>143</sup>

*National Coalition* concerns a challenge to three pieces of legislation – the Sexual Offences Act, Criminal Procedure Act and the Security Officers Act – and the common law offence of sodomy on the ground that they violate the right to equality and not to be discriminated against on the basis of sexual orientation.<sup>144</sup> For the Court, the criminalisation of sodomy in private between consenting gay men is intrusive upon their privacy.<sup>145</sup> A combined reading of the rights to equality, the right to privacy and the right to human dignity led the Court to observe the unfairness of such discrimination. Sachs J approached the issue from a moral standpoint and observed how heteronormativity informed legislation punishing the act and should be abandoned.<sup>146</sup>

He remained constant in that position five years later in *Fourie*. *Fourie* combined two petitions brought before the Court, the first of which claimed that the common law definition of marriage excluded same-sex couples and the second indicating that the Marriage Act did not include same-sex couples in the formula that religious officials observe when celebrating marriage.<sup>147</sup> The Court found in favour of the applicants. It ruled that the common law definition of marriage was unconstitutional

142 *Minister of Home Affairs and Another* (n 14) paras 59-62; E Cameron *Justice: A personal account* (2014) 212-218.

143 J Fowkes *Building the Constitution: The practice of constitutional interpretation in post-apartheid South Africa* (2016) 156.

144 *National Coalition for Gay and Lesbian Equality* (n 14) paras 1-8.

145 *National Coalition for Gay and Lesbian Equality* (n 14) paras 32; 75-76.

146 *National Coalition for Gay and Lesbian Equality* (n 14) para 137.

147 *Minister of Home Affairs and Another* (n 14) para 3.

for excluding same-sex couples from the benefits and responsibility heterosexuals enjoy.<sup>148</sup> The Court also ruled that omitting the mention 'or spouse' after 'or husband' in the Marriage Act was inconsistent with the Constitution and accorded Parliament 12 months in which to correct the defects.<sup>149</sup>

#### 4.1.3 *Choice and application of methods of constitutional interpretation*

Judges combine different approaches in the interpretation of equality as a constitutional right and value, with the approaches ranging from methods based on the constitutional text, the country's socio-political history, moral-philosophical considerations and the quest for justice in the newly democratic South Africa.<sup>150</sup> Whilst there is no indication on when, how and to what degree to apply a particular method, it is apparent from all the cases that the Court does not resolve them through a literalist or formalistic approach. The wording of section 9 serves as point of departure for the interpretation of equality, but judges place it within its textual and historical context to find out its purpose. They draw on the philosophical considerations underpinning the right to equality and certain societal practices.<sup>151</sup>

The Court uses the text of section 9 to determine the legal regime applicable to a case, whether the matter is about discrimination on a ground prohibited under section 9(3) or relates to measures to address historical marginalisation under section 9(2). As there is an interpretive presumption of consistency between various parts of section 9, the Court generally believes a 'disjunctive or oppositional reading' among them can 'frustrate the foundational equality objective of the Constitution and its broader social justice imperatives'.<sup>152</sup> This is an implied recognition of the Court's role in achieving social justice in the new South Africa and it thus embraces a consequentialist and realist conception of the role of

148 *Minister of Home Affairs and Another* (n 14) para 75.

149 *Minister of Home Affairs and Another* (n 14) para 161. The Civil Union Act 2006 was subsequently adopted.

150 Michelman (n 68) 483.

151 *Minister of Home Affairs and Another* (n 14); *Bothma* (n 14).

152 *Van Heerden* (n 14) para 33.

courts in new democracies – a role that a purely legalistic approach could deny to courts.<sup>153</sup>

A substantive reading of equality enables the Court to partake in the broader project of establishing an egalitarian society.<sup>154</sup> It must scrutinise

the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of [the] Constitution.<sup>155</sup>

However, the judges' debate in *Van Heerden* suggests that the determination of the relevant constitutional text is the result of interpretation. Mokgoro J and Ngcobo J disputed the generous approach Moseneke J took when he considered the presence of two blacks, 11 Indians and 12 coloureds along 105 white MPs as irrelevant to the conclusion that this group is composed of historically advantaged members.<sup>156</sup> For similar reasons, Mokgoro J and Ngcobo contested the application of section 9(2) on remedial measures given that some white parliamentarians also benefited from the new pension scheme (17 per cent and 20 per cent). Justices agreed at least on the relevance of such measures to address historical injustices, despite the different routes they took to arrive at that agreement.<sup>157</sup>

There is consensus that courts must address historical marginalisation through equality litigation. Cases under study pointed to an increasing reliance on the country's history of colonialism, segregation and apartheid to heal the wounds of the past.<sup>158</sup> History serves to clarify both the purpose and scope of the equality and promote the social function of the provision.<sup>159</sup> Yet, the nature and the scope of history as an element of contextual interpretation of equality varies from case to case. Frequently used historical data includes the history of exclusion of blacks to emphasise the importance of the right, history and vulnerability of

153 Botha (n 57) 143; Du Plessis (n 47) 32-9 to 32-10.

154 Sec 1 of the 1996 South African Constitution.

155 *Van Heerden* (n 14) para 27.

156 *Van Heerden* (n 14) paras 67;132.

157 *Van Heerden* (n 16) para 135.

158 On the use of history, see generally P de Vos 'A bridge too far – history as context in the interpretation of the South African Constitution' (2001) 17 *South African Journal on Human Rights* 1.

159 *Van Heerden* (n 14) para 28.

the group to which complainants belong,<sup>160</sup> the history of South African society, the historical advantage of certain groups based on race or skin colour, and the historical development of institutions (for example marriage).<sup>161</sup> These historical data have no clear source. In some cases, the preamble is used as the manifestation of the commitment of the drafters of the constitution to heal the 'divisions of the past' and promote justice and freedom. Resort to academic sources and state organs' affidavits and reports also serves to inform the Court of certain historical events.<sup>162</sup> Judges use history of their own accord or because parties' submissions relied on it. It is generally applied to emphasise the importance of equality and of combatting discrimination against vulnerable or marginalised groups.<sup>163</sup>

In the cases examined, the Court used human dignity as the 'lodestar for equality',<sup>164</sup> along with the right to privacy, because applicants directly relied on such provisions or judges realised the intrinsic links between dignity, equality and privacy.<sup>165</sup> The ubiquity of dignity in the equality jurisprudence is, legally, the result of a constitutional obligation to further dignity as a right and value when interpreting the Constitution and construing limitations to constitutional right.<sup>166</sup> Ackerman J argues that dignity provides meaning to the right to equality because the object of equality is 'human worth'.<sup>167</sup> Certain variants of dignity can be located in African indigenous values, thus providing local legitimacy to the use of such a meta-value in constitutional interpretation.<sup>168</sup>

However, the use of 'dignity' as a lodestar for equality in interpretation is generally the result of judges' personal choice as there is no clear methodology about when to resort to it to enlighten the interpretation of equality.<sup>169</sup> Even the five explanations of the role of dignity provided

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160 *South African Police Service* (n 1) para 30; *Minister of Home Affairs and Another* (n 14) para 50; *Bhe* (n 14) para 57.

161 *Minister of Home Affairs and Another* (n 14) paras 23; 57.

162 *Minister of Home Affairs and Another* (n 14) paras 28; 166.

163 *Minister of Home Affairs and Another* (n 14) para 50.

164 Ackermann (n 102).

165 As above.

166 Secs 36 & 39 of the 1996 South African Constitution.

167 J Klaaren 'The constitutionalist concept of Justice L Ackermann: Evolution by revolution' in Bohler-Muller, Cosser & Pienaar (n 102) 28.

168 See the discussion in sec 3.4 above.

169 *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 35.

by Woolman are merely descriptive of how the courts apply 'dignity'.<sup>170</sup> The *Barnard* case shows how Moseneke J did not consider the dignity of the individual adversely affected by 'restitutionary measures' and balance the dignity of the individual with that of marginalised group and resolve important issues on competing 'dignities'.<sup>171</sup> Isaiah Berlin, speaking about value pluralism, warned about the possibility of conflicts among values.<sup>172</sup> In his metaphor, 'the freedom of the pike is death for minnows', Berlin emphasises that the 'liberty of some must depend on the constraints of others'.<sup>173</sup>

We can apply the same reasoning in regard to dignity. If in affirmative action cases, the 'pike' represents the historically marginalised groups and the 'minnows' are the advantaged group (such as Ms Barnard), we can conclude that Moseneke's rationality test has not provided a correct approach that helps explain how the dignity of the 'minnows' is preserved.<sup>174</sup> The responses to the question of conflict among different values came from judges who concurred with Moseneke J in *Barnard*. They provided two alternative tests; fairness on the one hand and proportionality on the other. Van der Westhuizen's conclusion is precisely the kind of justification one expects in conflicting-values cases: '[T]he impact on [Barnard's] dignity is not excessively restrictive and indeed reasonably and justifiably outweighed by the goal of the affirmative measure'.<sup>175</sup> Justice van der Westhuizen's harmonious interpretation of equality and dignity was intended to clarify the social function of section 9(2) and explain why Barnard's treatment was justified.<sup>176</sup>

Debates among judges and the use of divergent tests to reach similar outcome indicates that judges and the Court are aware of the importance of equality in South Africa.<sup>177</sup> However, the scope of argumentative practice differs from judge to judge.<sup>178</sup> Judges who present full evidence in their dissenting opinions or carefully elaborate the reasoning behind

170 S Woolman 'Dignity' in Woolman & Bishop (n 47) 36-19 to 36-25.

171 *South African Police Service* (n 1) para 133.

172 I Berlin, H Hardy & I Harris *Liberty: Incorporating four essays on liberty* (2002) 171.

173 As above.

174 S Vice 'Dignity and equality in *Barnard*: Affirmative action' (2015) 7 *Constitutional Court Review* 135.

175 *South African Police Service* (n 1) para 183.

176 Dworkin (n 97) 1.

177 Sachs J in *Van Heerden* (n 14) para 135.

178 Ngcobo J in *Van Heerden* (n 14) para 124.

the main judgment do so on the basis of several assumptions. A decision seeks to persuade parties to litigation as well as the public in general. It aims to lay down principles and guidance that guide future cases and inferior courts. Human rights litigation plays a pedagogical role and goes beyond resolving present cases: it builds and sustains constitutional democracy in a country.<sup>179</sup>

The foregoing illustrates first, the existence of several tools judges can use to buttress effective interpretation of equality; secondly, that the absence of methodological limitations in the use of certain values and right enhances the exercise of fundamental rights, on the basis that the freer judges are in finding interpretive tools, the greater the protection of the right and the more robust the justification that can be provided; and, thirdly, the role that the explicit recognition of moral, political and social equality plays in the transformation of a society.

#### 4.1.4 *Implications for the right to equality and non-discrimination*

The multi-pronged approach to the interpretation of section 9 illustrates the Constitutional Court's role in realising social justice and eliminating discrimination against the most vulnerable individuals. Social justice is an imperative the state must strive to achieve,<sup>180</sup> as the aim is, among others, to ensure that the collective good is attained by way of historically marginalised groups having equal access to economic and employment opportunities.<sup>181</sup> The development of a purpose-based test to assess the validity of restitutionary measures in *Van Heerden* and *Barnard*, and the evolutionary approach Langa DCJ adopted in *Bhe* and *Rhamuhovi* to ensure that 'official customary law' adjusts to the day-to-day realities of people (living customary law), are telling examples which demonstrate that formalism is a hindrance to the protection of the right to equality.

The multidisciplinary approach enables the Court to consider the 'real-life' situation of certain excluded groups, draw on available social and

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179 A Klaasen 'Constitutional interpretation in the so-called "hard cases": Revisiting *S v Makwanyane*' (2017) 50 *De Jure* 5.

180 Preamble to the Constitution.

181 D Davis 'Maverick Citizen: Op-Ed: Social justice and economic inclusion: Where to South Africa?' (*Daily Maverick*, 23 February 2020) <https://www.dailymaverick.co.za/article/2020-02-23-social-justice-and-economic-inclusion-where-to-south-africa/> (accessed 27 October 2020).

economic data, resort to academic scholarship on relevant constitutional rights, obtain a holistic picture, and alleviate the plight of those who have suffered the most. The Court's approaches have contributed to the 'redistribution' of economic opportunities and the 'recognition' of the status of individuals who are marginalised by patriarchal norms and practices and the heteronormative bias of laws and religious and social practices.<sup>182</sup> The contextual and moral compromises Sachs J made in *Fourie* suggests the harmony that judges must strive to construct between various constitutional provisions. He protected the rights of gays and lesbians and gave latitude to civil marriage officials who do not want to perform same-sex marriages on the basis of their rights to 'freedom of religion, belief, and opinion' to refrain from performing such marriages.

However, the use of academic literature and reference to the practices of an 'open and democratic society' have lacked a systematic methodology indicating when and under what circumstances a judge may resort to them. Extensive reliance on academic literature is a progressive interpretive practice, for it indicates judges' flexibility in engaging with non-legal materials examining the social and political contexts within which the Bill of Rights operates.<sup>183</sup> The Court nonetheless must justify the reliance on academic sources. It may also wish to consider academic literature that provides opposing views. In this instance, it must explain why judges prefer some academic sources over others, otherwise the approach may be considered eclectic.

Furthermore, while reference to an 'open and democratic society' remains helpful in constitutional jurisprudence, its open-endedness is a cause for caution.<sup>184</sup> How many open and democratic societies should be surveyed or practices of theirs identified to warrant their use in a constitutional case?<sup>185</sup> What do we do about other open and democratic societies that courts excluded from the examination and which may have contradictory practices?<sup>186</sup> Whilst the Court justified the exclusion of

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182 *National Coalition for Gay and Lesbian Equality* (n 14) para 37; Davis, 'Maverick Citizen' (n 181); 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) 9-26.

183 See for example *National Coalition for Gay and Lesbian Equality* (n 14) para 20.

184 See generally DW Jordaan 'The open society: What does it really mean?' (2017) 50 *De Jure Law Journal* 396.

185 Jordaan (n 184) 404.

186 For instance, the Court excludes the European Court's jurisprudence because of the existence of the margin of appreciation principle. On this principle, see

certain jurisprudence from the United States on the basis of differences in provisions between the constitutions, it is not clear, except perhaps with Canada, why the Court relied on jurisprudence from other countries whose constitutional provisions also differ substantially from those of the 1996 South Africa Constitution.<sup>187</sup> In the absence of proper response to these questions and of a persuasive explanation of instances when and when not to resort to the practices of an ‘open and democratic society’, it is clear that the Court’s approach has been somewhat eclectic.

## 4.2 Fair trial and due process of law

Fair trial and due process of law are among the rights that some racial groups did not entirely enjoy.<sup>188</sup> The existence of racially based crimes, the number of black activists who stood trial on various counts and who were sentenced to death have made fair trial and due process of law of utmost significance in democratic South Africa.<sup>189</sup> Their constitutional recognition and protection are ‘a guarantee of non-repetition’, as the Constitution places rights beyond the reach of parliamentary manipulation and opportunistic, unreasonable and unjustifiable restrictions.<sup>190</sup>

In this section, I review the content and the scope of fair trial rights and due process of law under the South African Constitution, the choice and the application of methods of constitutional interpretation, and the implications they have for enhancing fair trial and due process rights.

### 4.2.1 *Constitutional protection and scope of fair trial and due process of law*

The Constitution recognises different aspects of fair trial and due process of law. This includes just administrative action (section 33), access to court (section 34), and arrested, detained and accused persons (section

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SB Traoré & PA Leta ‘La marge nationale d’appréciation dans la jurisprudence de la Cour africaine des droits de l’homme et des peuples: entre effleurements et remises en cause’ (2021) 31(3) *Swiss Review of International and European Law* 417-446.

187 Examples include the United Kingdom.

188 Roux & Davis (n 6) 34-36.

189 J Burchell ‘Criminal law’ in CG van der Merwe & JE du Plessis (eds) *Introduction to the law of South Africa* (2004) 448.

190 J Burchell ‘South Africa’ in KJ Heller & M Dubber (eds) *The Handbook of comparative criminal law* (2010) 457; Burchell (n 189) 448.

35). The discussion focuses on section 35(3) on accused persons<sup>191</sup> fair trial rights to understand the extent to which the Court's interpretation has enhanced the rights of individuals whose fate lies in the hands of the state and its prosecutors. There is also an assumption that most individuals who become 'accused' have been 'arrested' and 'detained' and have benefitted from guarantees under section 35(1) and 35(2) of the Constitution.

The purpose of fair trial in any legal system is to 'establish ... rules and procedures applicable throughout a trial ... to ensure the equilibrium between the parties and implement structures that are capable of safeguarding judicial independence and impartiality'.<sup>192</sup> Constitutional texts seldom define what they mean by fair trial.<sup>193</sup> However, section 35(3) provides a detailed, comprehensive picture of what a fair trial should be like.<sup>194</sup> The list is non-exhaustive,<sup>195</sup> as the use of the verb

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191 P Schwikkard 'Arrested, detained and accused persons' in I Currie & J de Waal *The Bill of Rights handbook* (2016) 751.

192 NJ Udombana 'The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa focus: Twenty years after the entry into force of the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 300.

193 Udombana (n 192) 300-301.

194 Sec 35(3) reads as follows: 'Every accused person has a right to a fair trial, which includes the right –

- (a) to be informed of the charge with sufficient detail to answer it;
  - (b) to have adequate time and facilities to prepare a defence;
  - (c) to a public trial before an ordinary court;
  - (d) to have their trial begin and conclude without unreasonable delay;
  - (e) to be present when being tried;
  - (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
  - (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
  - (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
  - (i) to adduce and challenge evidence;
  - (j) not to be compelled to give self-incriminating evidence;
  - (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
  - (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
  - (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
- 195 (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
- (o) of appeal to, or review by, a higher court'.

‘include’ attests, so courts may use other sources to ascertain further aspects of fair trial rights that section 35(3) does not specify. Fair trial rights preserve the integrity of the trial and criminal justice system, protect the accused from unnecessary conviction, limit the adverse impact of confessions obtained illegally, and prevent an unduly delayed trial – all of which were mischiefs under the apartheid criminal justice system.<sup>196</sup> As Sachs J notes, ‘It [was] no accident that section 35 of the Constitution, which deals with arrested, detained and accused persons, [was] by far the longest section in the Bill of Rights.’<sup>197</sup>

The history of trial politicisation may thus suggest that section 35(3)’s level of detail is no cause for surprise as it is the product of South Africa’s past.<sup>198</sup> Yet certain aspects of the accused rights’ to fair trial and due process are intrinsically linked to the English criminal law and its adversarial or accusatorial criminal justice system.<sup>199</sup> As Theophilopoulos puts it, most common law countries recognise the right to remain silent,<sup>200</sup> along with the right to ‘adduce and challenge evidence’ (stemming from the cross-examination principle), right not to testify during proceedings, and right ‘not to be compelled to give self-incriminating evidence.’<sup>201</sup> They form part of the requirements of substantive fairness courts must observe throughout the trial. The existence of uniquely English common law procedural guarantees in criminal trials – parties or state notice to appeal or to cross appeal, state notice to demand an increased sentence on appeal<sup>202</sup> – that are equally subject to the respect of the Bill of Rights buttresses substantive fairness.

These guarantees are provided in similar terms or with greater detail in the Criminal Procedure Act of 1997. There is thus synergy between the Constitution, criminal legislation and common law principles in the protection of rights of accused persons, the latter two being subject to the consistency with the former.

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195 *Bogaards* (n 14) para 49.

196 C Merrett ‘Detention without trial in South Africa: The abuse of human rights as state strategy in the late 1980s’ (1990) 37 *Africa Today* 53-54.

197 *Bothma* (n 14) para 32.

198 Merrett (n 196) 53-54.

199 Burchell (n 189) 458.

200 C Theophilopoulos ‘The evidentiary value of adverse inferences from the accused’s right to silence’ (2002) 15 *South African Journal of Criminal Justice* 322.

201 *S v Molimi* (n 14) para 16. See other aspects in JD Mujuzi ‘The history and nature of the right to institute a private prosecution in South Africa’ (2019) 25 *Fundamina* 132.

202 *Bogaards* (n 14).

Be that as it may, section 35(3) contains open-ended guarantees – ‘sufficient detail’, ‘unreasonable delay’, ‘substantial injustice’ – and related requirements of ‘substantive fairness’, ‘natural justice’ under general common law. The role of ‘creative’ interpretation and a substantive rather than textual or formal approach is thus more pronounced when courts face such concepts, as the cases under study suggest.<sup>203</sup>

#### 4.2.2 *Overview of cases under discussion*

The Court’s interpretation of fair trial rights has achieved several goals. It fostered a victim-friendly criminal justice system, humanised criminal proceedings, and revived the normative power of fair trial rights.

##### *Fostering a victim-friendly criminal justice system*

The *Bothma* case involved a challenge against the High Court decision to stay private prosecution for rape instituted 39 years after the crime was committed.<sup>204</sup> The High Court suspended the prosecution as the delay with which the victim brought the prosecution could adversely affect the accused’s right to adduce and challenge evidence and be tried within a reasonable time.<sup>205</sup> The Constitutional Court considered the nature of the offence and the importance of ensuring deterrence of (child) rape as relevant factors that warrant prosecution to proceed, the 39-year delay notwithstanding.<sup>206</sup> The absence of rape from offences subject to the 20-year prescription period under section 18 of the Criminal Procedure Act meant that the legislature was aware of situations such as 39-years delay.<sup>207</sup> Most importantly, the purpose of criminalising rape, ‘to protect the dignity, sexual autonomy and privacy of women and young girls as being generally the most vulnerable group in line with the values enshrined in the Bill of Rights – a cornerstone of [the South African] democracy’,<sup>208</sup> appears to justify delayed prosecution.

Whilst this case is a clear example of a clash between the victim and accused’s fair trial rights, it does not mean that the accused’s rights are

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203 *S v Molimi* (n 14) para 42.

204 *Bothma* (n 14) para 1.

205 As above.

206 *Bothma* (n 14) paras 64-65.

207 *Bothma* (n 14) para 45.

208 As above.

endangered. Fair trial guarantees are multifarious. Accused persons can invoke the presumption of innocence and the obligation to prove beyond reasonable doubt as additional protection mechanisms.<sup>209</sup>

### *The humanisation of criminal proceedings*

Evidence is crucial in criminal proceedings,<sup>210</sup> especially in the adversarial criminal system.<sup>211</sup> Fair trial rights ensure the prosecution obtains evidence in a manner not prejudicial to accused rights.<sup>212</sup> The state and the judiciary must have due regard to principles enshrined in the Bill of Rights in the examination of criminal evidence. The *Molimi*, *Mhlungu* and *Zuma* cases<sup>213</sup> boil down to the relevance of protecting accused against the state or prosecutor's powerful influence on witnesses and accomplices from which it can obtain adverse admissions or confessions against accused persons while the latter, at least in theory, have to fend for themselves to find evidence that will discharge them.<sup>214</sup> Fair trial guarantees thus balance the powerfulness of the state or prosecutor with the powerlessness of accused persons.

The *Molimi* case involved a challenge against the admissibility of extrajudicial statements made against the co-accused as their late consideration by the trial court deprived the applicant of the right to cross-examine evidence.<sup>215</sup> The Court stated that overlooking fair trial guarantees endanger the adversarial nature of proceedings, their legitimacy and the right to adduce or challenge evidence.<sup>216</sup> The Court used a necessary guarantee of a fair trial and the obligation to prove beyond a reasonable doubt, to note the state's inability to meet the standards.<sup>217</sup> The proper balance of the state's power is equally visible when courts recall that the state should prove the accused's guilt while the accused has no obligation

209 *Bothma* (n 14) paras 74; 81.

210 AO Olaborede & LM der Walt 'The dangers of convictions based on a single piece of forensic evidence' (2020) 23 *Potchefstroom Electronic Law Journal* 3.

211 DWM Broughton 'The South African Prosecutor in the face of adverse pre-trial publicity' (2020) 23 *Potchefstroom Electronic Law Journal* 3-4.

212 Broughton (n 211) 3.

213 *S v Molimi* (n 14); *S v Zuma and Others* (n 14); *S v Mhlungu and Others* (n 14).

214 M Schonteich 'Strengthening prosecutorial accountability in South Africa' (2014) *Institute for Security Studies Papers* 24.

215 *S v Molimi* (n 14) para 43.

216 *S v Molimi* (n 14) para 42.

217 *S v Molimi* (n 14) para 50.

to prove his or her innocence.<sup>218</sup> The nub of *Molimi's* contribution, as far as interpretation is concerned, is the systemic synergy among various aspects of fair trial guarantees and the Court's ability to rely both on the Bill of Rights and aspects of the South African criminal justice system in interpreting the rights at stake.

Although *Mhlungu* and *Zuma* are 13 years older than *Molimi* and the Court decided them based on the interim Constitution, the thrust of the three cases remains the 'humanistic' approach courts adopted in interpreting fair trial rights post-apartheid. *Mhlungu* is perhaps the most humanistic of all and triggered scathing criticism from inside and outside the Court because the Court departed from the obvious 'ordinary meaning' of the words of the Constitution in the furtherance of fundamental rights and constitutional values.<sup>219</sup> The applicants in *Zuma* and *Mhlungu* challenged section 217(1)(b)(ii) of the Criminal Procedure Act for it required accused persons to prove whether the confessions was not obtained freely, thus putting the burden of proof on the accused instead of the state.<sup>220</sup> *Zuma* partially resolved the matter by declaring the provision invalid only for cases that commenced on or after 27 April 1994.<sup>221</sup> However, *Mhlungu* extended the protection to cases that preceded the commencement of the interim Constitution and in which courts will issue decisions after 27 April 1994, while the ordinary meaning of section 241(8) of the of the interim Constitution suggested the contrary.<sup>222</sup>

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218 *S v Molimi* (n 14) para 53.

219 See debates and controversies in Z Motala 'The Constitution is not anything the Court wants it to be: The *Mhlungu* decision and the need for disciplining rules' (1998) 115 *South African Law Journal* 141-142; DM Davis 'The need for disciplining rules: A reply to Ziyad Motala' (1999) 116 *South African Law Journal* 157; E Fagan 'The longest erratum note in history: *S v Mhlungu and others* CCT25/94; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC)' (1996) 79 *South African Journal on Human Rights* 79; A Fagan 'In defence of the obvious – Ordinary meaning and the identification of constitutional rules' (1995) 11 *South African Journal on Human Rights* 545; E Fagan 'The ordinary meaning of language – A response to Professor Davis replies' (1997) 13 *South African Journal on Human Rights* 174; D Davis 'The twist of language and the two Fagans: Please sir may I have some more literalism!' (1996) 12 *South African Journal on Human Rights* 504; N Smith 'The purposes behind the words – *S v Mhlungu and Others*' (1996) 12 *South African Journal on Human Rights* 90.

220 *S v Mhlungu and Others* (n 14) para 4; *S v Zuma and Others* (n 14) para 3.

221 *S v Zuma and Others* (n 14) para 46.

222 Motala (n 219) 142.

*Ascertaining the normative power of the right to a fair trial*

Substantive and procedural fairness that the fair trial rights encapsulate are instrumental in ensuring that courts conduct the trial in a manner compliant with the Bill of Rights and principles of natural justice under the common law. The *Bogaards* case illustrates the obligations imposed on the judiciary to give effect to such principles and develop the common law. It illustrates the two-pronged protection (by the Bill of Rights and common law principles) from which litigants facing criminal trials benefit. *Bogaards* dealt with the violation of fair trial guarantees that occurred when the Supreme Court of Appeal increased the sentence at the appeal stage without providing notice to the appellant that it could increase the sentence.<sup>223</sup> The Bill of Rights' ideals are that courts must develop the common law as provided under section 35(3) of the Constitution.<sup>224</sup> The Court notes in *Bogaards* that the common law fails to require courts to notify appellants when they envisage increasing the sentence of their own accord. This can enable appellants to exercise their informed right to appeal and to present their submissions against the increase, or seek leave to withdraw the appeal.<sup>225</sup> The possibility for the court to read the right of appeal in litigation presented before it buttresses the normative power of section 35(3)(o) and strengthens the criminal justice system.<sup>226</sup>

#### 4.2.3 *Choice and application of methods of constitutional interpretation*

Some argue that the 'value-laden' way in which fair trial rights and the South African Constitution are crafted proscribes a 'technical, positivist and value-free'<sup>227</sup> approach to interpretation. For others, the ordinary meaning of the text of the Constitution must be respected.<sup>228</sup> The Court interprets fair trial rights using the context and the history of the Constitution and rights<sup>229</sup> to extract the meaning of words, the purpose

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223 *Bogaards* (n 14) para 21.

224 *Bogaards* (n 14) para 68.

225 *Bogaards* (n 14) paras 57-58.

226 *S v Molimi* (n 14) para 42.

227 See Sachs J in *S v Mhlungu and Others* (n 14) para 111.

228 See Kentridge JA in *S v Mhlungu and Others* (n 14); Motala (n 219); Smith (n 219); A Fagan (n 219); and Fagan (n 219).

229 *S v Zuma and Others* (n 14) para 3.

of protecting the right, and the necessity to ensure they avoid absurd and discriminatory outcomes.<sup>230</sup>

The Court's generous approach leads to an interpretation in favour of the protection of the right which, as the *Mhlungu* case suggests, can create tension between the ordinary language of constitutional provisions and the overall aim to further fundamental rights. Mahomed J provided a theory to convince both his peers and the interpretive communities concerned that departing from the text does not endanger the constitutional edifice. The theory has three components, the first being the ability of interpretation to give effect to the 'fundamental objectives and aspirations of the Constitution'. Second, interpretation must not result in arbitrariness. Third, the harmony of the interpretation with the context of section 241(8) itself and the Constitution as a whole must be preserved.<sup>231</sup> The interpretive conclusion is reached using many interpretive presumptions, such as that 'the law-maker might not have intended to leave uncertain and unresolved serious disputes about substantive and procedural rights',<sup>232</sup> or that 'the law giver must not be imputed to enact irrational, arbitrary or unjust consequences'.<sup>233</sup>

In the approach chosen by the majority and minority in the *Mhlungu* case, certain fundamental jurisprudential issues come to light that affect interpretation in a nascent democracy regardless of the legal tradition.<sup>234</sup> Whilst the minority agreed that literal interpretation could lead to discrimination among individuals standing trial,<sup>235</sup> there exist other means by which to address discrimination. For example, the Attorney-General can withdraw prosecutions to prevent discrimination. Indeed, the Attorney-General is bound to respect and protect human rights. In other words, courts cannot solve all the problems.<sup>236</sup> Furthermore, the opposing approaches that judges chose shows that courts should strive to find a 'reasonable and acceptable' interpretation, as there seems to be no 'right' interpretation.<sup>237</sup>

230 *S v Mhlungu and Others* (n 14); *S v Molimi* (n 14); *Bothma* (n 14); *S v Zuma and Others* (n 14).

231 *S v Mhlungu and Others* (n 14) para 45.

232 *S v Mhlungu and Others* (n 14) para 19.

233 *S v Mhlungu and Others* (n 14) para 36.

234 See literature in (n 219).

235 *S v Mhlungu and Others* (n 14) para 81.

236 A Barak *The Judge in a democracy* (2008) 88.

237 Fletcher (n 19) 699; Christie (n 19) 27-28.

The approach also attenuates the conventional truism about the need for clarity of language and usefulness of plain meaning in interpretation. The approaches that were taken highlight the need to look at the Constitution when an interpretation offers less protection to fundamental rights. At the core of the majority argument in *Mhlungu* lies a successful application of consequential reasoning in Bill of Rights litigation.<sup>238</sup> It (the majority argument) translates into a particular conception of constitutional law: an open and progressively developed set of norms must be sensitive to its intra-textual and socio-political contexts and the values society aims to embody.<sup>239</sup> Courts can eschew the plain meaning of a constitutional provision through reasoned and persuasive arguments backed up with both the intra-textual, historical and political context of a country to accord strengthened protection to individual rights and full effect to the Bill of Rights.

The Court's interpretive approach likewise furthered the broader societal goal of combatting rape yet did so without endangering fair trial rights. Some approaches may strike a balance between the two goals, and the *Bothma* case is the perfect illustration in this regard. The contextual approach in *Bothma* is the result of several factors. They relate to the growing domestic<sup>240</sup> and international consensus<sup>241</sup> to prosecute rape, especially child rape, the existence of other guarantees for the accused, such as the evidentiary standard to prove beyond reasonable doubt and the presumption of innocence, the deterring effects of allowing delayed prosecution as well as the absence of the victim's responsibility in the loss of evidence.<sup>242</sup> These considerations are unique to this case, but the multiplicity of interpretive approaches enhanced the importance of fair trial guarantees in the South African legal system.

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238 D Davis 'Of closure, the death of ideology and academic sand castles – A reply to Dr Fagan' (1997) 13(1) *South African Journal of Human Rights* 180.

239 Madlingozi (n 10) 126.

240 African Charter on the Rights and Welfare of the Child; Namibia, Botswana, Zimbabwe, Canada, New Zealand, England jurisprudence cited in *Bothma* (n 14) paras 49-52; 57.

241 *Bothma* (n 14) paras 54-60.

242 *Bothma* (n 14) para 79.

#### 4.2.4 *Implications for the right to a fair trial and due process of the law*

The adjudication of fair trial rights aptly clarified the nature, the scope and the importance of these guarantees, which aim to ‘cure mischief from the pre-constitutional era of South Africa.’<sup>243</sup> The relevance of courts and other organs of state upholding fair trial rights is reiterated throughout the Court’s jurisprudence. The purpose of including them in a justiciable Bill of Rights is placed in the broader transformative purpose of the final Constitution. In this sense, the structural reading with other rights, such as human dignity and freedom and security of the person, enables the Court to confer fair trial guarantees to individuals whom section 35(3) excludes from protection.<sup>244</sup> This generous approach protects the rights of the accused against the state (prosecution) through the implicit recognition of an imbalance of power between them. The Court recalled the onus placed on the prosecution to prove the accused’s guilt beyond reasonable doubt and not the other way around, the broadness of fair trial guarantees beyond the list provided in the Constitution,<sup>245</sup> and the utmost importance of a substantive rather than formalistic reading of the right.

### 4.3 Political rights

The absence of an inclusive democratic system of government before 1994 disenfranchised the majority of South Africans, as political rights were largely the preserve of whites.<sup>246</sup> The recognition and protection of political rights signalled the dawn of representative and participatory democracy typified by regular, free and fair elections. Political rights entail that individuals are members of a political community (nation) and have a duty to participate in nation-building through democratic channels as voters and elected officials. Some aspects of these rights are elevated to founding values of the South African legal and political systems.

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<sup>243</sup> *S v Zuma and Others* (n 14) para 17.

<sup>244</sup> *Bothma* (n 14) para 32.

<sup>245</sup> *S v Zuma and Others* (n 14) para 17.

<sup>246</sup> G Fick ‘Political rights’ in Currie & de Waal (n 191) 421.

### 4.3.1 *Constitutional protection and scope of political rights*

‘Every citizen’ enjoys political rights while only ‘adult’ citizens have the right to vote and to ‘stand for public office and, if elected, to hold office.’<sup>247</sup> Section 19 does not mean that legislation cannot prevent citizens from voting or standing for or holding office. The limitation must be instituted by a law of general application, and should be reasonable and justifiable.<sup>248</sup> By enabling citizens to exercise their political choices freely, section 19(1) breaks with the erstwhile apartheid exclusion of segments of the population and aligns itself with international human rights instruments that accord similar rights to all citizens.<sup>249</sup> The section goes beyond the protection the African Charter on Human and Peoples’ Rights and the International Covenant on Civil and Political Rights accord. Indeed, aspects on the formation of and campaigning for political parties which are the epitome of political pluralism that the multi-party system embodies are included in section 19(1).<sup>250</sup> In a country where colonialism and apartheid prevented the development of African political parties and where political activists were forced into exile, the historical relevance of this provision cannot be gainsaid.<sup>251</sup>

Section 19(2), too, is an outstanding provision. It makes the organisation of free, fair and regular elections ‘for any legislative body established in terms of the Constitution’ a right, placing the duty on the government to organise such elections, to ensure citizens participate in elections unconditionally and that the quality of elections lives up to the standard of free and fair elections.<sup>252</sup> The absence of indicators of what amounts to free and fair election does not diminish the value of recognising such a right and may require of judges to bring to bear context-related considerations as well as international standards on the

247 Sec 19 of the South African Constitution. Discussing the extension of voting rights to non-citizens, see Le Roux (n 45) 143.

248 Sec 36 of the 1996 South African Constitution.

249 Art 25 of the International Covenant on Civil and Political Rights and art 13 of the African Charter on Human and Peoples’ Rights.

250 Sec 19 is broader in scope than sec 21 (political rights) of the Interim Constitution.

251 ‘Suppression of communism Act, No. 44 of 1950 approved in parliament’ 26 September 2016 in *South African History Online* <https://www.sahistory.org.za/dated-event/suppression-communism-act-no-44-1950-approved-parliament> (accessed 27 October 2020).

252 Sec 19 of the 1996 South African Constitution.

fairness of elections.<sup>253</sup> What is clear from section 19(2) is the inherent connection the right to free and fair elections has with other rights in the Bill of Rights such as the freedom and security of voters and political activists; privacy; freedom of religion, belief and opinion; freedom of expression, assembly, demonstration, picket and petition; and freedom of association and access to information.<sup>254</sup> This 'bundle of rights' is also linked to section 19(3) in its double dimension: it guarantees the right to vote in secrecy, on the one hand, and the right to stand for public office and, if elected, hold office, on the other.

The preceding discussion points to the interconnectedness and interdependency of political rights and other rights in the Bill of Rights which constitute its extension. Also, the constitutional values of 'multi-party system of democratic government' and relevant international law norms provide relevant content for political rights.<sup>255</sup> Together, they form a normative system based on which courts can assess the conduct of the state and its organs in giving effect to section 19. Within a normative system, norms have different 'weight' and 'value', and the interpretation of section 19 has confirmed such a universal truism; by the same token, it has also enabled the Court to persuasively explain which norm counts the most and under which circumstances.

#### 4.3.2 *Overview of cases under discussion*

The interpretation of Section 19 gives effect to values underlying the post-apartheid constitutional dispensation by controlling the exercise of political power. The Court's enhancement of political participation and intra-party transparency and accountability has furthered the right to vote as well as advanced multi-party democracy and political pluralism generally

253 See, for examples, the African Charter on Democracy, Governance and Elections; the African Union Declaration on the Principles Governing Democratic Elections in Africa, AHG/Decl.1 (XXXVIII) 2002 [https://archives.au.int/bitstream/handle/123456789/572/AHG%20Decl%201%20%28XXXVIII%29%20\\_E.pdf?sequence=1&disAllowed=y](https://archives.au.int/bitstream/handle/123456789/572/AHG%20Decl%201%20%28XXXVIII%29%20_E.pdf?sequence=1&disAllowed=y) (accessed 27 October 2020).

254 See secs 12, 14, 15, 16, 17, 18 & 32 of the 1996 South African Constitution.

255 Sec 39 of the 1996 South African Constitution.

*Enhancing political participation, intra-party transparency and accountability*

Courts and citizens must check political parties to ensure they take into consideration constitutional ideals of participation, transparency and accountability in the exercise of their mandate.<sup>256</sup> It is the absence of appropriate legal mechanisms to enhance participation and combat corruption within parties that two cases – *New Nation Movement and Others v President of the Republic of South Africa and Others* and *My Vote Counts NPC v Minister of Justice and Corrections Services and Democratic Alliance* – bring into the spotlight. *Mpho Ramakatsa and 9 Others v Elias Magashule and 25 Others* relates to intra-party transparency.<sup>257</sup>

Until the *New Nation Movement* case, independent candidates could not stand for public office and hold office in provincial legislatures and National Assembly given that the 1998 Electoral Act failed to provide for such a possibility. This failure was challenged on the grounds of its being inconsistent with section 19(3)(b) and section 18 of the Constitution. Political parties *suo motu* chose individuals who could represent them to legislative houses, narrowing the possibility for voters to hold their elected officials accountable. The Court addresses this accountability gap in opening up the competition and allowing individuals who do not pledge allegiance to any political party to compete in elections.<sup>258</sup> A review of relevant international and foreign materials leads the Court to believe that ‘coercing’ individuals to be members of political parties is both against their ‘negative right’ not to associate and their dignity, and does not stand the limitation test.<sup>259</sup> This pronouncement can increase the accountability of political parties to their voters and transparency about whom they appoint.<sup>260</sup>

256 Moseneke (n 18) 249.

257 See generally T Roux ‘The South African Constitutional Court’s democratic rights Jurisprudence’ (2013) 5 *Constitutional Court Review* 41.

258 *New Nation Movement* (n 2) paras 52-53.

259 *New Nation Movement* (n 2) paras 60-62. See generally SE Vohito-Anyanwu ‘Constitutionalisation of the rights of political parties in Africa and its impact on constitutionalism: A comparative study of the Central African Republic, Senegal and South Africa’ (2018) unpublished doctoral thesis, University of Pretoria, 145-146.

260 ‘Media Statement: SAHRC welcomes the Constitutional Court judgment enabling independent candidates to stand for public office in national and provincial elections’ <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/2382-media-statement-sahrc-welcomes-the-constitutional-court-judgment->

The *My Vote Counts* case emphasises the importance of transparency in political party funding. Petitioners challenged the constitutional validity of the Promotion of Access to Information Act since it fails to facilitate access to information on private funding of political parties and independent candidates, which is essential in making informed political choices.<sup>261</sup> A holistic approach to interpretation that considered the purpose, the context and relationship between the right to vote and access to information on private funding enabled the Court to rule that the post-election favours which parties and elected officials give in return of funds they receive can be easily detected.<sup>262</sup> Political rights regulate the relationship between political parties and their members, and the pronouncement of the Court in *Ramakatsa* emphasises political parties' duties to facilitate the enjoyment of section 19 rights.

*Ramakatsa* concerned a challenge by members of the ANC in the Free State Province to the lawfulness of the ANC's Provincial Conference held in June 2012 and the validity of the Provincial Executive Committee (PEC) elected at that conference. The applicants alleged widespread procedural and substantive irregularities at branch level which, they argued, tainted the conference and infringed their constitutional right under section 19 of the Constitution to participate meaningfully in the activities of a political party. They further contended that the ANC had failed to address these irregularities through its internal processes, thereby breaching both its own constitution and constitutional standards of lawful and democratic internal governance.

*In the name and for the furtherance of the right to vote*

*August* and *Richter* emphasise the relevance of ensuring that the state and its organs do not unjustifiably restrict the right to vote. This may have adverse consequences for nation-building as citizens can be disenfranchised or left behind if institutions tasked to organise elections are uncontrolled. The *August* case challenged the failure of the Independent Electoral Commission to register as voters individual prisoners awaiting trial or sentenced between November 1998 and March 1999 when registration

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enabling-independent-candidates-to-stand-for-public-office-in-national-and-provincial-elections accessed 27 October 2020.

261 *My Vote Counts NPC* (n 14) para 34.

262 *My Vote Counts NPC* (n 14) para 72.

was under way.<sup>263</sup> The Court recalls that disenfranchisement can only be instituted by a 'law of general application.'<sup>264</sup> In the absence of such a law, the Court could not help but order the Commission to register prisoners.<sup>265</sup> The Court clarified the Commission's power, which is to manage elections, and said that any Commission's attempts to determine the nature of voters is unconstitutional.<sup>266</sup> The *August* ruling laid the foundation for further right-to-vote cases.

*Richter* challenged the non-inclusivity of section 33(1)(e) of the Electoral Act and Regulation 6 implementing it for their failure to grant special votes to citizens who are outside the country for reasons other than those stipulated under the law.<sup>267</sup> A purpose-based interpretation made the Court realise the symbolic and democratic value of the right to vote, which an Act of Parliament can infringe when it fails to enable a citizen to take 'reasonable' steps to vote.<sup>268</sup> The use of a global citizenship-like argument deriving from the context and the world 'we now live'<sup>269</sup> in shows the unrestricted ability of judges to resort to sound argument that can support their positions. *August* and *Richter* give flesh<sup>270</sup> to the abstract constitutional value of 'universal adult suffrage' and 'a national common voters roll'.<sup>271</sup>

### *Furthering multi-party democracy and political pluralism*

*African Christian Democratic Party v the Electoral Commission and 2 Others* demonstrates the Court's willingness to resort to a value-laden approach to override statutory provisions that could have prevented the African Christian Democratic Party (ACDP) from contesting local government elections.<sup>272</sup> The Electoral Commission disqualified the

263 *August and Another* (n 14) para 27; AK Abebe 'In pursuit of universal suffrage: The right of prisoners in Africa to vote' (2013) 46 *Comparative and International Law Journal of Southern Africa* 431-432.

264 *August and Another* (n 14) para 23.

265 *August and Another* (n 14) para 42.

266 *August and Another* (n 14) para 33.

267 *Richter v The Minister for Home Affairs* (n 14) para 1.

268 *Richter v The Minister for Home Affairs* (n 14) para 58.

269 *Richter v The Minister for Home Affairs* (n 14) para 69.

270 There are many equally valuable cases. See, for example, *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* 2005 (3) SA 280.

271 *Richter v The Minister for Home Affairs* (n 14) para 15.

272 *ACDP* (n 14) paras 23-25.

ACDP and its candidates for not having paid the necessary deposit and given notice of intent to contest in the Cape Metropolitan area as per sections 14 and 17 of the 2000 Local Government: Municipal Electoral Act.<sup>273</sup> In its reasoning, the Court relied on the purpose of sections 14 and 17,<sup>274</sup> the importance of the promotion of multi-party democracy and political rights, and the absence of harm a broader and generous interpretation could cause to the electoral process and other parties, all of which prompted the Court to rule in favour of the participation of the ACDP.<sup>275</sup> In certain circumstances, legal formalism might hamper the prospects for achieving multi-party democracy, while the Court's effort to chart a path that enables litigants to understand when it can override ordinary language to avoid absurd consequence is argumentatively sound.

#### 4.3.3 *Choice and application of methods of constitutional interpretation*

Interpreting political rights using six sets of methods – purposive, textual-contextual, historical, generous, consequentialist and moral or philosophical – is premised on five underlying assumptions about political rights.

First, political rights aim to further 'universal adult suffrage', enhance citizens' participation in public affairs, and promote multi-party democracy. This assumption entails that the role of interpretation is to give effect to this broader purpose and avoid restrictive purposes that contradict the founding values of the constitutional dispensation.<sup>276</sup> The resort to several techniques to locate the purpose of political rights in history, the constitutional text itself, the preamble to the Constitution,<sup>277</sup> the country's socio-political contexts, and international law instruments shows the variety of tools as well as the synergy that exists among them in respect of a unique goal. The Court in *My Vote Counts* ascertained the relevance of combatting corruption through access to information on private funding of political parties, as corruption is proscribed under

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273 *ACDP* (n 14) para 3.

274 *ACDP* (n 14) para 27.

275 *ACDP* (n 14) para 33.

276 See Skweyiya J in *ACDP* (n 14) paras 42-43.

277 *My Vote Counts NPC* (n 14) para 34.

the United Nations Convention Against Corruption<sup>278</sup> and the African Union Convention on Preventing and Combatting Corruption,<sup>279</sup> which imposes on South Africa an explicit obligation to ensure transparency in the funding of political parties.<sup>280</sup> The Court uses a similar international-law-based approach to provide justifications for the relevance of the right to vote and freedom of association as constitutional imperatives, as obligations the African Charter on Human and Peoples' Rights imposes on South Africa, and as practices promoted in open and democratic societies.<sup>281</sup> O'Regan J in *ACDP* favoured an interpretation that was against the language of the statute, suggesting when there is a contradiction between the text and the purpose, the latter should override the former.

Secondly, constitutional values, principles and subsidiary legislation adopted to advance political rights are part of a normative system the Court must read in harmony to give effect to the purpose underlying political rights. *My Vote Counts* makes a structural connection between section 19 and freedom of expression to ensure that academia and the press have the ability to claim information on private funding if this is relevant to their constitutional rights.<sup>282</sup> The use of extra-textual context – the nature of the South African political system<sup>283</sup> – helps the Court be aware of the social realities surrounding it.<sup>284</sup>

Thirdly, the history of disenfranchisement of black South Africans should resonate when construing the meaning of political rights.<sup>285</sup> History can, however, be subjected to idiosyncratic interpretation. In *New Nation Movement*, Froneman J noted that

the 'never again' impulse of section 19 does not boil down to the simplistic view that our past of disenfranchisement means that the ambit of constitutionally protected interests in section 19(3)(b) should be set as widely as possible to supposedly promote enfranchisement.<sup>286</sup>

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278 Art 7(3) of the 2003 United Nations Convention Against Corruption.

279 Art 10 of the 2003 African Union Convention on Preventing and Combatting Corruption.

280 *My Vote Counts NPC* (n 14) paras 49-50.

281 *New Nation Movement* (n 2) para 30.

282 *My Vote Counts NPC* (n 14) para 55.

283 *Ramakatsa* (n 14) para 40.

284 Roux (n 257).

285 The achievement of the franchise is significant for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race and the accomplishment of all-embracing nationhood.

286 *New Nation Movement NPC* (n 2) para 220.

In other words, history does not always mean what we want it to mean, or we cannot twist it to lead to *a priori* conclusions we already envisaged. Froneman J's warning is that the relevance of historical events in a legal system does not equate to the consequence one draws from them. Aside from issues relating to the scope of history, the fact that there can be clashes among the history of different constitutional provisions or values indicates that preferring one at the expense of the other without valid reasons may be an imposition of one's personal view.<sup>287</sup>

Fourth, interpretation must aim to avoid absurd consequences which are contrary to full and effective political participation. It is a general interpretive principle that 'good consequences are presumed to be intended' while bad and absurd ones are presumed not to have been intended.<sup>288</sup> The prevention of the ACDP from running for local government elections when it demonstrated its willingness to follow the requirements could be indeed absurd. However, justice-oriented this approach was, the purposive-*cum*-consequentialist method adopted in this case endangered the rule of law. It is difficult to predict what the exact meaning of statutory provisions and the scope of the court's powers are if the consequence can prompt the court to overlook the ordinary meaning of statutory words.<sup>289</sup> Those in a legal system concerned with preserving legal stability and legal certainty (the rule of law) at the altar of good consequences can require the Court to apply the ordinary meaning of words irrespective of the outcome.<sup>290</sup>

If consequences are contrary to political participation, defenders of the rule of law can contend that Parliament intended such outcomes and only Parliament, not the Court, must remedy them.<sup>291</sup> This position is detrimental to furthering a culture for protecting human rights and promoting democracy as circumstances that norms did not envisage can occur, thus justifying an active role of the Court. While the concern for the rule of law and separation of powers is as sound as the protection of fundamental rights, the Court should simply lay down a theory of when it can resort to the consequentialist approach for litigants to know in advance what the behaviour of the Court in particular instances

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287 As above.

288 R Sullivan *Statutory interpretation* (2007) 209.

289 Bishop & Brickhill (n 3) 697.

290 Bishop & Brickhill (n 3) 697-698.

291 Bishop & Brickhill (n 3) 699.

can be.<sup>292</sup> This is in line with predictability and certainty, the founding components of the rule of law. *ACDP* contains several waymarks which suggest that O'Regan J provided such a theory, albeit an implicit one.<sup>293</sup>

Fifth, there exists a normative framework external to the legal order that can serve to ascertain the rightness and wrongness of decisions courts adopt in political rights cases. This line of thought emerged from the Court's early jurisprudence on prisoners' right to vote, and cemented a dignified approach to the interpretation of the right later applied in subsequent cases. Sachs J puts this in *August* by arguing for the inclusivity of citizens as voters:

The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity.<sup>294</sup>

These five assumptions encapsulate the remedial nature of political rights in post-apartheid South Africa. The choice and application of various methods show the pattern of absence of formalism in the Court's reasoning. The positive or negative outcome of a case does not necessarily hinge on the method chosen but the way it is utilised to accommodate a particular outcome. To quote Fletcher, South African legal reasoning is inclined towards finding 'a reasonable or acceptable approach to the problem'<sup>295</sup> rather than finding the 'right' approach.

#### 4.3.4 *Implications for political rights*

The five cases discussed and the interpretation chosen and applied therein advanced different aspects of democratic governance. These aspects include the proper conceptualisation of the right to vote and its relevance to the democratic process; the enhancement of the accountability of political parties to their members; increased citizens' participation; and

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292 It first asked the Independent Electoral Commission about possible consequences; it examined the nature and type of harms a finding in favour of applicants might cause; and it also realised there was no party to be harmed by a progressive interpretation.

293 *ACDP* (n 14) para 33.

294 *August and Another* (n 14) para 17.

295 Fletcher (n 19) 699.

institutional dialogue between the Court and other state organs (here, the Independent Electoral Commission). The Court's role in interpretation suggests it is increasingly a key actor in the judicial and political arena in deciding on legal matters that have political implications and doing so through the application of law, logic and institutional standards. The Court's understanding of this role is that it is giving effect to political rights in such a way as to ensure that citizens remain an integral part of the political process and that elected officials are accountable to them.

## 5 Interpretation of limitations of rights

In the previous section, I have explained how the Court has applied various methods of constitutional interpretation to enhance equality, fair trial and political rights. These rights are not merely 'legal' entitlements. The context which led to their constitutional recognition, the present social and political context, and their purpose confer on them a historical, present and future significance. This section examines methods the Court has used to interpret the limitations of rights. The main idea here is that limitations to equality, political and fair trial rights are, to a certain extent, interpreted differently. Legal systems sharing a similar legal tradition with South Africa approach the interpretation of limitations to these rights in different ways due to differing legal and historical or contextual reasons.

To begin with, section 36 regulating 'limitations of rights' imposes a purposive, teleological, historical and contextual analysis of actions and omissions of organs of state that, broadly speaking, infringe on constitutional rights.<sup>296</sup> In its content, one notes the exclusion of a formalistic and minimalist approach in favour of a maximalist approach to interpreting the limitations of rights that section 36 imposes.<sup>297</sup> The existence of two stages<sup>298</sup> in the examination of limitations warrants a 'generous' interpretive approach in favour of individual rights in the first stage – when examining the existence of a violation – because of the possibility given to the organ of the state to justify the violation.<sup>299</sup>

296 S Woolman & H Botha 'Limitations' in Woolman & Bishop (n 47) 3-17.

297 As above.

298 In some instances, examined, the Court refrained from jumping to the second stage of limitation, arguing it could not imagine any justification of the violation. There is hence no single one-size-fits-all approach.

299 Currie & de Waal (n 191) 153.

This argument is premised on the assumption that the state organ or any other respondent will be apt in providing reasoned and sound justification in the second stage. I discuss first aspects of section 36 that dictate purposive, teleological, historical and contextual analyses, after which I examine whether, how and to what extent the limitation clause applies to the three rights under study.<sup>300</sup>

For courts to determine the reasonableness and justifiability of limitations in an open and democratic society based on human dignity, equality and freedom, they need to do more than just apply the law to facts submitted to them. The process necessitates an active role from the Court and parties. Currie and de Waal rightly suggest that the analysis ‘requires evidence, such as sociological or statistical data, on the impact that the legislative restriction has on society.’<sup>301</sup> Multidisciplinary inquiry is thus unavoidable, and the elements to which one may resort, be they philosophical arguments or practices in international law and foreign jurisdictions, are unlimited, albeit they must be ‘capable of easy verification.’<sup>302</sup> Achieving an understanding of how the measures adopted did not invade rights beyond the minimum necessary and served a legitimate constitutional purpose must be the result of a contextual and purposive examination. These tools serve to enhance a society where individuals and state organs are mindful of what the Bill of Rights allows and prevents in pursuit of the Constitution’s transformational ideals.

The right to vote and the right to stand for public office and, if elected, to hold office has special historical significance that resists frivolous limitation. As Langa DCJ noted in *Bhe*, equality and dignity ‘assume special importance in South Africa because of our past history of inequality and hurtful discrimination on grounds that include race and gender,’<sup>303</sup> which thus requires that reasons for limitation be all the ‘more persuasive or compelling.’<sup>304</sup> Open-ended concepts like an ‘open and democratic society based on human dignity and equality’ warrant a non-formalistic interpretation. The concept of ‘open and democratic society’ provides the Court with unrestrained powers to resort to as many countries as possible that meet such conditions.<sup>305</sup> Tentatively,

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300 Currie & de Waal (n 191) 152.

301 Currie & de Waal (n 191) 154.

302 Currie & de Waal (n 191) 155.

303 *Bhe* (n 14) para 71.

304 *Bhe* (n 14) para 70.

305 *August and Another* (n 14) para 30.

these societies are Western European and North American; no African country seems to qualify, at least based on our sampled cases, as an open and democratic society. For instance, while several African countries provide for the possibility of independent candidates to run for national and provincial legislatures, the *New Nation Movement* case failed to refer to these practices.

Furthermore, unlike political and fair trial rights, the equality clause contains internal limitation provisions that generally serve as the basis for the examination of limitation in concrete cases. Resort to section 36 becomes dependent on the nature of the discrimination invoked in an equality case.<sup>306</sup> *Barnard* and *Van Heerden* were resolved without resort to section 36, perhaps because the Court could assess remedial measures as a limitation to equality based on section 9(2) of the Constitution.<sup>307</sup> The provision served the Court in devising a test to verify the validity of measures adopted under section 9(2),<sup>308</sup> coupled with a review of the rationality of the adopted measures. *National Coalition*, *Bhe* and *Fourie* examined limitations to equality within the ambit of section 36.

The multiplicity of evaluative criteria – rationality, fairness, proportionality or dignity – in the South African legal system is a factor that helps diminish the likelihood of unfair discrimination. Equality, along with dignity, serves as a meta-right against which limitations to a fair trial and political rights can be tested. Thus, normatively, equality is more ‘powerful’ than its two counterparts. The importance of fair trial rights may also suggest there might be difficulties to imagining circumstances in which legislation limiting the right of appeal or to adduce and challenge evidence, among others, could be justifiable.

## 6 Conclusion

Constitutional interpretation of fundamental rights remains instrumental in South Africa. Starting with equality, the Court generally strives for attaining substantive equality whether in matters pertaining to the marginalisation of women, affirmative action, or the rights of voiceless sexual minorities. This approach allows the Court to address,

306 Affirmative actions (sec 9(2) of the 1996 South African Constitution) grounds for discrimination (sec 9(3) of the 1996 South African Constitution).

307 Even with this shortcut, Mokgoro J contested the validity of relying on sec 9(2) and not sec 9(2) of the 1996 South African Constitution.

308 *Van Heerden* (n 14) para 37.

within the limit of its powers, the inequality certain individuals continue to witness. The argument made at this stage is that the formulation of the right to equality under the South African Constitution is substantive and encourages courts to look beyond formalistic criteria.

Similarly, the interpretation of fair trial and due process of law benefits from an approach chosen by judges to ensure that individual liberties are not unjustly restricted but also that serious crimes committed are prosecuted no matter the lapse of time. The last analysis pertains to political rights. The Court strives for a substantive approach to interpretation ensuring that political participation, intra-party transparency and accountability, the possibility for individuals to vote and political pluralism prevail.

In equality, fair trial and political rights litigation, the history of South Africa is echoed, showing that judges are mindful of the need to ensure that their interpretation takes the country from a 'culture of authority' to a 'culture of justification'. Although judges may disagree on a particular approach to adopt, it is clear that the Court does not use formalistic arguments and that judges are committed to the idea that the Court, along other state institutions, must serve as instruments of transformation through interpretation and remedial findings.

The methods the Court chooses, the synergy between them and the reliance on non-binding legal sources are evidence that constitutionalism and constitutional supremacy cannot tolerate legislation and executive or parliamentary conduct that jeopardise the constitutional order and prevent society from moving towards the equality which framers of the Constitution envisaged. The Court has not shied away from taking its responsibility and standing by those whose rights are affected. Its success is attributable to legal and non-legal materials it uses in the course of argumentation and justification. The substantive and open-ended nature of the wording of constitutional rights – equality, fair trial and political rights – provides judges with wide discretion. However, they have endeavoured to apply legal and constitutional principles as well as sources accepted *within* the legal system broadly and generously. In a sense, the historical significance of the rights under study – they are important to the reconstruction of South African society – enables the Court to flex its human-rights-protective muscles. Rights in the South African legal systems are multidimensional, value-oriented and consequentialist in nature, requiring of interpreters to cease being the

infamous Montesquieuan 'mouth of the law' if they are to prevent governmental, majoritarian or plutocratic tyranny.

