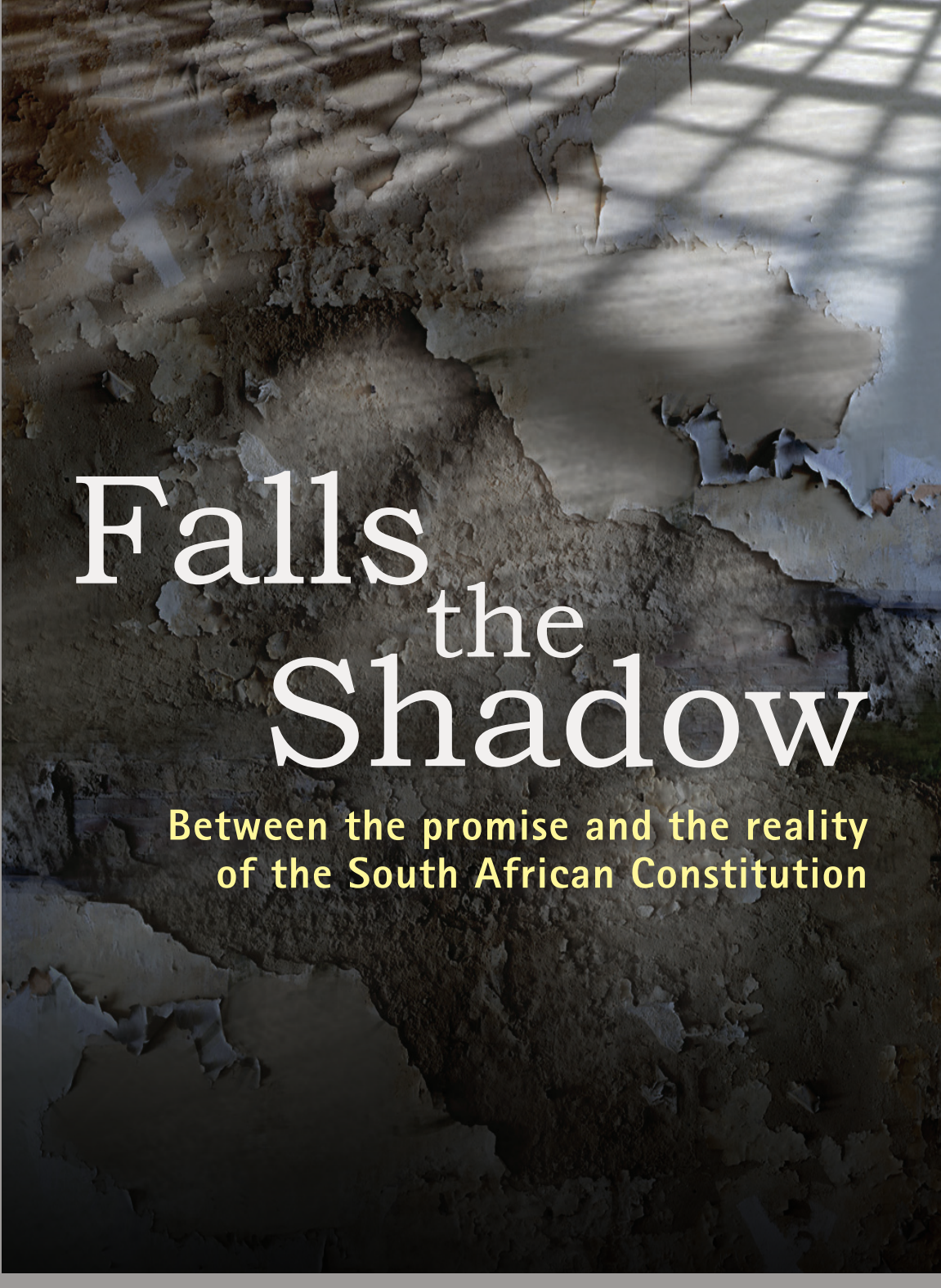

Edited by KRISTINA BENTLEY, LAURIE NATHAN & RICHARD CALLAND

Falls the Shadow

Between the promise and the reality of the South African Constitution

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Kristina Bentley, Laurie Nathan & Richard Calland

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Foreword

Sipho M. Pityana

> *We must make our choice. We may have democracy, or we may have wealth concentrated in the hands of a few, but we can't have both.*
> (Justice Louis Brandeis, United States Supreme Court, 1916–1939)[1]

The South African Constitution offers a vision for the transformation of our country into a non-racial, non-sexist and equitable society. Its Bill of Rights includes, among others, socio-economic rights such as rights to decent basic education, healthcare and housing, as well as to water, a clean environment and social security. It assertively mandates society in its journey to an equitable dispensation, to redress the legacy of inequality of the past.

To the extent that poverty, inequality and unemployment are rampant and the gap between the rich and poor has widened, it is clear that the Constitution's vision of an equitable society, characterised by human dignity, fairness and justice, has not been realised.

Transformation is the cardinal mandate of our Constitution. Central to it is the realisation of an inclusive economy through a race- and gender-based departure from the previous dispensation. We must debate whether our Constitution, which avowedly asserts this mandate, may simultaneously be inhibiting as a result of its provisions protecting property rights. Evidence suggests that the failure to effect a meaningful economic redistribution is more a consequence of governance and policy failure than any limitation arising from the Constitution.

Importantly, to the extent that section 25 of the Constitution, which protects property rights, remains untested against a radically transformative economic policy framework, the jury is still out. Our firm view is that the Constitution points the way towards a transformation-friendly body of property law. Our Constitution emphasises land as an instrument of transformation and justice, hence the need for land to be owned by black people on which to live and work.

The Constitution is, therefore, the embodiment of our struggle for liberation, codified in what became the supreme law of the land. We chose this path. We, as a central part of our victory over apartheid, chose to have not just democracy, but constitutional democracy. With careful deliberation did we turn our back on the system of parliamentary supremacy that had enabled that egregious abuse of power, that crime against humanity, known as apartheid. By an overwhelming majority, South Africans, through their democratically elected Constitutional

Assembly, opted for a constitutional dispensation that circumscribes the power, not only of the executive but also other arms of government, through a system of checks and balances.

The inevitably controversial role of determining the constitutionality of executive and legislative actions, as well as those of our fellow citizens, rests with the judiciary and, ultimately, as the primary custodian of the Constitution, with the Constitutional Court. We could have opted for a system of parliamentary sovereignty where a dominant majority party changes laws and policies at its whim. Informed by experiences elsewhere in post-colonial and liberated countries, we opted to entrust our future with the Constitution rather than the absolute rule of a leader or political party. As former President Nelson Mandela aptly put it:

> *People come and people go. Customs, fashions, and preferences change. Yet the web of fundamental rights and justice which a nation proclaims must not be broken. It is the task of this court* [Constitutional Court] *to ensure that the values of freedom and equality which underlie … our … Constitution … are nurtured and protected so that they may endure.*[2]

This new constitutional dispensation that emerged in the mid-1990s enjoyed public legitimacy and earned global admiration. That golden period of constitution-making, under the bright promise of a rainbow nation, is now but a hazy glow and to many, especially the younger generation, it offers little, even in the way of sentiment. We have entered a turbulent new phase in our history, where little is certain and, on some days, the threats appear to overwhelm the opportunities and the significant advances that we have made.

The Constitution is now a site of political contest. From one perspective, this is how it should be. Although our Constitution was the product of political struggle, as well as political compromise, it is not set in granite. It has been amended several times already, and it will need to be amended again. For example, it may well be desirable for our electoral system to be changed radically in order to extract greater and more direct accountability from elected members of parliament.

The Constitution is not, therefore, an untouchable 'sacred cow'; it is precious, but it is not made of porcelain. It must be robust enough to accommodate on-going political debates about the future character of our society. But nor should it be taken for granted.

This is so because of the pivotal role assigned to the Constitutional Court as the final arbiter of disputes about the legality of both laws passed by parliament and executive actions undertaken by our democratically elected government. One can be forgiven for concluding that the so-called 'review' of the performance of the Constitutional Court that was announced by Cabinet towards the end of 2011 (but later withdrawn in October 2012) was nothing less than a euphemism for reining

in or intimidating the judiciary. After all, the hostility of the government — or at least certain members of the current administration — towards the judiciary has been expressed unequivocally enough, leaving little room for doubt that this current phase is more than just the 'natural tension' that can often emerge between the different branches of a robustly democratic state.

Perhaps due to the sense of frustration provoked by their own failings, these government ministers apparently prefer to seek out a convenient scapegoat — the Constitutional Court. This is one explanatory theory. Another is that those who choose to assert that the Constitution is 'anti-transformation' are speaking with forked tongues and that what they really mean is that it is the rule of law — and therefore the courts — that stands between them and the further accumulation of wealth and personal enrichment through the malign acquisition of state power.

If so, a dangerous and potentially destabilising project, which might have untold consequences for our democracy, is being pursued. We may be witnessing the most lethal assault on our constitutional democracy yet, which poses the most searching examination of our commitment to real freedom since it was won in 1994. The judiciary is being isolated politically through populist rhetoric as an illegitimate entity that is antagonistic to the elected legislature and the executive. The Constitution, rather than the policy and administrative shortcomings of government, is presented as the pretext for the failure to deliver on the expectations of the people.

This is as reckless and irresponsible as it is unreasonable and unjust. An executive that threatens to reduce the powers of the Constitutional Court cannot, in the same vein, claim either a commitment to the Constitution or to the vision of socio-economic transformation and equality that it articulates, and thereby offends the progressive political tradition that underwrote its inception in 1996.

The vision of 'progressive constitutionalism' — an interpretation of the Constitution that furthers progressive political and societal values — is in danger of being squeezed out. Those values include economic welfare; quality basic education and substantial healthcare; freedom to make significant life choices; and environmental protection and sustainable development, among other things.

Furthermore, the Constitution provides for equality before the law. For progressive constitutionalists this means substantive equality, and the 'equal protection clause' constitutes a pledge to overcome the hierarchic domination of some social groups by others — discrimination based on gender, race, religion and sexual orientation.

The Constitution is intended, therefore, not just as a set of rules to govern power and the administrative arrangements and institutions of state, but also to chart the path to a just and equal society. Yet, as the final chapter of this book notes, this notion of 'transformative constitutionalism' is also not a neutral term. To what do we want to transform? Some want to transform society all right, but

they want to do it for their own selfish purposes — personal enrichment dressed in the language of social transformation.

As I said at the time that we launched the Council for the Advancement of the South African Constitution (CASAC), the progressive vision of the Constitution has come under attack from conservative forces. These forces come in many shapes and sizes, and some are to be found in surprising places, including those in the guise of revolutionary rhetoric. The dangers that they pose to a progressive vision of the Constitution should not be underestimated; manifested in the accumulation of material wealth, ill-gotten gains plundered from the state at the expense of the public interest and the poor, they undercut the legitimacy of the democratic order.

Consequently, the majority see the liberating promise of the Constitution as betrayed; they feel despondent and alienated. Thus, the credibility of the Constitution, as a powerful product of the struggle for liberation, is questioned. Accordingly, it is incumbent upon all of us who subscribe to the vision of 'progressive constitutionalism' to speak up and to be active, as well as vigilant, in our defence of the principles and values that underpin the Constitution.

Accordingly, we must embark on a nation-wide conversation that educates so as to render the next generations 'constitutionally literate'. The young must learn about the origins of the Constitution, as well as about what it means as a piece of law. They must have their attention drawn to where the Constitution has protected their interests or those of their parents or friends and siblings. Only then can a constitutional narrative take hold.

In this process we must acknowledge that although there have been significant democratic gains, and some people have benefited directly from the protective shield of the Bill of Rights, many progressive-thinking people are concerned that the values that underpin the Constitution — such as human dignity, equality, public accountability and transparent government, and basic freedom — cannot be taken for granted. In saying this, we also need to recognise that these values do not mean the same things for everyone. They are the subject of intense contestation — one person's freedom is another person's exploitation. And an honest assessment would have us conclude that, while some have done very well out of democracy, the majority have done very poorly — as the chapters of this volume record.

The Marikana tragedy of August 2012 brought many of these considerations into far sharper focus. For many it was a wake-up call. Certainly it showed how shallow our post-1994 social compact is, and how the rights of the poorest members of society can be trampled upon, apparently in full view of television cameras, to the horror of South Africans and of millions around the world. It shows the painful and inexcusable inadequacy of our public order policing capability and of how division within progressive organisations, such as the

trade union movement, undermines the rule of law and creates an atmosphere of violence and thuggery, which obliterates our ability as a society to maintain peaceful, democratic dialogue.

So Marikana tests us all; it may well be a turning point. It tests our institutions, including our cherished Constitution. That is why this book is an important contribution to the debate about the Constitution and about the State of the Nation. It dissects the 'gap' with lucid precision and rightly concludes that unless the gap is closed, the constitutional democratic project may be vulnerable, and that a shadow may fall across the land. Hence, we urgently need to create a popular narrative that is not self-serving of the interests of the rich and powerful, but which is truly transformational for the lives of the majority. As the black American social reformer and leader of the abolitionist movement, Frederick Douglass, said in 1886:

> *Where justice is denied, where poverty is enforced, where ignorance prevails and where any one class is made to feel that society is in an organized conspiracy to oppress, rob and degrade them, neither person nor property is safe.*[3]

The people are the ultimate custodians of the Constitution. This custodianship needs to be relocated from institutions to the people. This is the time to build a broad-based multi-class platform for engagement that can advance the Constitution to the point at which the majority of South Africans would be willing to stand firm in its defence. Once constitutional rights are claimed by the many, then ordinary people will undertake extraordinary acts to assert their rights and protect and advance the Constitution.

Joining the dots between each occasion on which the Constitution has protected the weak and advanced the interests of the poor is the necessary, though demanding, assignment that such a project entails. Only when a critical mass of ordinary citizens can give their account of the value of the Constitution, based on their own direct experience, will the constitutional order be secure. To my mind, this is the only way in which the gap between the promise of the Constitution and the lived reality of the majority of people who live in South Africa can be closed.

Dr Sipho M. Pityana is a business leader and the Chairman of the Council for the Advancement of the South African Constitution (CASAC).

End notes

1 http://www.brandeis.edu/legacyfund/bio.html.
2 Mandela, Nelson. Speech at the inauguration of the South African Constitutional Court, 14 February 1995. http://www.anc.org.za/show.php?id=3516.
3 Speech made in April 1886. http://www.quotationspage.com/quote/33382.html.

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The extract of the poem in the Introduction is taken from T.S. Eliot's *The Hollow Men* written in 1925.

Thanks to Patrick McDaid, visiting foreign intern, for assistance in finalising and editing Chapter 3: Security and the Constitution: Xenophobia. Whose rights? Whose safety?

Chapter 7 is, in large measure, an excerpt from a paper published in May 2010 by the Democratic Governance and Rights Unit, Faculty of Law, University of Cape Town.

Chapter 8 was previously published as Nathan, L. (2010). Intelligence bound: The South African Constitution and intelligence services, *International Affairs*, 86(1): 195–210. It is republished in this volume with the permission of *International Affairs*.

The title of the Conclusion, 'Things fall apart; the centre cannot hold' is a line from W.B. Yeats's poem *The Second Coming* written in 1919 in the aftermath of the First World War.

Acronyms

ABA	American Bar Association
ALN	AIDS Legal Network
ALP	AIDS Law Project
ANC	African National Congress
ATM	Automated teller machine
AsgiSA	Accelerated and Shared Growth Initiative for South Africa
BAA	Black Authorities Act of 1951
CALS	Centre for Applied Legal Studies (University of the Witwatersrand)
CASAC	Council for the Advancement of the South African Constitution
CASE	Community Agency for Social Enquiry
CAT	Committee against Torture (United Nations)
CC	Constitutional Court
CCOD	Compensation Commissioner for Occupational Disease
CERD	Committee on the Elimination of Racial Discrimination (United Nations)
CGE	Commission for Gender Equality
CLRA	Communal Land Rights Act 11 of 2004
COIDA	Compensation for Occupational Injuries and Diseases Act 130 of 1993
CPA	Communal Property Association
CSO	Civil society organisation
DGRU	Democratic Governance and Rights Unit (University of Cape Town)
DHA	Department of Home Affairs
DoJ	Department of Justice
DoJCD	Department of Justice and Constitutional Development
DPLG	Department of Provincial and Local Government
DRC	Democratic Republic of Congo
ECOSOC	Economic and Social Council (United Nations)
EU	European Union
FHR	Foundation for Human Rights
GDP	Gross domestic product
HDI	Human Development Index
HRC	Human Rights Commission
ICESR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Council of Jurists
IEC	Independent Electoral Commission
ILO	International Labour Organisation
JSCI	Joint Standing Committee on Intelligence

JSC	Judicial Service Commission
LAB	Legal Aid Board
LRC	Legal Resources Centre
MBOD	Medical Bureau for Occupational Disease
MDGs	Millennium Development Goals
NHRI	National human rights institution
NIA	National Intelligence Agency
NICOC	National Intelligence Co-ordinating Committee
NUM	National Union of Mineworkers
ODMWA	Occupational Diseases in Mines and Works Act 78 of 1973
OECD	Organisation for Economic Co-operation and Development
OIGI	Office of the Inspector-General of Intelligence
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
PIL	Public interest litigation
PLAAS	Programme for Land and Agrarian Studies (University of the Western Cape)
PROVIDE	Provincial Decision-Making Enabling Project
RAF	Road Accident Fund
RPM	Rural People's Movement
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SALS	Southern African Legal Services Foundation
SANCO	South African National Civics' Organisation
SCA	Supreme Court of Appeal
SSR	Security sector reform
TAC	Treatment Action Campaign
TCB	Traditional Courts Bill 15 of 2008
TGLFA	Traditional Leadership and Governance Framework Act 41 of 2003
UIF	Unemployment Insurance Fund
UNDP	United Nations Development Programme
UNHCR	United Nations High Commission for Refugees
UPR	Universal Periodic Review (United Nations)
USAID	US Agency for International Development
WLC	Women's Legal Centre

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Introduction

Mind the gap! The Constitution as a blueprint for security

Laurie Nathan

Are the people of South Africa secure and are they growing more secure or less secure over time? The normative and political importance of this question might be clear but the answer is not straightforward. It hinges on what we mean by 'security' as there are several possible meanings and dimensions; to whose security we are referring, given the substantial social and economic disparities that exist between different groups in our country; and on what benchmarks, criteria and methods we use for gauging security. This book explores these issues through the lens of the Constitution, which contains a range of injunctions, values, aspirations and mechanisms for enhancing security.

Passengers boarding a train at one of London's underground stations are sometimes warned by a sombre disembodied voice, broadcast over the intercom system, to 'mind the gap' between the platform and the train. This warning is worth heeding in relation to the more exalted and serious matter of the South African Constitution. On the face of it, the founding charter of our democracy provides for the security of all people in South Africa and, as discussed later, it does this in numerous ways. In reality, though, there is a yawning gap between the constitutional promise and its realisation. Many South Africans — arguably a large majority of the population — are socially, economically, physically and psychologically insecure.

The idea of an unrealised promise as a terrain of estrangement and despair is captured in the title of this edited volume, *Falls the Shadow*, taken from T.S. Eliot's haunting poem, *The Hollow Men*. Eliot writes:

> *Between the idea*
> *And the reality*
> *Between the motion*
> *And the act*
> *Falls the Shadow …*
>
> *Between the desire*
> *And the spasm*
> *Between the potency*
> *And the existence*

Between the essence
And the descent
Falls the Shadow …

These lines reflect Eliot's pessimistic view of Western Europe after World War I and a personal sense of spiritual and psychological impotence. In the context of this book, the 'shadow' is an inhospitable and alienating socio-economic existence, a realm of diminished dignity and chronic insecurity in the vast gap between constitutional commitments and lived realities in South Africa.

This introductory chapter discusses the constitutional promise of security, an elemental concept that goes to the heart of human needs and anxiety; it considers the essence of constitutionalism, namely the idea of government constrained by law in order to safeguard the security of citizens against abuse of power; and it presents the rationale for the book, sets out the questions that underpin its chapters and provides an overview of each of these.

The Constitution as a blueprint for security

The ending of the Cold War in the late 1980s inspired a revolution in academic and policy perspectives on security. Progressive thinkers contended that the Cold War conception of security—centred on the state and its territory and preoccupied with military threats, enmity between ideological blocs and the risk of nuclear war—should be replaced with a holistic and people-centred approach (for example, Booth, 1991). Encapsulated by the term 'human security', this approach gained international prominence with the publication of the United Nations Development Programme's *Human Development Report 1994*. This report advanced the thesis that the scope of global security should be expanded to include threats to economic security, food security, health security, environmental security, personal security, community security and political security (United Nations Development Programme, 1994).

The human security paradigm has great conceptual and political utility because it broadens our focus beyond the traditional emphasis on state security, territorial integrity and the armed forces to encompass the security of people, multiple dimensions of security and a variety of institutions with responsibility for security (Buzan, 1991; King & Murray, 2001). Omitted from the Cold War model of security were the 'legitimate concerns of ordinary people who sought security in their daily lives' and worried about hunger, disease, unemployment, crime, environmental hazards, political repression and conflicts within states (United Nations Development Programme, 1994: 22). The Cold War model was also predicated on the false assumption that the security of the state is synonymous with the security of people. In fact, throughout history and throughout the world

it has often been the state that poses the greatest threat to the security of its inhabitants.

The concept of 'human security' has been criticised for being too expansive and vague to be useful for government decision-making (Paris, 2001). This criticism ignores the fact that the narrow Cold War notion of 'national security' was itself ambiguous, elastic and applied in an excessive fashion (Wolfers, 1952). The problem of ambiguity and elasticity is inherent in 'security' as an inescapably contested, politicised and malleable construct. In any event, part of the normal business of governance entails decision-makers having to turn expansive concepts and ideals into concrete policies and programmes. Regardless of how security is defined, moreover, governments never have unlimited resources to meet all conceivable security threats and they consequently have to make tough choices on security priorities and allocation of resources. In this process of decision-making, the idea of human security brings into sharp relief the need to weigh up military expenditure against public spending on welfare and social services.

The Constitution of the Republic of South Africa Act 108 of 1996 adopts a holistic and people-centred model of human security: section 198(*a*) proclaims that 'national security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life'. This formulation has two striking features. First, although it appears at the start of the chapter on the security services, it locates the responsibility for security not with the army, police and intelligence agencies, but with society writ large. Section 198(*b*) of the Constitution adds the essential dimension of democratic governance by stipulating that 'national security is subject to the authority of Parliament and the national executive'. Second, the new Constitution marks a radical departure from the apartheid regime's resort to 'national security' as the justification for restricting rights and freedoms, such as through censorship, detention without trial and states of emergency (Cock & Nathan, 1989). As articulated in section 198(*a*), national security is no longer considered separate from, and potentially in conflict with, human rights, fundamental freedoms and human security. On the contrary, national security is a global term covering all of these imperatives.

From the perspective of holistic human security, the Constitution can be read as a comprehensive blueprint for security. Most literally and directly, it entrenches the right to life[1] and the right of freedom and security of the person, which includes the right not to be deprived of freedom without just cause and the right to be free from all forms of violence from public and private sources.[2] These are obviously vital components of physical and psychological security.

Our security is also intended to be enhanced by the provisions that deal with equality and the prohibition on unfair discrimination;[3] the right to have

one's dignity respected and protected;[4] the right to privacy;[5] political rights, which include the right to participate in political activity;[6] the right to just administrative action;[7] and the right to a fair trial.[8] These rights formally protect us against a range of activities that would render us insecure: unfair discrimination in relation to the state, employment and other spheres of life; humiliating and degrading treatment; unwarranted intrusions into our private lives; political repression and exclusion; capricious and unfair administrative action; and trumped up charges, secret hearings and kangaroo courts.

The Constitution famously includes socio-economic rights, which cover labour relations;[9] the environment;[10] housing;[11] education;[12] and healthcare, food, water and social security.[13] These are all crucial elements of human security. At the time of the drafting of the Constitution in the early 1990s, these rights were tenuous or absent for millions of black South Africans as a result of apartheid. In light of this history, the Constitution is not content to enshrine socio-economic rights, but goes much further by imposing an obligation on the state to take positive steps to ensure their fulfilment: the state 'must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of the right to have access to adequate housing, healthcare services, sufficient food and water, and social security.[14] The state must also take reasonable measures to make 'further education', beyond basic education, progressively available and accessible.[15] More generally, the Constitution expects the state to have a proactive and assertive posture on human rights, requiring it to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.[16]

In our Constitution, even the rights relating to language, culture and religion can be said to contribute to the security of persons and communities.[17] The constitutional formulation is such that these rights are implicitly conferred on groups as well as individuals: persons belonging to a cultural, religious or linguistic community may not be deprived of the right, with other members of that community, to enjoy their culture, practise their religion and use their language, and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.[18] In the absence of rights of this nature, there is a danger in multicultural societies that the freedom and well-being of minority groups will be eroded and undermined by majoritarianism.

The Constitution is a blueprint for security, not only in terms of embracing human rights but also in terms of the institutional safeguards and mechanisms it establishes in order to protect these rights and prevent abuse of power by the state. For example, the Constitution is at pains to ensure that the armed forces, police service and intelligence agencies, which are designed to play a major role in the maintenance of physical security, do not themselves present a threat to the populace and our constitutional democracy. The Constitution

thus provides that the security organisations must be structured and regulated by legislation;[19] they are bound by the rule of law;[20] they are obliged to be non-partisan in relation to political parties;[21] they must be overseen by multiparty parliamentary committees;[22] and their members must disobey manifestly illegal orders.[23]

Although the courts are conceptually and politically distinct from the security services, principally because they are independent of the executive and not under its control, they also contribute to the security of people and communities. They do this in several ways: by protecting the public through the application of criminal law; by fair and impartial adjudication and resolution of disputes; by defending and promoting constitutional rights; by upholding constitutional principles that aim to prevent abuse of power; and, as discussed in the following section, by reviewing the constitutionality of law and conduct.[24]

In addition, the Constitution sets up independent statutory bodies—which include the Public Protector, the Gender Commission and the South African Human Rights Commission (SAHRC)—that are mandated to support and strengthen constitutional democracy and thereby enhance the security of citizens.[25] The SAHRC has the power to take steps to obtain appropriate redress where human rights have been violated and each year it must require relevant organs of state to provide it with information on the measures they have taken towards the realisation of the rights regarding housing, healthcare, food, water, social security, education and the environment.[26]

Government constrained by law

Members of the executive have expressed growing frustration with constitutional constraints and decisions of the Constitutional Court that limit the government's freedom of action. After all, we are reminded, the government is democratically elected and therefore rules with a popular mandate. In November 2011, President Jacob Zuma expressed this view in his address to the National Assembly:

> *We respect the powers and role conferred by our constitution on the legislature and the judiciary. At the same time, we expect the same from these very important institutions of our democratic dispensation. The Executive must be allowed to conduct its administration and policy making work as freely as it possibly can. The powers conferred on the courts cannot be regarded as superior to the powers resulting from a mandate given by the people in a popular vote*. (Zuma, 2011)

The Constitution itself contains an emphatic rejoinder to President Zuma's assertion: the powers conferred on the courts are undoubtedly superior to the government's popular mandate. This is because the Constitution is the supreme law of the country, with the result that law or conduct inconsistent

with it is invalid;[27] the courts are empowered to determine whether any law or conduct is inconsistent with the Constitution;[28] and they must declare any law or conduct inconsistent with the Constitution to be invalid to the extent of its inconsistency.[29] This political arrangement—whereby government is constrained by law and its actions are subject to judicial review—is not a peripheral aspect of a constitutional democracy. It is the predominant feature of the system (McIlwain, 1940; Gordon, 1999). Where government is not constrained by law and its actions are not subject to judicial review, there is no constitutional democracy.

It should be stressed that the constitutional constraints on the government and the state are not peculiar to South Africa. They are not simply a product of the negotiations to end minority rule in the early 1990s and a manifestation of the compromises that were reached between the liberation movements and the parties representing white minority interests. More broadly and more deeply, the principle of government restrained by law is embedded in constitutional democracies everywhere. In his magisterial history of constitutionalism, which can be traced back to ancient Greece, Charles McIlwain (1940: 24) defines the concept as 'the limitation of government by law'. For Scott Gordon (1999: 5), in his historical survey, the essence of constitutionalism is that the coercive power of the state is constrained.

Constitutionalism's emphasis on constraint flows from the premise that any actor or entity with power can abuse its power and that the potential for abuse is of particular concern with respect to the coercive power of the state. While the validity of this premise was confirmed dramatically by South Africa's experience under apartheid, its enduring relevance derives not from any single experience but from the universal trauma, across time and place, of power being grossly abused by rulers. The security of people is thus a primary motivation for constitutionalism. Indeed, most of the pillars of our democratic system—including protection of rights; separation of powers; the rule of law; the supremacy of the Constitution; the independence of the judiciary; and the principles of accountability, openness and responsiveness—are intended to control and constrain the state's exercise of power so as to safeguard the freedom and security of people. In short, constitutionalism aims to ensure that the state is a protector and not a predator.

The gap between the constitutional promise and the reality

The constitutional provisions pertaining to security might appear on paper to be exemplary, but so what? How much do they really matter in practice? What is the nature and extent of the gap between the constitutional promise of security and the reality of people's lives? In 2009 the Democratic Governance Rights Unit (DGRU) in the Faculty of Law at the University of Cape Town launched a

seminar series aimed at addressing these questions. The chapters in this volume are based on the papers presented at these seminars.

The point of departure for the seminar series was that the Constitution has a significant but differential impact on security. We wanted to learn more about the differential effects and to understand what accounts for the differences. More specifically, we were interested in whether the gaps are larger in relation to some rights than others. For example, the right to freedom of thought and belief is largely unfettered, but for tens of thousands of people the right to sufficient food is out of reach. Flowing from this, we wanted to know whether the gaps between the vision and the reality of security depend on biological and social criteria such as race, class, gender, health and nationality. Are some groups more secure than others?

Notwithstanding the Constitution's formal guarantee of equality, it seems painfully obvious that people who are poor are less able to exercise and enjoy their rights—and so in concrete terms can be said to have weaker rights or fewer rights—than people who are wealthy. Paradoxically, but not surprisingly, those who are most destitute and most in need of security lack the means, status and confidence to defend and claim their rights. Foreign nationals seeking refuge in South Africa fall into this category, perilously insecure despite the fact that the Constitution affords them many rights.[30]

Further questions emerge from these disquieting observations: is the gap between the constitutional vision of security and the real world of insecurity greater with regard to some government departments than others? Do the departments of defence, policing, justice, education and foreign affairs have different levels of respect for the Constitution and fundamental rights? If this is the case, does the extent of the gap depend on the department's functions or on the disposition of its minister? For example, does the size of the gap in the area of health or intelligence change as one minister takes over from another? Alternatively, is the nature of the gap a reflection of the policy perspectives of the ruling party, the African National Congress (ANC)?

What combination of ideas and values, political contestation, historical circumstances and financial and bureaucratic constraints account for the gaps? The socio-economic insecurity experienced by the majority of citizens, for example, is a legacy of persistent neglect and discrimination under apartheid; a consequence of current financial and organisational limitations (themselves partially but not wholly a spillover from apartheid); and an outcome of the post-apartheid government's policies and priorities. The chronic insecurity that engulfs foreign nationals stems not only from competition over scarce resources but also from the callous and unconstitutional approach of some government bodies. Finally, and perhaps most importantly, have the security gaps narrowed or widened since 1994 and, if the situation is one of widening, what are the

implications for human suffering and the potential for conflict and violence?

The questions raised above determined the choice of topics and speakers at the DGRU seminars. The editors and chapter authors do not claim, however, that the book addresses all the questions or tackles any of them in an exhaustive manner. There is still much investigation, analysis and theorising to be done on specific security concerns and on the causal and symptomatic relationships between them. For scholars and students interested in the Constitution and security, the research agenda is wide open.

Outline of the book

Five chapters in this book focus on categories of people who are denied full enjoyment of their rights as a result of their social or economic status. In Chapter 1 Tseliso Thipanyane considers the plight of the poor, arguing that poverty is not only an assault on socio-economic rights but also impedes the fulfilment of civil and political rights. Despite extensive government measures to alleviate and eradicate poverty, millions of black South Africans continue to live in abject poverty and the gap between the rich and the poor is growing. South Africa's Human Development Index (HDI) has declined since 1990, suggesting a general deterioration in life conditions. This is at odds with the constitutional requirement of a progressive realisation of socio-economic rights. The problem is partly attributable to the legacies of colonialism and apartheid and to the recession in 2008–2009, but Thipanyane claims that the slow progress is mainly due to weak implementation of anti-poverty policies, inadequate accountability and transparency, and poor leadership by government. He goes on to show that poverty is a major cause of violence in the form of social delivery protests, violent crime and xenophobia.

Kristina Bentley investigates how poor and marginalised communities are able to access justice and assert their constitutional rights (Chapter 2). She describes the role of the statutory Legal Aid Board (LAB) and civil society organisations (CSOs) in this regard. The LAB has provided legal assistance to hundreds of thousands of indigent people but it has limitations of both capacity and mandate. It deals principally with criminal cases since the government does not support the view that access to justice includes the right to legal representation in civil matters. This stance impairs the ability of poor and marginalised people to exercise their constitutional rights relating to resources and services. Women are especially hard hit, finding it difficult to enforce their rights in divorce, maintenance and social grants claims. CSOs have played a critical role in filling the gap left by the LAB, undertaking public interest litigation in landmark cases that have had a far-reaching impact on the rights to housing, land, water and healthcare, as well as on equal treatment for women, refugees and migrants, and

people living with HIV/AIDS. Nevertheless, individuals who are poor remain severely disadvantaged in accessing justice in the civil realm.

In Chapter 3 Judith Cohen explores the scourge of xenophobia directed at Africans from other states who are living in South Africa. The most dramatic and notorious display of xenophobic violence occurred in May 2008—it swept through the country and left 62 people dead, hundreds wounded, an unknown number of women raped and over 100 000 people displaced. Cohen points out that this horrific phenomenon had many, less high-profile precedents and that the police, rather than protecting non-nationals, are often a source of intimidation and harassment. She explains how the state's failure to uphold the right of non-nationals to physical security and freedom from violence has made it difficult, if not impossible, for them to enjoy their other rights. Whereas certain political rights apply only to citizens (for example, the right to vote), other rights are formally held by everyone in South Africa (such as the rights to privacy, dignity and access to housing, healthcare, food, water and education). In practice these rights tend to be denied to non-nationals.

Mazibuko Jara looks at rural communities that were once part of the bantustans of apartheid South Africa (Chapter 4). He maintains that the post-1994 legislation on customary law and traditional leadership has effectively defined the rural inhabitants of these areas as subjects without rights under the undemocratic rule of traditional leaders. This scheme has been imposed on the rural dwellers. It has conferred substantial executive, legislative and judicial powers on unelected traditional bodies, compromising the doctrine of separation of powers, freedom of expression and association, and rights relating to property, equality and the administration of justice. The security and rights of rural women have been sorely prejudiced by the powers given to patriarchal traditional authorities. The legislative framework is also in conflict with constitutional sections on the objects of local government, which include providing 'democratic and accountable government for local communities' and encouraging 'the involvement of communities and community organisations in the matters of local government'.[31]

Meryl du Plessis reviews the situation of miners who have contracted occupational diseases (Chapter 5). Her point of departure is section 27 of the Constitution, which provides that everyone has a right of access to social security, including, if they are unable to support themselves and their dependents, access to appropriate social assistance; and that the state must take reasonable legislative and other measures to achieve the progressive realisation of this right. In light of these provisions, and taking account of international law and domestic policy documents dealing with occupational disease and injury, the legislation governing compensation to miners (and their dependants) who contract occupational diseases is woefully inadequate. Du Plessis identifies

a number of weaknesses in the occupational health and safety system, which hamper the access of miners and their dependants to social security. She concludes that an overhaul of the compensation regime is urgently needed and that the courts could make a useful contribution to this process by setting out normative standards derived from the Constitution.

The courts are arguably the most influential institutions in relation to the Constitution because they are empowered to rule on constitutional matters and the Constitutional Court's decisions in this regard are not subject to appeal. For this reason, and because the Constitution promotes transformation, the question of judicial appointments is very important.

Chris Oxtoby and Abongile Sipondo raise the issue of judicial appointments, scrutinising the Judicial Service Commission's process of interviewing candidate judges (Chapter 6). The transformation of the judiciary is crucial but must go beyond race and gender alone in order to ensure a diversity of background and outlook in the judiciary. The attainment of this goal and the appointment of the best possible judges are inhibited by shortcomings in the commission's interview process. These shortcomings include inconsistencies in the duration and focus of the interviews, leading to unequal treatment of candidates. This commission sometimes displays a narrow understanding of transformation that excludes key factors such as intellect, background and judicial philosophy. A further worry is that certain lines of questioning might lead to the appointment of judges who are overly deferential towards the executive.

In Chapter 7 Susannah Cowen advocates a principled public discussion on the criteria for judicial appointment. This could strengthen democracy, the rule of law and protection of human rights. She dissects the requirements that a judge should be 'appropriately qualified' and a 'fit and proper person' for judicial office, the latter term encompassing the attributes of independence, impartiality, fairness, integrity, judicial temperament and commitment to constitutional values. It is also essential that judges respect diversity and pluralism, appreciate the extent and limits of judicial deference, promote an active citizenry and are committed to the transformative goals of the Constitution. These personal attributes have to be accompanied by attention to the imperative of achieving racial and gender representivity on the bench.

In Chapter 8 Laurie Nathan examines the relationship between the intelligence services and the Constitution, illuminating the distinctive feature of a constitution as a text that is powerful enough to restrain the strongest actors in a society, but whose power and authority derive from the willingness of these actors to heed the text and be restrained. On the one hand, the Constitution has been an influential instrument in transforming the intelligence community so that it conforms to democratic norms. On the other hand, the intelligence services, the executive and parliament view the services as something of an

exceptional case in terms of constitutional compliance. Because of the nature and importance of intelligence efforts to uncover and counter threats to national security, it is felt that the services are not bound by constitutional provisions to the same extent as other organs of the state. This notion of 'intelligence exceptionalism' is unconstitutional and subversive of democracy.

In the book's Conclusion, Richard Calland poses the question of whether the Constitution itself can mind the gap between the rich constitutional promise of transformation and equality and the harsh reality of insecurity for the vast majority of people. This question concerns the potential and limitations of 'transformative constitutionalism', a term that 'connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law'.[32] While this potential has been demonstrated in landmark judgments of the Constitutional Court, it might be the case that South Africa's model of capitalism will thwart the constitutional vision of overcoming structural inequalities and injustice. Moreover, in response to popular frustration at unmet expectations, senior ANC members have conveniently blamed the Constitution for stifling progress. In the final analysis, both the challenge of transformation and the challenge of defending the Constitution are political endeavours. The jurisprudence of the courts has a vital role to play, but the struggle is ultimately political rather than legal.

Conclusion

The chapters in this book highlight and illustrate the contention that security and human rights are closely connected and mutually reinforcing. The realisation of political and socio-economic rights serves to enhance the security of individuals and communities and the negation of these rights threatens their security. People are rendered deeply insecure, not only when they are victims of physical violence but also when they do not have adequate shelter, when they are jobless, when they are constantly hungry and when they are denied access to decent education and healthcare. They are also profoundly insecure when they are subject to pernicious discrimination and harassment by virtue of their identity or socio-economic status, whether as women, rural dwellers, foreign nationals or people living with HIV/AIDS. As noted earlier, the Constitution recognises the interconnectedness of these issues, employing the term 'national security' to encompass peace and harmony, equality, freedom from fear and freedom from want.

In the famous *Grootboom* case the Constitutional Court emphasised that all the rights in the Bill of Rights are 'inter-related and mutually supporting'.[33] 'There can be no doubt', the Court insisted, that 'human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people

therefore enables them to enjoy [their] other rights'.[34] This passage brings to the fore a second major theme that recurs in the chapters of the current volume: poverty is the most extreme and pressing manifestation of the gap between the constitutional promise of security and the lived reality of insecurity. In 1998 the Constitutional Court portrayed this crisis as the crux of the constitutional project of transformation, its apprehension as valid today as it was then:

> *We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist, that aspiration will have a hollow ring.*[35]

End notes

1 Section 11 of the Constitution.
2 Section 12 of the Constitution.
3 Section 9 of the Constitution.
4 Section 10 of the Constitution.
5 Section 14 of the Constitution.
6 Section 19 of the Constitution.
7 Section 33 of the Constitution.
8 Section 35(3) of the Constitution.
9 Section 23 of the Constitution.
10 Section 24 of the Constitution.
11 Section 26 of the Constitution.
12 Section 29 of the Constitution.
13 Section 27 of the Constitution.
14 Sections 26(2) and 27(2) of the Constitution.
15 Section 29(1) of the Constitution.
16 Section 7(3) of the Constitution.
17 The rights relating to religion, language and culture are covered in sections 15, 30 and 31 of the Constitution.
18 Section 31(1)(*b*) of the Constitution.
19 Section 199(4) of the Constitution.
20 Sections 198(*c*) and 199(5) of the Constitution.
21 Section 199(7) of the Constitution.
22 Section 199(8) of the Constitution.
23 Section 199(6) of the Constitution.
24 Chapter 8 of the Constitution deals with the courts and the administration of justice.
25 Chapter 9 of the Constitution.

26 Sections 184(2) and (3) of the Constitution.
27 Section 2 of the Constitution.
28 Section 172 of the Constitution.
29 Section 172(1)(*a*) of the Constitution.
30 The Constitution distinguishes between rights held by citizens, such as 'every citizen has the right to form a political party' (section 19(1)), and rights held by everyone, such as 'everyone has the right to life' (section 11).
31 Section 152 of the Constitution.
32 Klare (1998: 150) cited by Calland (in the Conclusion).
33 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), cited by Thipanyane (in Chapter 1).
34 Ibid.
35 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), cited by Thipanyane (in Chapter 1).

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Chapter 1

You can't eat the Constitution: Is democracy for the poor?

Tseliso Thipanyane

1.1 Introduction

Poverty deprives the poor of basic human rights and fundamental freedoms[1] and undermines their aspiration to lead their lives 'free from fear and want' (Preamble to the Universal Declaration of Human Rights, 1948). In support of this position the South African Constitutional Court, in the landmark *Grootboom* case, stated:[2]

> *Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in* [the Bill of Rights].

The UN Office of the High Commissioner for Human Rights, in response to the debilitating impact of poverty, has said that 'no social phenomenon is as comprehensive in its assault on human rights as poverty'.[3] Poverty, as argued in this chapter, constitutes a threat to peace and security in any society and its alleviation and eventual eradication should be a main concern of all states and the global community in the twenty-first century (UN General Assembly, 2000, paras 11, 19 & 27; UN General Assembly, 2008, para 4).

It was in response to the high levels of poverty, a legacy of apartheid and colonial policies, laws and practices (UN, 1973), that the 1996 Constitution of the Republic of South Africa created a framework to ensure an effective alleviation and eradication of poverty. On the intended role of the Constitution in this regard, the Constitutional Court in *Soobramoney v Minister of Health, KwaZulu-Natal* said:[4]

> *We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a*

> *commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist, that aspiration will have a hollow ring.*

The Constitution lays the basis for the establishment of a post-apartheid society that is 'based on democratic values, social justice and fundamental human rights' (Preamble to the Constitution, 1996). The Bill of Rights, in this regard, enshrines the rights of all people in the country to basic and further education, access to land, adequate housing, healthcare services, sufficient food and water, social security and appropriate social assistance, and makes specific provision for basic nutrition, shelter, healthcare and social services for children.[5] The state, accordingly, has an obligation to protect and promote these rights and to fulfil them by taking 'reasonable legislative and other measures, within its available resources' (*Minister of Health v Treatment Action Campaign*).[6] The effective implementation of this framework in the alleviation and eradication of poverty will, to a large extent, determine whether democracy is indeed for the poor in South Africa.

This chapter critically reviews the progress made in the fight against poverty in post-apartheid South Africa, using the Constitution as a framework. Section 1.2 of this chapter reviews the progress and challenges in efforts to alleviate and eradicate poverty. This will be based on four categories: income poverty, human capital poverty, economic growth and employment, and inequalities (The Presidency, 2008: 17). Section 1.3 reflects on the basis for some of the challenges and failures that have led to the relatively high levels of poverty and resultant inequalities and their implications for the enjoyment of human rights and democracy. Section 1.4 concludes with several human rights-based proposals that could help to achieve greater progress in addressing poverty and inequalities and thus ensure that South Africa's Constitution and democracy do not leave the poor with unfulfilled promises and a 'hollow ring'.

1.2 Progress and challenges in the alleviation and eradication of poverty

1.2.1 Income poverty: Progress and challenges

The provision of social grants in the form of old-age pensions, disability grants and child support grants through the government's social security assistance programme, as regulated by the Social Assistance Act 13 of 2004, has been the main measure in alleviating and reducing income poverty. This intervention is regarded as the 'largest form of government support for the poor' (The Presidency, 2008: 19–20).[7] It has contributed to a reduction in poverty levels from an estimated 52.5 per cent in 1999 to 47.9 per cent in 2005 (The Presidency,

2008: 18)[8] and to on-going efforts to combat the high levels of poverty that stood at 42.9 per cent in 2007 (UNDP, 2009)[9] and rose to 48 per cent in 2010, according to the Diagnostic Overview report (National Planning Commission, 2011a: 8).[10] The number of beneficiaries of social grants increased from 2.5 million in 1999 to over 12 million in 2007 (The Presidency, 2008: 19) and to approximately 14 million in 2009 (Statistics South Africa [Stats SA], 2010a: 92). This last figure constituted 28.3 per cent of the total population and 45.8 per cent of South African households (Stats SA, 2010a: 19). In 2010 the 15.3 million beneficiaries of these grants amounted to 30 per cent of South Africa's population of 48.9 million (Dlamini, 2011).

Despite the provision of social grants and their impact on the alleviation and reduction of poverty, the levels of poverty in South Africa remain unacceptably high and children suffer the most due to the slow pace in the reduction of poverty. While there was a reduction in poverty levels for children from 76 per cent in 2002 to 63.6 per cent in 2008, more than 11 million children lived in income poverty in 2008 (Hall, 2010: 105).[11]

The number of households that have inadequate access to food is another concern — 20 per cent of households, according to the 2009 General Household Survey (Stats SA, 2010a: 38), had inadequate access to food and this figure increased to 21.9 per cent in 2010 (Stats SA, 2011a: 11).

1.2.2 Human capital poverty

The delivery of basic services such as water, sanitation and electricity, and the provision of healthcare services and education, are also central to efforts to alleviate and reduce human capital poverty (The Presidency, 2008: 21). Provision of basic services for South African households, in terms of access to electricity, water and sanitation, has been on the increase due to measures taken by the government. This includes the provision of 6 000 litres of free water and 50 kWh of free electricity every month for many poor households (The Presidency, 2008: 21).[12]

Due to the measures instituted by government, the percentage of households with access to clean water (piped or tap water) increased from 84.5 per cent in 2002 to 89.3 per cent in 2009 (Stats SA, 2010a: 24). There were also measures taken to reduce the number of households without toilet facilities or that used bucket toilets, leading to a decline from 12.6 per cent in 2002 to 6.6 per cent in 2009 (Stats SA, 2010a: 26). There was a further reduction to 5.5 per cent in 2010 (Stats SA, 2011a: 14).

The number of households with access to electricity increased from 76.8 per cent in 2002 to 82.6 per cent in 2009 (Stats SA, 2010a: 31), but this figure declined slightly to 82.0 per cent in 2010 due to electricity disconnections as result of non-payment by many poor households (Eastern Cape Socio Economic Consultative Council, 2011: 15).

There were also increases in spending on education that led to improvements in the enrolment rates of students in educational institutions (The Presidency, 2008: 22–25).[13] According to the government's 2010 *Millennium Development Goals Country Report* (Republic of South Africa, 2010: 43), the enrolment rates of boys in primary education increased from 96.4 per cent in 2002 to 99.4 per cent in 2009, while that of girls increased from 97.0 per cent to 98.8 per cent in the same period. The figures for 2010 were 99 per cent for boys and 95 per cent for girls, reflecting a slight decline (Stats SA, 2011: 4). Notwithstanding the fall in the enrolment rates, the government is still of the view that South Africa is on course to attain the target of obtaining universal primary education for boys and girls under Goal 2 of the Millennium Development Goals. The government's nutrition programme, which benefited 66.1 per cent of learners in public schools, has contributed to the generally high enrolment (Stats SA, 2011a: 5).

The proportion of the population with access to treatment for HIV/AIDS increased from 13.9 per cent in 2005 to 41.6 per cent in 2009 and the HIV prevalence among people aged 15–24 years decreased from 9.3 per cent in 2002 to 8.7 in 2008. Due to increases in health funding, South Africa now has one of the world's largest antiretroviral therapy programmes in terms of the number of people receiving treatment (Republic of South Africa, 2010: 75–76).

Notwithstanding the achievements made from 2002 to 2009 in the percentage of households with access to piped or tap water, in 2010 there was a decline to only 83.6 per cent of households with this access (Stats SA, 2011a: 13). There were also reversals in the academic performance of learners in secondary schools, despite the general increase in enrolment and funding. The matriculation pass rate declined from 73.3 per cent in 2003 to 60.6 per cent in 2009, with particularly low pass rates in 2009 for mathematics (29 per cent) and physical science (21 per cent) (Organisation for Economic Co-operation and Development [OECD], 2010: 97–98). While the 2010 matriculation examination results improved to 67.8 per cent, only 15 per cent of learners obtained an average mark of 40 per cent or more (National Planning Commission, 2011a: 14).[14]

The decline in the academic performance of learners has raised concerns over the quality of education. The poor quality of education reflected in the performance of learners in literacy and numeracy is of particular concern in view of the role of education in the fight against poverty and inequality. The Dinokeng Scenarios report, expressing similar concerns, stated (2009: 28):

> *In spite of government's best efforts, our education system is faltering. South Africa ranks amongst the lowest in the world on basic literacy and numeracy skills. In terms of the quality of mathematics and science education, South Africa ranks 132nd out of 134 countries surveyed by the World Economic Forum.*

Notwithstanding government's commitment to equal education, schools in poorer communities mirror the legacy of the apartheid education system. According to the Dinokeng Scenarios report, nearly half of all schools, most in poor communities, have extremely poor infrastructure: 79 per cent have no libraries, 60 per cent have no laboratories and 68 per cent have no computers (2009: 28). The lack of electricity, water and sanitation in many poor and black schools, coupled with inadequately qualified teachers, also affect the quality of education (National Planning Commission, 2011a: 14, 16). The low enrolment of children in early childhood development institutions (31.8 per cent in 2010) also contributes to the poor performance of learners later on and the output and quality challenges of the education system (Stats SA, 2011a: 4).

Poor health indicators for children and the worsening maternal mortality rates are a reflection of challenges in South Africa's public health system and a symptom of income poverty (Sanders, Bradshaw & Ngongo, 2010: 39).[15] South Africa's 2010 *Millennium Development Report* indicated that South Africa will not meet many of its health-related Millennium Development Goals and targets for 2015. The report reflects a worrying increase in under-five mortality rates from 59 deaths per 1 000 births in 1998 to 104 deaths in 2007 and in maternal mortality rates from 369 deaths per 100 000 births in 2001 to 625 deaths in 2007. Infant mortality rates, according to the report, have remained largely unchanged at 54 deaths per 1 000 births in 2001 to 53 deaths in 2007 (Republic of South Africa, 2010: 60, 67). The high HIV/AIDS prevalence rates in the country, especially among men and women between the ages of 15 and 49 years, have also contributed to these challenges — the rates for this group were 15.6 per cent in 2002 and 16.9 per cent in 2008 (Republic of South Africa, 2010: 76).

1.2.3 Asset poverty

Access to housing and land are the main measures provided by government to address asset poverty. About 3.1 million housing subsidies (Stats SA, 2010a: 3, 4, 12) were approved and 2.3 million housing units completed from 1994 to 2008 at the cost of R48.5 billion (The Presidency, 2008: 28). The number of housing units built increased to 2.8 million in 2009, benefiting over 13.5 million people (Republic of South Africa, 2010: 95) and, according to the Minister of Human Settlements, Tokyo Sexwale (2011), the number rose to 3 million in 2011. Land assets worth R12.5 billion were transferred to 1.4 million beneficiaries between 1994 and 2007 through the land restitution programme (The Presidency, 2008: 28); in 2010 approximately 6 million hectares of land had been transferred through the land restitution and redistribution programmes (Nkwinti, 2010). This figure stood at 7.4 million hectares in 2011 (Ndlangisa, 2011).

Despite the progress made in the provision of housing since 1994, the country's housing backlog remains high and increased from 1.5 million in 1994

to 2.1 million in 2008, leaving about 12 million people with inadequate housing (Sexwale, 2011). The number of households living in informal dwellings increased from 13.0 per cent in 2002 to 13.4 per cent in 2009,[16] but dropped back to 13.0 per cent in 2010 (Stats SA, 2010a: 8). This has contributed to the mushrooming of the informal settlements that characterise much of the South African landscape.

The implementation of the land restitution, redistribution and tenure reform programmes has also been a challenge. The target to transfer 30 per cent of white-owned agricultural land (amounting to 24.9 million hectares) to black people by 2014 is not likely to be met: by 2008 only 4.8 million hectares had been transferred (The Presidency, 2008: 29), and by 2010 this had increased to only about 6 million hectares (Nkwinti, 2010). This failure, according to Minister Nkwinti, has 'contributed to declining productivity on farms, decrease in employment in the agricultural sector and deepening [of] poverty in the country side' (Nkwinti, 2010).

1.2.4 Economic growth and employment

Economic growth and increases in employment opportunities are fundamental for any meaningful and sustainable intervention against poverty. After a long period of negative growth between 1989 and 1993, the economy experienced an average annual growth of 3 per cent between 1994 and 2003 and 5 per cent between 2004 and 2007. Growth figures provided by the Organisation for Economic Co-operation and Development (OECD) were 2.7 per cent for the period between 1994 and 1999 and 3.6 per cent between 2000 and 2009 (OECD, 2010: 100). The public sector debt or budget deficit was reduced from 44 per cent of GDP in 1994 to below 20 per cent in 2008, while in the same period the country's foreign reserves increased from a deficit of US$25 billion in 1994 to a positive balance of US$34 billion in 2008 (The Presidency, 2008: 33). This positive economic growth also helped to reduce unemployment from 31.2 per cent in 2003 to 23 per cent in 2007, and allowed the government to allocate more resources for the alleviation and reduction of poverty (The Presidency, 2008: 32, 34).

However, economic growth fell short of the required rate of 4.5 per cent between 2004 and 2009 set by the Accelerated and Shared Growth Initiative for South Africa (AsgiSA) in order to reduce poverty by half in 2014 (The Presidency, 2008: 30–31). The economy also experienced a negative growth of –1.5 per cent in 2009 due to the global financial and economic crisis (Stats SA, 2011b: 5). While there was recovery in 2010 with GDP growth of 2.8 per cent, an estimated growth of 3.1 per cent for 2011 and a forecasted growth of 3.4 per cent, 4.1 per cent and 4.3 per cent for 2012, 2013 and 2014 respectively (National Treasury, 2011: 6, 7), it is clear that these rates will not be sufficient to reduce poverty levels by half in 2014, as expected. [17]

The recession of 2008 and 2009 also led to increases in the unemployment rates. According to the *Quarterly Labour Force Survey, Quarter 4 2011* of Statistics South Africa, there was a rapid increase in the number of unemployed persons from 3.9 million to 4.2 million between the fourth quarter of 2008 and the fourth quarter of 2009 (Stats SA, 2012: xiv). This peaked at 4.5 million unemployed persons in the second quarter of 2011 (25.0 per cent)[18] and was still high at 4.2 million (23.9 per cent) in the fourth quarter of 2011 (Stats SA, 2012: xiv).

1.2.5 Inequalities

Legislative measures instituted to address inequalities that have a bearing on poverty and the marginalisation and exclusion of the poor include the Employment Equity Act 55 of 1998, the Broad-Based Black Economic Empowerment Act 53 of 2003, and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). Institutional measures, such as the South African Human Rights Commission (SAHRC), the Commission for Gender Equality (CGE) and other constitutional bodies, were also established to address inequalities.[19]

However, the increasing gap between the rich and the poor in post-apartheid South Africa highlights a worrying challenge to addressing inequalities that transverse gender, race and class and throws into question the effectiveness of these legislative and institutional measures. According to *Towards a Fifteen Year Review*, income inequality, as measured by the Gini coefficient, increased from 0.64 to 0.69 between 1995 and 2005 (The Presidency, 2008: 101). This increased to 0.7 in 2009 (National Planning Commission, 2011a: 28), making South Africa one of the most unequal countries in the world in terms of income.[20]

African/black South Africans continue to be disproportionately affected by poverty — a reflection of past racial inequalities. In this regard, while African South Africans comprised 77 per cent and 79 per cent of the population in 1995 and 2005 respectively, they accounted in both years for 93 per cent of poor people who lived on less than R322 a month (The Presidency, 2008: 18). In the case of children, the 2009/10 Child Gauge report by the Children's Institute of the University of Cape Town indicated that 71 per cent of African children lived in poor households in 2008 compared to 4 per cent of white children, 11 per cent of Indian children and 37 per cent of coloured children (Eley, 2010: 44). The child poverty figures in 2009 stood at 68 per cent for African children, 33 per cent for coloured children, 6 per cent for Indian children and 4 per cent for white children (Chennells & Hall, 2011: 85).

Unemployment rates also reflect these racial inequalities, with unemployment rates in the second quarter of 2010 for African South Africans at 29.5 per cent, coloureds at 22.5 per cent, Indians/Asians at 10.1 per cent and white people at 6.4 per cent (Stats SA, 2010c: xii, 4, 5). The 2009 General Household Survey

provides other examples of inequalities in education, health and access to housing and water.[21] Naomi Klein (2007: 206) pointed out that only 4 per cent of companies listed on the stock exchange were owned or controlled by black South Africans in 2005, while white South Africans, who were about 10 per cent of the population, 'monopolized seventy per cent of the land in 2006'.

In the context of gender inequalities, women, while making up the majority of the population at 52 per cent (Stats SA, 2012: 2), continue to experience higher levels of unemployment. The unemployment rate for women in the fourth quarter of 2008 was 6.6 per cent higher than that of men, although this had gone down to 4.7 per cent by the fourth quarter of 2011 (Stats SA, 2012: xv). In the public service in 2009, women held only 36.1 per cent of senior positions (National Planning Commission, 2011a: 27).

1.3 Gap between promises and performance: Basis and implications

1.3.1 Basis for the challenges

Despite laudable measures instituted in the alleviation and reduction of poverty and the positive economic growth that the country experienced following the advent of democracy in 1994, the reality is that millions of South Africans, especially black South Africans, still live in abject poverty and still bear the brunt of the inequalities that characterise the country's social and economic landscape. Many of the anti-poverty measures introduced to address these challenges have not been very effective.

The decline in South Africa's Human Development Index (HDI)[22] and life expectancy rates[23] are an indication of these challenges. South Africa's HDI (a measurement of life expectancy, education and standards of living in terms of gross domestic product per capita) improved from 1980 (0.66) to 1990 (0.7), but it has been declining since then and was at 0.683 in 2009 and 0.597 in 2010. South Africa is now behind countries such as Botswana, Namibia, Gabon and Mauritius in terms of its HDI (UNDP, 2010b: 144–145).

Notwithstanding the legacy of colonialism and apartheid and the 2008/09 recession that South Africa experienced as a result of the global economic and financial crisis, many of these challenges can be attributed to weaknesses in the implementation of policy and anti-poverty measures, inadequacies in accountability, transparency processes and mechanisms, and poor leadership. Corruption and inadequate engagement and participation of citizens in matters of government, including service delivery, have also had a major negative impact on the fight against poverty. Millions of rands of state resources aimed at fighting poverty have not been used properly due to poor leadership, among other factors. [24]

The minister responsible for land and rural development has attributed the challenges in land reform, which have had a negative impact on the fight against poverty, to institutional weakness in overall management, policy and legislation (Nkwinti, 2010). The minister also referred to weak leadership as one of the factors impeding progress in the fight against poverty. On the issue of leadership failures, which have led to deteriorating standards in the education and health systems, among other consequences, the Dinokeng Scenarios report (2009: 35) observed:

> *Fifteen years into our democracy, we find ourselves having to confront some stark realities. We see the ugly face of rising political intolerance; a leadership that has failed to build adequate state capacity to protect its citizens from the ravages of crime; a leadership that has failed the accountability provision of the Constitution and that has turned a blind eye to corruption and incompetence in the public service; a leadership often driven by nepotism and greed.*

The challenge of leadership has also led to weaknesses in monitoring and accountability mechanisms. Statutory bodies such as the South African Human Rights Commission (SAHRC), the Commission for Gender Equality (CGE), the Public Protector and other constitutional and statutory bodies have not been adequately supported in their work. There have also been many instances in which some of these institutions have been undermined by government through inadequate support and questionable appointments of certain members of these institutions (Parliament of South Africa, 2007).[25] There have also been challenges to ensuring effective implementation of relevant legislation such as the PEPUDA, which is meant to address inequalities and promote equitable distribution of the country's wealth and resources.

The government has also taken few or inadequate measures to ratify key international instruments that could assist in the fight against inequalities and poverty. As an example, the International Covenant on Economic, Social and Cultural Rights (1966), which provides for the right to work, has not been ratified. The government's reporting record on key international instruments — such as the Convention on the Rights of the Child (1989) and the Convention on the Elimination of All Forms of Discrimination against Women (1979) — has been very poor even though these instruments provide a good framework for the fight against poverty and inequalities, which would benefit children and women, the two groups most affected by poverty (Office of the UN High Commissioner for Human Rights, 2010a).[26]

The lack, for many years, of a comprehensive anti-poverty strategy is another example that brings into question the government's full commitment to addressing poverty and inequalities. This challenge was acknowledged in the Revised Green Paper of the National Planning Commission which stated that

the 'lack of a coherent long term plan' has led to 'policy inconsistencies and, in several cases, poor service delivery outcomes' (The Presidency, 2010). And in its Diagnostic Overview report, the National Planning Commission correctly observed that: 'In successful societies governments have a clear sense of what they want to achieve, clear guidelines on how to structure relationships with their social partners, and an equally clear sense of the public interest actions they expect from these actors' (2011a: 29).

1.3.2 Implications and consequences of high levels of poverty and inequality

Those affected by poverty and its devastating impact on human rights, who do not have adequate food, access to clean water, sanitation, education and jobs, soon get tired of living on unfulfilled promises of a better life. Many of them may resort to violence and conduct that constitute a threat to peace and security as an expression of the inhumane conditions in which they find themselves. This response to human rights violation has been acknowledged by the Universal Declaration of Human Rights (1948), which provides in its Preamble: '[I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.'

Former President Thabo Mbeki, in his statement at the UN Millennium Summit in 2000, also commented about this situation and reminded his fellow leaders that the poor are waiting 'at the gates of the comfortable mansions occupied by each and every King and Queen, President, Prime Minister and Minister', wanting to know what they are doing 'to end the deliberate and savage violence against [them] that, everyday, sentences many of [them] to a degrading and unnecessary death'. He also warned them by saying that '[a]ll of us, including the rich, will pay a terrible price' if there is no credible demonstration of the will and determination to alleviate and eradicate poverty (Mbeki, 2000).

On the impact and consequences of poverty in post-apartheid South Africa, the late Kader Asmal said in 1994:

> *The biggest threat to the future is the inability of an ANC government to meet the legitimate needs of the people … They want clean water, they want shelter, they want education for their kids, they want the possibility of work. And unless the government meets the very legitimate aspirations, and unless white society understands that they must be met, that's the biggest threat, that's what will destabilize the emerging democratic order.* (Butler, 2007: 373)

The numerous service delivery protests throughout the country led by ordinary citizens and the labour strikes by workers over poor pay and deplorable working

conditions are already a manifestation of the growing impatience against the impact of poverty and inequalities. The violence that often accompanies these protests and strikes is a clear indication of how poverty and responses thereto constitute a threat to democracy and stability.[27] Tokyo Sexwale, the minister responsible for housing, acknowledged in his budget vote speech in 2010 that the housing backlog and the resultant mushrooming of informal settlements have contributed to some of the on-going service delivery protests (Sexwale, 2010a). The report on service delivery protests produced by parliament's research unit also listed poor service delivery, inadequate housing and high levels of poverty and unemployment as some of the causes of these protests (Research Unit, Parliament of South Africa, 2009).

Poverty levels, coupled with high levels of unemployment and limited education and skills among the black youth, have also led to a situation in which many of them engage in violent and destructive conduct, as seen in much of the xenophobic violence and other criminal activities in the country.[28]

1.4 Ensuring democracy for the poor

For South Africans to live in peace and harmony, free from fear and want (Constitution, s 198*(a)*), the persistent high levels of poverty and increasing inequalities between the rich and poor have to be addressed effectively and decisively. This will require numerous interventions and the contributions of several stakeholders.

The main intervention in this regard is to ensure sustainable and equitable economic growth and development. Without this, and without an equitable distribution of wealth, poverty and inequalities cannot be meaningfully addressed. Joseph Stiglitz, in *Globalization and its Discontents* (2002: 251–252), says in support of this position:

> *What is needed are policies for sustainable equitable and democratic growth. This is the reason for development. Development is not about helping a few people get rich or creating a handful of pointless protected industries that only benefit the country's elite; it is not about bringing in Prada and Benetton, Ralph Lauren or Louis Vuitton, for the urban rich and leaving the rural poor in their misery. Development is about transforming societies, improving the lives of the poor, enabling everyone to have a chance at success and access to health care and education. This sort of development won't happen if only a few people dictate the policies a country must follow.*

Measures have to be instituted to ensure that economic growth addresses poverty more significantly and effectively, creates more employment and closes the gap between rich and poor. Effectively fighting crime and corruption is another

important intervention required. While there are legislative and institutional measures intended to address crime and corruption, the effectiveness of these measures is questionable, as corruption remains high and continues to undermine economic growth and development.

Strong and effective monitoring and accountability mechanisms and processes are major tools in the fight against poverty and inequality. Institutions established to strengthen constitutional democracy, such as the SAHRC, the CGE and the Public Protector, should be supported in discharging their pro-poor mandates.

The SAHRC has a constitutional mandate to 'monitor and assess the observance of human rights', including socio-economic rights. It has powers to 'investigate and to report on the observance' of these rights and to 'secure appropriate redress' (including litigation and public hearings) where these rights have been violated and where the state has not taken the requisite measures to ensure their realisation (Constitution, 1996: s 184).[29] An effective realisation of this mandate could make an important contribution to the fight against poverty and inequality — a fight that can ensure that democracy does indeed benefit the poor. The same applies to the CGE in its important work of ensuring gender equality.

The Auditor-General and the Public Protector have an important role to play in ensuring public accountability and appropriate and effective use of public power and resources. The role of these two institutions is particularly relevant in local government, where challenges of poor service delivery are most felt.

The inadequate support for these institutions by government, however, severely undermines their role in the fight against poverty and has the potential to discredit and render some of them irrelevant in the struggle against poverty and inequalities. On the importance of strong and effective state institutions such as the SAHRC, Bremmer (2006: 8) contends that '[a] highly stable country is reinforced by mature state institutions [and] [s]ocial tensions in such a state are manageable'.

A cohesive and comprehensive anti-poverty strategy is another crucial measure in the fight against poverty. While numerous anti-poverty policies have been passed by government, the lack of a comprehensive strategy has led to several challenges and weakness. One example is the failure to amend PEPUDA to include socio-economic status as a prohibited ground for discrimination. This failure is difficult to comprehend and brings into question the government's commitment to fighting poverty. The inclusion of socio-economic status in the legislation in 2000, or soon thereafter, would have gone a long way in alleviating the plight of the poor from unfair discrimination on the basis of their economic status. This would have provided a useful means of assessing all polices, laws and practices that undermine the poor and deprive them of their dignity and

fundamental human rights, especially economic and social rights. It would have been an important tool in the fight against poor service delivery in the form of inadequate access to water and sanitation, and inadequate housing and related infrastructure, which have seen many poor South Africans taking to the streets in protest. The implementation of s 28 of PEPUDA, requiring the SAHRC to submit an annual report to the National Assembly on progress made in addressing unfair discrimination based on race, gender and disability, would have made a particularly important contribution.

Government, therefore, urgently needs to come up with a comprehensive strategy to fight poverty. Joseph Stiglitz says that 'there is broad agreement that government has a role in making any society, any economy, function efficiently — and humanely' (2002: 218). Effective leadership is needed in the fight against poverty and increasing inequalities. This leadership should ensure greater effectiveness of the pro-poor provisions of the Constitution, ensure accountability to the citizens and foster greater and meaningful participation and engagement with the people, especially the poor (UN General Assembly, 1993).[30] Effective leadership has been sorely lacking in the past, as reflected by persistent high levels of poverty and unemployment and increasing inequalities; there has been much rhetoric and many empty promises of a better life, but millions continue to suffer.

The National Development Plan: Vision for 2030, drawn up by the National Planning Commission (2011), is an important development in the struggle against poverty and would go a long way in this regard if effectively implemented. However, this plan should be accompanied by a comprehensive national action plan for human rights and a greater acknowledgement of and support for the role of constitutional bodies established to strengthen constitutional democracy, such as the SAHRC. Time will tell whether this plan will become yet another unfulfilled promise to the poor.

1.5 Conclusion

While it is acknowledged and appreciated that there is no magic wand that will solve South Africa's poverty and inequality challenges and undo the effects of apartheid overnight, there can be no proper justice and meaningful democratic dispensation for millions of poor South Africans if these challenges are not addressed effectively. The benefits of the new South Africa cannot be a preserve of a few while millions are expected to live on empty and unfulfilled promises.

Poverty threatens South Africa's constitutional order and deprives the poor of the promises of a better life guaranteed by the Constitution. As highlighted earlier and as shown by current developments in the country, including labour strikes in the mining and other industries, South Africa has a bleak future if poverty and inequalities between the rich and poor are not combated effectively and decisively.

End notes

1 The Draft Guiding Principles on 'Extreme Poverty and Human Rights: The Rights of the Poor' adopted by the United Nations Sub-Commission on the Promotion and Protection of Human Rights defines extreme poverty as a 'human condition characterized by sustained or chronic deprivation of resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights' (UN Human Rights Council, 2006: annex).

2 *Government of the Republic and Others v Grootboom 2000* (11) BCLR 1169 (CC) para 23.

3 According to the Office of the UN High Commissioner for Human Rights, 'no social phenomenon is as comprehensive in its assault on human rights as poverty'. Available at: http://www2.ohchr.org/english/issues/poverty/index.htm (accessed 4 May 2008). Paragraph 14 of Part 1 of the Vienna Declaration and Programme of Action (adopted on 25 June 1993 by the World Conference on Human Rights, A/CONF.157/NI/6) states: 'The existence of widespread extreme poverty inhibits the full and effective enjoyment of human rights; its immediate alleviation and eventual elimination must remain a high priority.'

4 *Soobramoney v Minister of Heath, KwaZulu-Natal* 1997 *(4)* BCLR 1696 (CC) para 8.

5 See ss 7(2), 25(2) and (5), 26(1) and (2), 27(2), 28(1)*(c)* and 29(1) of the Constitution of the Republic of South Africa, 1996. The state is required to provide for social rights for children where parents or primary caregivers are unable to do so (*Grootboom* case, para 77).

6 *Minister of Heath v Treatment Action Campaign* 2002 (5) SA 721 (CC) para 94. Section 41(1) of the Constitution also requires all spheres of government to 'secure the well-being of the people of the Republic', 'provide effective, transparent, accountable and coherent government for the Republic', and 'be loyal to the Constitution, the Republic and its people'. The Constitutional Court also said that the state is 'obliged to take positive action to meet the needs of those living in extreme conditions of poverty' (*Grootboom*, 2000, para 24)

7 *Towards a Fifteen Year Review: Synthesis Report: A Discussion Document*. The report also states that the 'Unemployment Insurance Fund and the Compensation Fund for occupational injuries and diseases have also contributed to alleviating poverty' with both funds paying out R18.4 billion from 2004 to 2008 (The Presidency, 2008).

8 This is based on an unofficial poverty line of R322 a month according to 2000 prices.

9 UNDP. (2009). *Human Development Report 2009*: *Overcoming Barriers: Human Mobility and Development*. New York: UNDP. According to this report (UNDP, 2009: 176), 42.9% of the South African population between 2000 and 2007 lived below the poverty income line at $2 a day.

10 However, while acknowledging that South Africa does not have a single official poverty line, the *Diagnostic Overview Report* (National Planning Commission, 2011: 8) indicated that 48% of South Africans lived below the poverty line set at US$ 2.00 per person per day or R524 per person sper month (at 2008 prices and updated to 2010). The government's 2010 *Millennium Development Goals Country Report* provided a figure of 34.8% for the population living below US$2.50 per person per day for 2006 (Republic of South Africa, 2010: 24). On the other hand, the 2010 *General Household Survey* indicated that 69% of South African households — 9.876 million out of 14.304

million households — were poor. This was on the basis of a household monthly expenditure below R2 500 (Stats SA, 2010: 11).

11 According to Hall (2010) the report the poverty line in 2008 was set at R569 per month.

12 According to the *Towards a Fifteen Year Review* report (see end note 7), 70% of households used electricity for lighting in 2001, an increase from 58% in 1996 (2008: 21). The report defines human capital as the capacity or ability of households to engage in wealth-producing activities that also improve the quality of life (2008: 21).

13 The *Towards a Fifteen Year Review* report reflected increases in school enrolment for five year olds from 40% (2002) to 60% (2007). For six year olds the increases were from 70% (2002) to 88% (2007), and 96% (2002) to 98% for the seven- to 15- year age group (2007). The *General Household Survey 2009* indicated that 62% of learners in public schools received food at school in 2009 as part of the school's feeding programme meant to alleviate poverty and that the number of those aged five years and above, who were attending schools but not paying tuition fees, increased from 0.7% (2002) to 44.5% (2009)(Stats SA, 2010a).

14 The increase can be attributed to the low pass mark for matriculation that is between 30% and 40% (Department of Basic Education, 2011: 55, 58).

15 According to the *South African Child Gauge* report, South Africa has not met its target of reducing child mortality and infant mortality rates (Sanders, Bradshaw & Ngashi, 2010). The child mortality rate was 66 deaths out of 1 000 live births in 1990 and worsened to 73 deaths in 2006, far from the target of 20 deaths per 1 000 live births. Infant mortality rates remained unchanged with no improvement at 48 deaths for children between birth and 1 year old in 1990 and 2006 and also missed the set target of 15 deaths per 1 000 live births. The maternal mortality ratio was 230 deaths per 100 000 live births in 1990 and this figure worsened to 400 deaths per 100 000 live births in 2005, far from the target of 58 deaths per 100 000 live births.

16 *General Household Survey* (2009: 21). The breakdown of these figures between 2002 and 2009 is as follows: 2003 (12.8%), 2005 (15.7%) and 2007 (15.0%).

17 The decline in South Africa's GDP between 2008 and 2009 is regarded by the OECD as the 'largest single-year slowdown on record for South Africa'; the OECD also indicated that South Africa would need a 7% annual economic growth rate to address the impact of the recession and meet the goal of halving poverty by 2014 (OECD, 2010: 22, 36).

18 However, National Treasury gave an unemployment figure of 25.7% for the second quarter of 2011 and also indicated that that the figure excluded an estimated 2.2 million unemployed workers who are no longer actively looking for work (National Treasury, 2011: 17).

19 While ss 181, 184 and 187 of the Constitution of the Republic of South Africa, 1996, provide for the establishment and functions of the South African Human Rights Commission and the Commission for Gender Equality, ss 2 and 25 of the PEPUDA gives these institutions a specific mandate to promote equality and prevent unfair discrimination.

20 The Gini coefficient is a measurement for income equality. A score of 0 represents total equality and 1 represents the highest level of inequality. Gini coefficient values around 0.6 represent very high levels of income inequalities (Milanovic, 2011). Available at: http://www.imf.org/external/pubs/ft/fandd/2011/09/Milanovic.htm (accessed 21 February 2012).

21 While Africans made up 79% of the population in mid-2009, they held 24% of post-graduate qualifications (master's and doctoral degrees); they made up 62.2% of the enrolment in higher education institutions, which translates to 2.5% of the African population being in tertiary institutions; 9% belonged to medical aid schemes; 27.6% had adequate housing; 26.5% used off-site water sources and 31.6% benefited from social grants (an indication of high levels of poverty within the African population). On the other hand, white South Africans, 9% of the population in mid-2009, held 62% of post-graduate qualifications (master's and doctoral degrees); they made up 22% of the enrolment in higher education institutions, which translates to 10.8% of the white population being in tertiary institutions; 74.4% belonged to medical aid schemes; over 80% had adequate housing; less than 2% used off-site water sources and only 9.8% benefited from social grants. This is an indication of low poverty levels within the white population (Stats SA, 2010: 14, 18, 19, 22, 26, 51, 55, 68, 77, 92, 96, 118).

22 See UNDP, International Human Development Indicators, available at: http://hdrstats.undp.org/en/countries/profiles/ZAF.html and http://hdr.undp.org/en/statistics/ (accessed 3 August 2010).

23 According to the World Bank, South Africa's life expectancy rate was 56.9 years in 1999 and this has steadily declined to 51.5 years in 2008; see http://data.worldbank.org/country/south-africa/ (accessed 23 May 2010). UNDP put this at 52.0 for 2010 (UNDP, 2010: 145).

24 Tokyo Sexwale, the Minister of Human Settlements, indicated in 2009 that 40 000 houses built by government for the poor had to be destroyed or repaired at the cost of R1.3 billion because of their poor quality, due to a mixture of incompetency and corruption (Sexwale, 2009).

25 The report highlights the failure by the state to respond to the findings of these institutions, failure to update their founding and enabling legislation and delays in the appointment of members of some of these institutions, as examples of incidents that undermined the work of these institutions.

26 According to information provided by the Office of the UN High Commissioner for Human Rights in 2010, South Africa submitted its last treaty report on the Convention of the Rights of the Child on 12 December 1997; it did not submit its second report due on 15 July 2002 and took more than 10 years to submit its second report on the Convention on the Elimination of All Forms of Discrimination Against Women, which it had to combine with the third and fourth reports submitted on 2 July 2009. South Africa's report on the International Convention on the Elimination of All Forms of Racial Discrimination was last submitted in 2004 and the report combining the fourth, fifth and sixth reports, due on 9 January 2010, had yet to be submitted, see http://www.ohchr.org/EN/Countries/AFRICARegion/Pages/ZAIndex.aspx (accessed on 14 August 2010).

27 The South African Human Rights Commission in its report on the 2008 public violence against non-nationals said: 'The South African Human Rights Commission is aware of the body of literature on causes of the violence, and acknowledges in particular the context of poverty and inequality in which this and other violence-such as protest violence-takes place' (SAHRC, 2010: 22).

28 In this regard, Edna Molewa, then the minister responsible for social development, said in her budget vote speech in 2010: 'In the midst of such despair the poor turn on themselves in violent ruptures, and social convulsions. Women and children often suffer the brunt of such paroxysms and their ability to make choices is extremely

limited. The youth turn to gangsterism, abuse drugs and other conducts of self-destruction in their hopelessness' (Molewa, 2010).

29 The UN Committee on Economic, Social and Cultural Rights has provided a list of activities that national human rights institutions, such as the SAHRC, should perform in order to give full attention to economic and social and cultural rights (UN, 1998). This includes raising awareness, handling complaints, and analysing laws and administrative decisions pertaining to economic social and cultural rights (para 3).

30 The Vienna Declaration and Programme of Action provides in para 8, Part 1: 'Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.'

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Chapter 2

Access to justice: The role of legal aid and civil society in protecting the poor

Kristina Bentley

2.1 Introduction

This chapter is concerned with how poor and marginalised individuals and communities are able to access justice in South Africa[1] and the challenges that they face in asserting their rights under the Constitution. The chapter outlines the role of the statutory Legal Aid Board (LAB) and civil society, and offers an account of some of the landmark cases that have shaped the constitutional jurisprudence on access to justice in South Africa since 1994. The chapter then concludes with an account of some recent developments to promote access to justice, and the challenges that persist.

The chapter considers the experience of the LAB since 1996, and its civil society partners, in facilitating access to justice for poor and indigent people. During this time the LAB and civil society have been instrumental in promoting the interests of communities and individuals in a number of groundbreaking cases with constitutional implications, illustrating their role in promoting access to justice. The LAB encounters limitations of capacity and mandate in so far as its ability to represent poor clients in civil litigation is concerned, and the role of civil society in this respect is therefore critical, as civil society organisations (CSOs) take on the majority of these cases.

The reflection on the work of the LAB and civil society focuses on two broad areas: access to justice itself, and the right to legal representation; and the enforcement of social and economic rights as laid down in the Constitution.

2.2 Background: Access to justice and public interest litigation in South Africa

The right of access to justice in South Africa is far from uncontroversial and clear-cut. There remains a degree of controversy over the *content* of this right, both in terms of the way that this right is cast in the Constitution,[2] and the way in which the courts have chosen to interpret it. That is, the specifics of what the exercise of the right requires — and consequently the duties incumbent on the state in terms of providing for its enforcement — remain a matter of contention and ongoing discussion between the Department of Justice and Constitutional Development (DoJCD), the LAB and its civil society partners. The DoJCD

tacitly holds the view that the state's duties extend to providing representation in criminal matters, which is reflected in the LAB's inability to take civil cases on in significant numbers (see the following section). The tacit denial on the part of the DoJCD that access to justice includes the right to representation in civil matters remains an area of concern, especially in so far as this impacts on the substantive ability of poor and marginalised people to exercise their rights, in particular their rights to services and resources. Furthermore, this controversy has deeply gendered consequences. By far the majority of those who benefit from legal representation provided at state expense in criminal cases are men, while women comprise the majority of those affected by civil litigation, in particular litigation to enforce their rights to access resources in divorce, maintenance and social grants claims.

It must be noted here that there is a tight nexus between the right of access to justice and the right to expert legal representation. As Budlender (2003) notes:

> *Access to court therefore means more than the legal right to bring a case before a court. It includes the ability to achieve this. In order to be able to bring his or her case before a court, a prospective litigant must have knowledge of the applicable law; must be able to identify that she or he may be able to obtain a remedy from a court; must have some knowledge about what to do in order to achieve access; and must have the necessary skills to be able to initiate the case and present it to the court. In South Africa, the prevailing levels of poverty and illiteracy have the result that many people are simply unable to place their problems before the courts.*

Budlender goes on to cite the judgment of the Constitutional Court in the case of *Moise v Minister of Defence* 1997 (1) SA 124 (CC) that notes that this poses a 'handicap', which isolates people from the mainstream of the law, and 'access to the professional advice they so sorely need is often difficult for financial or geographical reasons' (Budlender, 2003).

This indicates why the role of civil society is critical for access to justice. The approach that has been adopted by civil society actors in the area of access to justice has been to focus on selected cases that have an impact on law and policy for a group of people, rather than an individual. And so the area of public interest (or public impact) litigation (PIL) forms the core of a focus on access to justice as the chosen method of maximising resources to facilitate the rights of the poor, particularly in civil matters that relate to social and economic rights.

Vinodh Jaichand (2004: 128–132) highlights the success and importance of this strategy by considering how South Africa's Treatment Action Campaign (TAC) social movement has mobilised around the right to healthcare by harnessing civil society organisations with legal experience and resources, and

he refers to the TAC's strategy and successes as an example of effective PIL. The specifics of some of the cases that the TAC has championed (most importantly the case that established the right of pregnant HIV-positive women to receive Nevirapine, which reduces mother-to-child transmission, and the right of prisoners with HIV to receive ARV treatment) cannot be detailed here. The point, however, is that the power of the TAC as a social movement, which publicised and mobilised around this issue, put it in *opposition* to the position of the government at the time. So in the absence of this critical civil society intervention — both at the point of mobilisation and in its use of litigation as a legal strategy to enforce the rights concerned — access to justice in this critical area would have been denied.

Reflecting this concern, the Foundation for Human Rights (FHR) convened a conference on A Review of Public Interest Law in 2004, where some of these problems and tensions were highlighted. According to the conference report,

> *the best and most effective PIL is that which is located in a broader social and political context and 'which works with social movements, to identify issues to mobilise support around them, to place pressure on the political system, to use the legal system as a means to achieving this and to monitor and enforce the favourable laws and orders by the courts'*. (FHR citing Budlender, 2004: 18)

The state-sponsored LAB struggles with its role in terms of representing clients in civil matters (see 2.3 in this chapter) and so in the absence of the interventions of civil society in this area over the past two decades, a large gap would have remained in terms of some of the most critical cases involving access to justice for poor communities. Section 2.4 of this chapter therefore outlines the critical role that has been played by civil society in promoting access to justice for poor and marginalised people, both historically and currently.

Section 2.5, which considers a selection of the landmark cases in the area of access to justice, is divided into two parts, which highlight the gap between what state sponsored legal aid can accomplish and the demands of justice for citizens in civil matters. The first part considers the key case[3] that shaped the right of access to justice, by considering how the court interpreted this right, thus highlighting some of the ambiguity in terms of rights of access in civil matters. The second part considers some of the areas where 'impact litigation'[4] has occurred, relating to people's social and economic rights to housing, land, water and healthcare, and here the precedent-setting *Grootboom* case is discussed. Civil society has also played a leading role in enforcing the right of equal treatment in terms of s 9 of the Constitution, most importantly for women, refugees and migrants, and those living with HIV/AIDS, by leading landmark cases that have impacted on each of these groups.

Nonetheless, the role of the LAB in providing/supporting access to justice for the poor cannot be discounted, owing to the sheer volume of cases that it handles on an annual basis, as well as the evolving role that it is playing in the critical area of PIL. The LAB, while it is not able to represent poor clients in each and every case, also acts as a conduit between the state, clients and civil society, and so in the civil cases that it is unable (at present at least) to champion, it does often play the vital role of referring such cases to its civil society partners.

Section 2.6 in this chapter seeks to highlight some recent positive developments that have occurred to drive forward the promotion of access to justice for all, and to indicate how these complement the already significant impact of the LAB.

2.3 The development of the Legal Aid Board

The state-sponsored LAB provides legal services to indigent people, and deals mainly with criminal defences and, to a lesser extent, civil matters. The LAB was established in 1969 to provide legal representation to detained and accused people in terms of their right to have access to justice. The LAB's main purpose is to provide legal representation to those who cannot afford it and includes a particular focus on those it regards as vulnerable, such as women, children and the rural poor. The LAB is an autonomous statutory body established by the Legal Aid Amendment Act 20 of 1996. The LAB currently assists in excess of 400 000 applicants a year. In the 2009/10 year, according to the LAB's annual report, a staggering 422 882 cases were finalised and 416 149 new cases were dealt with (LAB, 2010: 10). The LAB's infrastructure consists of 64 Justice Centres and 64 Satellite Offices. The LAB has a staff of 2 513, and employs hundreds of graduates as candidate attorneys, thus providing an essential training function too (LAB, 2010: 13).

Despite the large number of cases it handles each year, the LAB encounters a number of limitations stemming from its role as it is defined in its constituting Act, as well as in how the right of access to justice has been interpreted by the courts and the DoJCD (the department that funds the LAB). While this is an ongoing debate, there is some doubt as to whether or not the LAB's mandate extends to representation in civil cases, and, if it does, what the extent and nature of that mandate is. In addition, there is a Draft Legal Practice Bill, which has been under discussion for some years now, and this, should it be enacted, aims to create a greater responsibility on the part of lawyers in private practice to devote a portion of their time to *pro bono* work, which may alleviate some of the direct pressure on the LAB in this respect. This is discussed in section 2.6 in this chapter.

Some reflection on the evolution of the LAB is useful as it illustrates how far this institution has come in a short time, its current shortcomings notwithstanding.

2.3.1 Reconstitution of the LAB in 1996

According to David McQuoid-Mason (nd: 1), 'South Africa is a useful model for countries in transition and developing countries as it shows what can be done with a modest per capita annual expenditure [on legal aid].' The provision of legal aid in South Africa dates back to 1935, when the first legal aid bureaux were established. In 1962, the first state-sponsored legal aid scheme was set up, and in 1969, the South African Legal Aid Board was originally constituted by the Legal Aid Act 22 of 1969. This followed the outlawing of the privately funded Defence and Aid Fund by the apartheid government in 1966, and so the constitution of the LAB was intended, at least in part, to deflect criticism and political pressure.

It is interesting to note that this 40-year-old piece of legislation, dating back to the apartheid era, continues to be the founding Act of the LAB, albeit in its amended form as the Legal Aid Act 20 of 1996 (this legislation is also currently under review). The changes that came about in the 1996 amendment, as well as the interpretations of the courts during the decade after 1994, significantly reshaped the mandate and direction of the LAB. It is also worth noting that the 1996 Act refers to the rights enshrined in South Africa's Interim Constitution of 1993, rather than the final Constitution of 1996, and so, to an extent, the interpretation of these rights is also contingent upon a version that has now been superseded.

From about 1994 onwards, the budget of the LAB began to increase dramatically in line with its expanding mandate (see the following section) under a new political and constitutional dispensation enshrining human rights. By way of illustration, in 1994/95, the LAB's budget was a modest R66.3 million, rising to R224.5 million in 1999/2000, to more than R500 million in the financial year 2006/07 (LAB, 2007a: 75). It is worth noting, however, that in spite of this exponential increase in the budget of the LAB, reflecting an increasing commitment to the enforcement of access to justice on the part of the DoJCD, South Africa's per capita expenditure in this regard is minuscule in comparison with other countries with similar legal systems, such as the UK and Canada (see fn 49 of McQuoid-Mason, nd: 5). The LAB has, therefore, had to grapple with a number of competing demands since the advent of democracy, and its expanding mandate has meant not only an increase in the resources at its disposal, but also added managerial pressures, issues of retaining skilled and experienced staff, and, most importantly, questions about capacity, as its larger number of facilities all require staff and infrastructure.

2.3.2 An emerging and expanding mandate: 1996–2006

As noted, before 1994, the budget of the LAB was small and its role was mainly to provide legal services to poor whites in civil cases. Legal aid and access to justice as a right were not taken seriously, but the LAB's existence was a token, on the part of the state, to replace the banned and defunct Defence and Aid Fund (noted earlier).

The political changes in the country, and the interim and final constitutions, which have as their bedrock a Bill of Rights, including a notion of a right of access to justice, were therefore to provide the first impetus for redefining the role of the LAB, and, as a result, its relationship with civil society. There were two events that led to the amendment to the Legal Aid Act[5] in 1996,[6] which resulted in an expansion in the role of the LAB. The first of these was the Bill of Rights in the Interim Constitution,[7] which made it incumbent upon the state to give effect to the right of access to justice, but significantly, by simply amending the existing Act, the state has the responsibility to determine by whom and how this right should be honoured through the instrument of the LAB. As already noted, new legislation is being debated, but this is yet to materialise.

The second major event was a series of cases pertaining to the interpretation of human rights in South Africa, for example, the case of *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3, the first case heard by the newly constituted Constitutional Court in 1995, which outlawed the death penalty in South Africa. Many of these cases considered, in addition to the interpretation of specific rights such as the right to life in *Makwanyane,* the attendant question of the environment in which justice is dispensed, and therefore commented on how citizens under a human rights dispensation should be supported in accessing justice. Therefore, *Makwanyane* is regarded as the 'certification' judgment[8] for the LAB, in the sense that it established the role of the LAB as the body responsible for representing poor defendants in criminal matters in the post-apartheid state.

While it is outlined later in section 2.5, worth noting here is the case of *S v Vermaas; S v Du Plessis* 1995 (2) SA 292 (CC) where the Constitutional Court contributed to the emerging jurisprudence on access to justice and legal representation. The court outlined three factors that needed to be taken into account in determining whether an injustice is sufficiently substantial as to result in a trial being regarded as unfair because of a lack of legal representation in a criminal case: 1) the complexity of the case; 2) the ability of the accused person to represent themselves;[9] and 3) the potential seriousness of the consequences in the event of a conviction[10] (see Budlender, 2003: 6). These criteria were incorporated by the LAB into its *Legal Aid Guide*, which is used to determine the eligibility of cases for representation (LAB, 2002).

The *Vermaas* judgment highlighted another feature of the emerging role of the newly defined LAB. This was the debate — ongoing — about whether the LAB's mandate extended to representing poor and indigent people in civil as well as criminal matters. The courts have not as yet commented decisively on this matter, and the DoJCD has thus far been reluctant to commit to an expanded mandate for the LAB as far as civil representation is concerned. This has enormous significance for the kind of cases that the LAB can take on; indeed, contrary to its role before 1994, now some 90 per cent of its cases are criminal defences. It is, however, a matter of ongoing debate between the LAB and the DoJCD, as well as within civil society, whose activities currently fill this lacuna. As already noted, this distinction is not without implications, both for *who* gets representation at state expense (note the earlier comments on the gender bias inherent in this distinction), but also for the *kind* of cases that the LAB can champion meaningfully. Many of the most pressing issues of access to justice, as defined by human rights in South Africa today, cohere around civil matters to do with social and economic rights. There may be some strategic interest on the part of the state to limiting the right of access to justice and, contingently, the LAB to criminal rather than civil cases, given that the state is frequently the defendant in civil human rights matters. Indeed, as Hennie van As remarks, the trend of increasing funding for criminal in favour of civil matters 'compels one to almost say that legal aid in South Africa is criminal legal aid to the detriment of those experiencing the need for civil legal aid' (Van As, nd: 2).

In keeping with the redefined role of the LAB post-1994, was a massively expanded mandate,[11] and it was this expanded mandate which prompted a change of model for the LAB from the judicare system to justice centres. In 1998, a National Legal Aid Forum was convened, where the reasons driving this change were debated. Key among these were the massive expansion in the number of cases that the LAB was beginning to handle — and thus the need for increased 'in-house' expertise to handle these cases; managerial concerns stemming from the volume of cases and, most importantly, the cost implications. The change in model reflects a move away from the LAB acting as a conduit between the state and private legal practitioners in cases in which the need for legal aid has been identified (the judicare system). In the past, the LAB primarily acted as the body that determined which cases qualified for legal aid (essentially on the basis of a means test) and referred these cases to private practitioners, who would handle them, paid from LAB funds.

What was being proposed now was that justice centres around the country, funded and staffed by the LAB, would handle the majority of cases that the LAB was required to deal with on a daily basis, in particular criminal matters. This new model required a massive increase in the number of salaried staff of the LAB, as well as the expansion of its administrative, managerial and financial

infrastructure. This was intended to streamline and reduce the overall cost of providing legal aid. The other ostensible advantage of the new model was that, at grassroots level, communities would have a portal via which to access the central national offices of the LAB through the justice centres and satellite offices staffed by paralegals. Justice centres around the country, supported by a number of satellite offices, which provide frontline advice, assess cases for referral and provide the all-important link between poor communities and the justice system.

The change of model has not been uncontroversial or without teething problems. There were, initially at least, some allegations of mismanagement on the part of the LAB,[12] as well as claims that inexperienced practitioners were not providing adequate defence to their clients. Another unintended consequence of this change of model has been the withdrawal of funding by the International Council of Jurists (ICJ) from civil society organisations at grassroots level, on the assumption that the justice centres would take over their role of providing access to justice to poor communities. However, this did not take into account the shift in representation from civil to criminal matters (see 2.3.3 below).

Consonant with the changing model in how it delivers on its mandate, the LAB's funding model has changed too. As indicated above, the LAB no longer acts only as the conduit between the state and private legal practitioners, which the judicare model necessitated. The LAB's expanding budget and mandate have meant that it is now responsible for a large infrastructure of salaried staff and offices around the country. While the LAB's funding continues to come via the DoJCD (and, therefore, has not changed in this respect), the LAB's financial accountability has increased in line with its increased mandate. Initially this posed some challenges for the management of the LAB, but by 2006/07, the LAB's finances appeared to be more tightly managed and audited.

2.3.3 Consolidation and challenges in the period: 2007–2011

The most recent period of activity of the LAB has been marked by successful consolidation, as well as some ongoing challenges. In addition to achieving control of its management and finances (with a now established track record of nine years of unqualified audits), its national footprint in 2010 expanded to 64 justice centres and 64 satellite offices (many in rural areas). This wide distribution of the LAB offices around the country means increased accessibility in areas which were previously beyond the reach of many communities.

The years 2006–2009 were those of the LAB's three-year strategic plan geared towards achieving this expanded footprint, and consolidating their systems and policies. In 2009, a new strategic plan period began. The primary aim of this period is to move beyond the consolidation and expansion of the earlier period, and to focus on reaching more clients, to expand its reach as a provider of legal services for the indigent and, therefore, increase access to justice. Taking into

account the difficulties in meeting its targets for assisting clients in civil matters (which is commented on below), the new plan contains 'a revised civil legal aid strategy … [to] restructure and increase, albeit in a limited way, [the] capacity to increase assistance in civil matters' (LAB, 2010: 10).

Some significant developments at the LAB are worth noting as these reflect an increase in access to justice. The LAB has for some years managed to achieve 100 per cent coverage of all criminal courts in the country,[13] and this, along with its expanding footprint, has resulted in a drastic reduction in the number of criminal cases that are subject to automatic review as a result of defendants in criminal matters appearing in court unrepresented. In 2009, the LAB reported that the number of automatic reviews, nationally, for the previous year, had been just over 10 000 (down from some 30 000 in 2002/03). In 2010, the LAB reported a further 17 per cent reduction on this figure, showing a steady decline in the number of criminal defendants appearing unrepresented in South African courts (LAB, 2009: 8; 2010: 10). The LAB has, during this period, focused particularly on representing children who are awaiting trial, and those affected in (civil) cases involving the resolution of estates. In 2009/10, the LAB recorded nearly 60 000 such representations, and attributed many of these to its relationship with civil society organisations (see below).

Another innovation is the Legal Advice Line, which was launched in July 2010 as a call centre to provide free legal advice over the telephone. While it is too soon to report on the performance of this service (as the current annual report is not yet available), it is expected that it will be of particular use to people who are unable to access LAB facilities because of their location, and thus may offset some of the difficulties encountered by rural people, in particular, in obtaining legal advice as an aspect of access to justice.

In spite of the successes of the LAB since its reconstitution in 1996, and especially since 2007, the LAB continues to face a number of challenges to its ability to provide comprehensive services to facilitate access to justice for all South Africans. These are highlighted here as they link with the following section, which looks at the complementary role that civil society continues to play in supporting access to justice.

A major challenge that has emerged from the LAB's evolving and expanding role in the past decade is the problem of dealing with civil cases in equal numbers and with equal commitment as with criminal cases. As already noted, the LAB has struggled to raise the ratio of civil matters it takes on to its target level of 30 per cent, and, in fact, this proportion shrank to just 7 per cent of new cases in the most recently reported financial year 2009/10, resulting in a 'revised' approach in the 2009–2012 strategic plan, noted above. The LAB is in a politically sensitive position in giving effect to this target, depending, as it does, on the DoJCD for its funding. While the LAB continues to engage the DoJCD on

this issue and press for more funds to support its capacity in civil matters, it has already been noted that the DoJCD tacitly regards the right to representation as being one relevant to criminal matters only. While this may yet be clarified, either by the courts or legislation, currently the LAB's ability to expand its litigation strategy to include the full range of civil matters is compromised. Note that there is nothing in the current legislation that *prevents* the LAB from taking on civil cases, but rather that there is necessarily a limit to the number of cases it can take on, and, given its greater expertise in criminal matters combined with the ambivalence of the DoJCD towards the LAB's role in representing clients in civil matters, the balance is tilted in favour of a massive bias towards criminal defences.

The change of model and funding of the LAB has also had some unintended consequences. Many non-governmental organisations (NGOs) have had to close their rural and smaller satellite offices and advice centres, as, with the advent of democracy, the ICJ withdrew its funding to non-state actors and entered into a bilateral agreement with the DoJCD (see above). The LAB's justice centres around the country were to have replaced these grassroots satellite offices, but, as noted, the LAB has also moved from a predominantly civil defence strategy to criminal defences. This leaves many poor people, particularly in rural areas, and especially women, in a difficult position. The NGOs that were previously in place to facilitate their access to the justice system in maintenance claims, divorce proceedings, land and housing applications, child support and welfare grants, have now evaporated, to be replaced by LAB satellite offices. But the LAB offices, as noted, take on mainly criminal matters, leaving these applicants without recourse or aid. This necessitates an examination of those civil society organisations in South Africa which play a role in facilitating access to justice, both in the past and in the present environment. It is clear that the LAB, at present at least, cannot stand alone in dispatching access to these fundamental rights, and that civil society organisations are important in filling this lacuna.

These challenges are significantly exacerbated by cuts in the budget of the LAB in its 2010–2013 funding cycle, which it attributes to the global economic recession. Not only has this resulted in its inability to expand representation in civil matters, but, as the 2009/10 annual report remarks: 'This limited capacity to undertake civil legal aid also results in a limited presence in rural areas making it difficult for clients in rural areas to access legal aid' (LAB, 2010: 11).

A consequence of the cut in funding is that, in spite of the change from the judicare to the justice centre model, the LAB still relies a great deal on its networks and relationships with civil society for referring cases to the LAB, and therefore fulfilling the role of grassroots contacts, as well as taking on cases that the LAB cannot. The LAB, therefore, has numerous partnerships, both formal and informal, with CSOs of various kinds, so finding a way to organise and formalise

these partnerships, where possible, would be useful in indirectly increasing the footprint of the LAB, and making best use of its in-house resources. The following section considers this complementary role of civil society.

2.4 The role of civil society, past and present

In commenting on the mobilisation of public interest litigation as a strategy for asserting the rights of poor and indigent people, Vinodh Jaichand remarks that '[t]he law is often a daunting and befuddling business, which never seems to see things from the view of the marginalised, vulnerable or indigent person' (Jaichand, 2004: 128). Jaichand analyses the strategy employed by the TAC in promoting the mass roll-out of ARVs in the Nevirapine case, but his comment serves to highlight the important role that civil society organisations have to play in bridging the gap between the law on paper and the practical reality experienced by people when their rights are not enforced.

Civil society in South Africa is protean, and this chapter focuses on those entities that facilitate access to justice through litigating on behalf of poor and indigent people, particularly in public interest cases that impact on the enforcement of people's rights. Even in this fairly narrow category, there are different types of entity. Some are focused on specific issues or the rights of particular groups, such as the Aids Legal Network (ALN) or the Women's Legal Centre (WLC). Others have a more general focus, such as the Legal Resources Centre (LRC) and the various university law clinics, although these, of course, have specific areas on which they focus. Notwithstanding these differences, civil society organisations play an integral role in facilitating access to justice for poor and indigent people in South Africa, particularly in civil matters.

It is important to note that the most strident voices in support of the rights of the poor, and their ability to access justice, come predominantly from civil society. There are historical reasons for this and civil society in South Africa has a long pedigree as far as fighting for justice is concerned. Broadly speaking there are three main phases to this activism:

1. The era before 1994, when civil society positioned itself in opposition to apartheid and defended clients from within the system.
2. The period between 1994 and 2000, when legal activists acted largely in co-operation with the state to define and flesh out policy to allow access to justice.
3. The current period since 2000, when the 'honeymoon' period ended, and now civil society frequently acts against government to hold it to its obligations under the Constitution.

Before the 1970s, few legal academics played an activist role against the state, but from the 1970s onwards, the university law clinics began to emulate their US

counterparts, who had used the university clinical legal environment to further the aims of the civil rights movement. Thus the first non-state actors to actively take on the provision of legal aid for poor clients were these clinics, although at this stage their role was 'palliative' rather than one of actively opposing apartheid (McQuoid-Mason, 2004: 33).

During the 1970s, this role began to evolve and an international Legal Aid Conference, funded by the Ford Foundation, was held at the University of Natal in 1973. According to McQuoid-Mason, this conference provided impetus for the growth of legal aid clinics during the 1970s (2004: 34). During this period, the law clinics primarily dealt with civil matters, in many cases those that the LAB did not cover. Also, while the LAB dealt mainly with civil matters, its limited criminal remit excluded cases on a number of grounds, and it was these cases with which the law clinics began to assist. By the late 1970s, the first specialist units to facilitate access to justice, such as the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand, were emerging. In 1979, both CALS and the LRC, an independent public interest law firm, were established (McQuoid-Mason, 2004: 36–38). Both continue to play a key role in public interest litigation to this day. It must be borne in mind that these entities were functioning in a hostile environment, where their activities put them in opposition to the state.

During the 1980s, while under a State of Emergency, the law clinics, legal academics and civil society increasingly began to focus on interventions facilitating access to justice, making use not only of the law clinics and street law programmes, but also through academic activities to publicise their work and the conditions under which they were working (for further details, see McQuoid-Mason, 2004: 38–47). During this early phase, civil society broadly was reliant upon foreign donors to support their activities, such as the Ford Foundation, and the US-funded Southern African Legal Services Foundation (SALS) in the case of the LRC. While this reliance on foreign funding continues to characterise civil society in South Africa, what makes the pre-democracy period different is that the foreign donors in question were more willing to support the activities of civil society activists directly, in opposition to an unjust state.

From the 1990s onwards, this role began to evolve in line with the political changes in the country, leading to the second major period of activity for civil society, where it played an active and indispensable role in the crafting of the Constitution and the new laws that were to reflect the changing ethos and the new human rights-based jurisprudence of the country. The LRC is an example of an NGO that was active in this period. According to Palmer, the LRC's view is that it functioned effectively during the transition period 'principally by being proactive on the new Constitution and new legislation, and then by thinking developmentally on social and economic rights' (Palmer, 2001: 12). Mark

Heywood (2007: 7), remarks (commenting on the case of civil society activists focusing on rights in the health sector in the context of HIV) that:

> *… between 1994 and 1999, there was close co-operation between the government, parliament, the health department and civil society. As a result, by the year 2000, major laws had introduced protections against discrimination based on HIV status, meaning that in theory the law could be utilised against unfair practices*.

However, after 2000, the environment in which civil society promoting access to justice was operating once again began to change:

> *It is significant that, in the years that have followed, the target of litigation has shifted from private individuals or institutions to the government and its departments — mirroring the growing unlawful conduct of government in key areas of life. In this changing context, groups such as TAC and the ALP* [AIDS Law Project] *have used targeted constitutional litigation to further define and fill out a range of rights* [in this case health]. (Heywood, 2007: 7)

It is this current period of perceived neglect of social and economic rights, and in some cases obstruction of their delivery (see Heywood, 2007: 15–17), that is significant for this chapter. As Heywood notes,

> [i]*n the face of this stalemate the odds against poor people gaining greater access to justice are mounting. The problem however is not limited to state omission. Sometimes the state can be seen to be working directly against this right — acquiring for itself legal services that it denies ordinary equal rights bearers.* (Heywood, 2007: 16)

This frames the context in which the cases commented on in the following section are cast, and highlights the critical role that the judiciary has to play in using its independence to interpret rights and hold the state to account when it falls short of its obligations.

2.5 Landmark cases

A major aspect of the emerging jurisprudence on access to justice in South Africa is how the courts have dealt with and interpreted the human rights matters referred to them. In particular, South Africa's highest court, the Constitutional Court, has played a critical role in both defining the content of certain rights and, more latterly, holding the government accountable in terms of its obligations to honour rights under the Constitution.

It is necessary to note here that litigation — least of all litigation in the Constitutional Court — is not the only mechanism by which access to justice

can be obtained. For poor litigants, especially, court action may not be either possible or desirable.[14] However, the focus of this study is litigation that has served some broader public interest by impacting on the rights of poor people or communities on a scale larger than the specific case in point, and so it is worthwhile to consider a few selected high-profile cases that have defined the parameters of important rights since 1994.

The other disclaimer that is necessary here is that these cases are merely high-profile examples that are well-known and precedent setting in significant ways. They are not offered as a comprehensive account of constitutional litigation, nor of public interest litigation over the past decade. The point of this account is illustrative of the broader trends and ways in which the justice system is dealing with these kinds of cases, and illustrates how the parameters of the LAB have been defined, as well as the important role of civil society in public impact litigation as it pertains to social and economic rights. For this reason, the section is divided into two sub-sections, each offering a brief account of a landmark case in each of these areas: access to justice, and the interpretation and enforcement of social and economic rights.

2.5.1 Access to justice and the right to legal representation

The fourth judgment to be handed down by the Constitutional Court was that of two separate matters jointly referred by the Transvaal Provincial Division of the High Court in the case of *S v Vermaas; S v Du Plessis* 1995 (3) SA 292 (CC). The applicants were relying on s 25(3) of the 1993 Interim Constitution, which laid down the right to legal representation at state expense. The trial judges in the two cases referred as a consolidated case to the Constitutional Court had held that the accused did not have recourse to s 25(3) because their trials had begun before the 1993 Constitution came into effect. They both, however, referred the matter to the Constitutional Court to assess this as a more general matter pertaining to the right to state-funded legal representation (Dugard, 2006: 269).

It should be noted that, like the sections of the final 1996 Constitution that was to follow it, the Interim Constitution did not cast the right to legal representation as an absolute or unqualified right, rather that it applied only 'where a substantial injustice would otherwise result'. The Constitutional Court held that this could be assessed only by taking the facts of the case into account. As a court of final instance, it was not in a position to pronounce on the interpretation of a right of general application in the cases under review. This was the role that would need to be played by the trial court. The Court instead laid down guidelines for trial courts to apply when determining whether or not state funding for representation is necessary. These were outlined earlier in 2.2.

While the Court therefore did not pronounce on the main question that the *Vermaas* case presented — which may be seen as a missed opportunity — the

Court made the following unanimous statement through Justice John Didcott, which reflects on the right of access to justice:

> *No counsel on either side could then tell us of any steps taken yet to establish the financial and administrative structures that were necessary to give effect to … legal representation at the expense of the state. We gained the impression that nothing of much significance has been done in that direction since the Constitution came into force a year ago. The impression, if true, is most disturbing. We are mindful of the multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform. But the Constitution does not envisage, and will surely not brook, any undue delay in the fulfillment of any promise made by it about a fundamental right. One can safely assume that … the situation still prevails where during every month countless thousands of South Africans are criminally tried without legal representation because they are too poor to pay for it. They are presumably informed … as the section requires them peremptorily to be, to obtain that free of charge in the circumstances which it defines. Imparting such information becomes an empty gesture and makes a mockery of the Constitution, however, if it is not backed by mechanisms that are adequate for the enforcement of the right.* (cited in Budlender, 2003: 20)

These comments by the Court serve to highlight the urgency of giving substantive content to the right to representation on the part of the state, and the *Vermaas* judgment has formed the basis of the LAB's reconstitution since 1996, as noted earlier. However, it is regrettable that the Court chose to adopt this narrow interpretation, and not to comment decisively on the content of the right to representation and access to the courts, in civil as well as criminal matters. Of course the case in question was a criminal matter (for a more detailed account of the details of *Vermaas* see Dugard & Roux, 2006), but some of the ambiguity which bedevils the current environment of access to justice, and ambivalence on the part of the DoJCD to commit itself to supporting civil rights claims, could have been avoided and clarified as far back as 1996, had the Court taken this opportunity.

There have been numerous other cases that have contributed to shaping the content of access to justice, especially in criminal matters, since 1996, in particular the case of *Legal Aid Board v Pretorius and Another* (332/05) [2006] ZASCA 75; [2006] SCA 81 (RSA) (31 May 2006), which effectively upheld the duty of the LAB to provide alternative representation when the counsel already provided proved unable to represent the accused effectively (in this case because of a too-heavy workload). This case therefore refined the terms of representation in light

of their quality or effectiveness. However, the *Vermaas* case stands out as the definitive statement from the Constitutional Court to date on the parameters of access to justice in terms of legal representation. And, as has been noted, this has the regrettable consequence of leaving open the question of the representation of the poor in civil matters as a matter of right. Thus, in the absence of the intervention of civil society in these cases, they would never have reached the courts. The limitations of this as a strategy are reflected on below.

2.5.2 Social and economic rights: Housing, land and healthcare

The South African Constitution recognises both civil and political, as well as social and economic rights. The social and economic rights are cast in aspirational language, however, and are subject to 'progressive realisation'.[15] The second decade of democracy in South Africa has seen these rights increasingly being the subject of litigation against the state, as people's basic material well-being does not begin to improve, and, in some cases, deteriorates. Principal among these have been claims for housing, land, healthcare, water, and other basic resources. While it is beyond contention that not everyone can enjoy the same material conditions of life, the South African state does, nevertheless, bear the duty of ensuring that state resources are allocated and used to progressively realise these rights. And it is critical to note here that, in the absence of civil society initiatives aimed at facilitating access to justice for the poor, these kinds of cases would be unlikely to arise, because poor and marginalised communities lack the resources to instigate these cases without assistance.

The most high-profile and significant example of this was the celebrated case of *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC). The *Grootboom* judgment exceeds the specifics of that case and provides the definitive statement from the Court directing the state to honour its duty to allocate resources to basic social and economic rights, in this case the right to housing:

> *Grootboom represents the first time the Constitutional Court found the state to be in breach of its obligations in respect of a* [social and economic] *right. Only the second* [social and economic] *rights case to come before the Court, it sets the basic framework for future claims against the state regarding its positive constitutional duties*. (Berger, 2008: 8)

Irene Grootboom, who gave her name to the case, was one of 150 children and 390 adults who were relocated to a sportsfield in the Oostenberg Municipality of the Western Cape after having been evicted from their informal homes, which were on private land that was to be redeveloped for low-cost housing. They made an application to the Court for the state to provide them with adequate basic

shelter until they could find permanent accommodation under s 26(2)[16] of the Constitution, but also under s 28(1)*(c)*[17] which stipulates the right of children to shelter. Note that the difference between these two sections is that in respect of adults, the state has an obligation to provide *access* to housing and therefore to 'take reasonable legislative and other measures to ensure the progressive realisation of this right within its available resources', whereas in the case of minors, this right is not qualified in this way.

In reflecting on this distinction, the Court held that s 26(2) does not give people the right to housing at the expense of the state. Rather, it 'requires the state to devise and implement within its available resources a comprehensive and co-ordinated programme progressively to realise the right of access to adequate housing', including 'relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations' (cited in Berger, 2008: 8). The housing programme of the state at the time did not make such provision and to that extent was unconstitutional.

There are a number of implications of this judgment, which go beyond the right to housing. The case sets down broader principles for the enforcement of social and economic rights, which the state, based on *Grootboom*, is held to in the enforcement of other such rights. Firstly, while the state has the duty to create conditions for access to housing for all citizens, 'the needs of the poor — who are particularly vulnerable — require special attention' (Berger, 2008: 9). This principle, extrapolated to apply to other social and economic rights, would imply that the state is obliged to make water, for example, accessible to all, whether they are rich or poor, and whether they can afford it or not, but to have regard for the needs of poor communities.

The second broad principle of application to all social and economic rights that stems from the *Grootboom* case is that the state has a duty to implement a 'reasonable plan to deal with a public problem', which, in any particular case, would depend on a consideration of the following:

- Flexibility to deal with emergency situations, as well as short- and longer-term needs.
- Allocation of sufficient resources to implement the plan.
- National government taking responsibility for ensuring that laws, policies and programmes are adequate, that tasks and responsibilities are clearly allocated, and retaining oversight of provincial and local projects (Berger, 2008: 8).

What the *Grootboom* judgment means, therefore, is that the progressive realisation of social and economic rights should not occur at some unspecified time in the future. Rather, government has specific, concrete duties correlative to those rights in order to ensure that their progressive realisation is achieved.

There are a number of shortcomings to such an approach, as it would appear that when the government does fall short in this regard, citizens have to undertake the arduous, lengthy and costly process of litigation in order to hold the state to account. In the absence of political will on the part of the state, the rights of the poor in such civil matters will continue to be enforced in a rather haphazard manner. While public interest litigation that has an impact on a large 'class' of people has the potential to be effective and transformative, it is only so in practice in so far as these judgments are acted upon by the relevant state departments.

South Africa's second decade of democracy is exemplified by issues concerning material inequality and, consequently, questions of justice that cohere around the question of social and economic rights. As Mark Heywood comments, in recent years there has been 'a flurry of human rights cases reaching the courts on issues such as access to health services, housing, provincial demarcation and social security' (Heywood, 2007: 19). The problem, of course, is precisely that of access to the justice system for poor clients — 'as promising as this tentative turn to the courts may be, it is a red herring to suggest that all is well with the legal system … For, while the law in South Africa has proved that it can be used for the poor, it is rarely being used independently by the poor' (Heywood, 2007: 19). And this points to the issue outlined in this chapter, which is that, in the absence of active civil society interventions, the rights of the poor, both in terms of their access to justice and in terms of public impact litigation on social and economic rights, will not be enforced in any consistent or sustainable way.

2.6 Recent positive developments

Access to justice remains a challenge for many South Africans, not least because of the prohibitive costs of legal action, as well as the complications of the legal and judicial system, which can frustrate applicants who do not have representation. However, a number of recent developments in the justice sector may serve to increase the capacity of citizens to access the courts and to increase representation in both criminal and civil matters.

The first of these is the co-ordination of free legal services through the activities of NGO ProBono.Org, which was founded in 2007. The Legal Practice Bill, which has been under discussion for a decade, and which was again delayed in August 2011, has among its aims an increase in provision of free legal services by private practitioners, and the activities of ProBono.Org facilitate this general aim. ProBono.Org currently has offices in Johannesburg and Durban, and plays a coordinating role in matching clients with private legal practitioners who are prepared to take on their cases free of charge. The organisation has a number of partners, including some 1 200 legal practitioners and donors. ProBono.

Org assists with simple legal matters such as the drafting of wills (which may be too costly for many people to afford); as well as more complex family law matters; and it also has legal clinics dealing with specific issues such as refugee law, housing issues, HIV/AIDS and consumer protection. It fills an important lacuna in access to justice in respect of a range of civil matters that the LAB is unable to take on.

A second development that has the potential to increase access to justice in respect of civil matters is the extension of the jurisdiction of regional magistrates' courts from 2010.[18] This is expected, in time, to reduce the waiting times for cases to be heard (by relieving pressure on the High Courts) and to make matters such as divorce and other civil matters less costly for clients, as they will no longer have pay advocates to represent them, but can rely on the services of attorneys in the lower courts. Furthermore, in so far as the magistrates' courts tend to be more accessible in terms of cost, location and procedures, it is expected that civil society bodies that play the important role of assisting ordinary people in accessing justice and the courts will find their work easier. Also worth noting is that all magistrates' courts were designated as Equality Courts in 2009, which empowers them to hear cases that arise from the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) and the Employment Equity Act 55 of 1998. These tend to be civil matters, and this development goes hand in hand with increases in the monetary jurisdiction of magistrates' courts, which allows them to hear a wider range of cases.

In 2007, the US Agency for for International Development (USAID) supported the DoJCD in establishing the first community courts to expedite criminal prosecutions for minor offences. It is mainly these minor crimes that cause backlogs in the justice system, and so the community courts serve both the purpose of diverting these cases from the regional and district magistrates' courts (freeing them up to deal with more serious criminal matters and now civil matters); they also divert offenders from the criminal system. The community courts primarily hand down community service sentences, and these are regarded as preferable, particularly in the case of juvenile offenders. The community courts are also aimed at promoting the involvement of members of the community and victims of crime in proceedings, by simplifying and streamlining court procedures, and by making the courts themselves accessible to local community members. While it is difficult to assess just how successful these courts have been, as they are relatively new, and it is impossible to measure the number of people who have been diverted from crime as a result of a first offence being heard in one of these courts, they do represent an innovative approach to addressing some of the issues of access to justice, such as expense, backlogs and alienation of ordinary people from the workings of the justice system.

A final initiative to note is a joint programme of the DoJCD and the European

Union (EU) called Access to Justice and the Promotion of Constitutional Rights: Strengthening Civil Society Participation, which runs from 2009–2013. The funding for this programme is being channelled through the Foundation for Human Rights, which supports ProBono.Org. While this relates to a problem noted earlier, which is that civil society bodies that promote access to justice now depend on funds dispensed through state channels, the programme does, nonetheless, reflect a concern with this vital area of enforcement of rights and a willingness to channel resources to its realisation.

2.7 Conclusion

There are some significant obstacles to access to justice in South Africa. The first is a lack of clarity on the definition of what access to justice in South Africa entails. The current situation, where the DoJCD tacitly limits its support to criminal matters, is unsatisfactory for a number of reasons, and is out of step with the stance of the courts on the enforcement of social and economic rights. Some thought needs to be given to the mechanisms that can be used to press the state on its commitment to the ICJ in terms of providing broad civil as well as criminal access to poor and rural communities. The state cannot consistently hold to a bilateral agreement, which sees all funding for access to justice being funnelled via the DoJCD, while evading responsibility for civil matters.

If the rights enshrined in Chapter 2 of the Constitution — the Bill of Rights — are to be meaningful, people who otherwise would not have the means to claim them, due to their financial circumstances, should be provided with the means, at public expense, to litigate. To serve this end, the right of access to justice needs to explicitly include those civil matters that have a bearing on the fundamental rights of the parties concerned. This requires the right to be spelled out specifically in the amendments to the Legal Aid Act, but, in addition, that methods other than, or in addition to, legal representation be included in the definition to allow for greater access to justice in both civil and criminal matters.

Another obstacle is the poor performance of the South African Human Rights Commission (SAHRC), which has the potential to diffuse some of the tensions that exist between the state and civil society, with a view to making the enforcement of social and economic rights less confrontational and more realisable. This relates back to the point that litigation is not the only, and, indeed, not always the most desirable strategy in asserting the rights of the poor to basic services. Questions arise as to why this body, and its sister bodies, are not, in many instances, playing their role to their full capacity, and what needs to be done to further capacitate them to work as they should.[19]

Some consideration also needs to be given to how the relationships between the various actors who play a role in facilitating access to justice can be formalised. Rather than the current informal networks, which result in the uptake of cases

being something of a lottery for poor clients, formal relationships need to be encouraged, for example, between the LAB and ProBono.Org. This would allow for both cases and funding to flow more freely among the various bodies — the LAB, civil society entities, grassroots organisations, the Chapter 9 institutions and the DoJCD. While it is to be hoped that the long-awaited Legal Practice Bill may assist to do this once it is finally enacted, the relevant actors, private practitioners in particular, may be wise to seize the initiative rather than have it thrust upon them by the DoJCD.

A final point worth noting is that the majority of funding to civil society in this area continues to come from sources outside of the country, as it did under apartheid. This poses something of a quandary for civil society, as increasingly donor funding is being channelled through the state in the form of bilateral agreements with various departments (as with the agreement between the ICJ and the DoJCD), but South Africa is no longer regarded as a country with an urgent need for such funding, unlike other countries in the region. Increasingly, as the reliable sources of funding for the activities of civil society actors evaporate, it is the poor and poor communities — especially women, children, the elderly and rural communities — that are being left without any means of support to access their rights. Caught between two stools (the LAB on the one hand and, increasingly, urban-based civil society on the other) these are the people who, ironically, are the victims of the changing justice environment. Ironic, because, under apartheid, civil society was able to retain a grassroots presence in poor communities that could offer advice and refer cases on where necessary. Now that funding for these core activities has been redirected, those most critically in need of assistance in asserting their rights to basic resources are left out of the system. One solution is to rethink the policy of bilateral agreements that bind the state only, but also to encourage more local donors from the private sector to get involved in funding the core operational activities of grassroots civil society initiatives in this area.

End notes

1 Access to justice, for the purposes of this chapter, is taken to mean the general capacity to enforce one's rights, and more specifically to a fair adjudication as per s 34 of the Constitution. The more specific relationship between access to justice and legal representation is discussed in section 2.2 in this chapter.

2 Section 34 of the Constitution of the Republic of South Africa Act 108 of 1996 specifies the right of access to courts and to a 'fair public hearing', but it does not specify what would constitute the standard for such fairness. Section 35 enshrines the rights of arrested, detained and accused persons, including the right to legal representation, which is why in criminal cases at least, this right is less ambiguous.

3 *S v Vermaas; S v Du Plessis* 1995 (2) SA 292 (CC).

4 Impact litigation covers cases that have an effect on the rights of a broader group of people, beyond those that are parties to the case. In many instances, CSOs who operate in the area of access to justice adopt impact litigation as a strategy to make the most of their resources, as their capacity to take on cases is not unlimited, and so choices have to be made about which cases to litigate. These choices are informed by a calculated consideration of the broader impact of the case in question.

5 Act 22 of 1969.

6 Legal Aid Amendment Act 20 of 1996, coming into effect in 1998.

7 Constitution of the Republic of South Africa Act 200 of 1993.

8 This point was made by a senior manager at the LAB in an interview, although 'certification' here is not to be confused with those cases in which the Constitutional Court has actually certified the validity of, for example, the 1996 Constitution against the principles of the 1993 Interim Constitution.

9 For example, in the case of *Vermaas*, the defendant was an attorney who had played an active role in his own defence.

10 So, for example, whether a conviction would result in a lengthy prison sentence.

11 The mandate was expanded beyond its apartheid-era role of representing indigent whites in civil and criminal matters to representing indigent criminal defendants of all races as a matter of right.

12 In 1997 the LAB had to answer to allegations of mismanagement before Parliament's Justice Committee. See: http://mg.co.za/article/1997-04-04-legal-aid-clause-triggers-flood-of.

13 This means that the LAB is able to provide representation to indigent clients in all criminal courts.

14 Other mechanisms would include negotiation and mediation strategies, and settlements reached without going to court. These devices are often better for communities as they are able to participate in the decisions that are made and communicate their case directly, which is not possible in a court setting. Keeping cases out of court also increases the accessibility of justice by keeping costs down.

15 See ss 26(2) and 27(2) of the Constitution.

16 Section 26 of the Constitution reads as follows:

Housing

1. *Everyone has the right to have access to adequate housing.*
2. *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.*
3. *No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.*

17 Section 28(1)*(c)* reads 'Every child has the right ... to basic nutrition, shelter, basic health care services and social services.'

18 Jurisdiction of Regional Courts Amendment Act 31 of 2008.

19 This point is not without controversy. Thipanyane (Chapter 1) and Cohen (Chapter 3) deal with the SAHRC in more detail, and offer a different view of its performance and capacity. However, for the purposes of this discussion, the point is maintained that the SAHRC and other Chapter 9 bodies could be more effective in promoting access, either on their own or in supporting civil society to do so, particularly in civil matters.

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Chapter 3

Security and the Constitution: Xenophobia. Whose rights? Whose safety?

Judith Cohen[1]

3.1 Introduction

Approximately a year after the May 2008 xenophobic violence in South Africa, a Congolese man arrived at the Cape Town offices of the South African Human Rights Commission (SAHRC). He was dishevelled, barefoot, wearing a dirty T-shirt and a yellow jacket covered in bloodstains and had fresh wounds on his face and body. Commission staff did not recognise him as one of the prominent refugee leaders who had frequented the offices during the previous year's violence. The refugee recounted how xenophobic incidents against non-nationals continue to occur.[2] The previous Friday, while travelling home by train, he was attacked by a group of South Africans who taunted him for being a non-national. During the attack his cell phone, wallet and money were stolen before he was thrown off the moving train by his attackers. He managed to walk to a police station to seek assistance. However, instead of being assisted and allowed to phone his brother, he was placed in the police cell, receiving no medical treatment and not knowing why he was being detained. During the course of the weekend the police cell filled up with detainees arrested on suspicion of committing various crimes, one of whom stole his shoes and socks. Early on Monday morning he was released without explanation by the police. Barefoot, still in pain from his injuries and with no money or cell phone, he went to the only other place he knew where he might receive assistance — the nearby SAHRC office.

Just like during the 2008 xenophobic violence, the refugee created a dilemma as the SAHRC is not mandated to provide medical or humanitarian assistance. However, it was clear that assistance was needed. Commission staff spent most of the day attending to the visitor's basic needs, providing him with tea and food from their own lunchboxes. The refugee was more anxious to ensure that his job and livelihood were safe, as he had failed to report for work that day, than he was to obtain medical assistance or pursue a complaint against the police.

SAHRC lawyers negotiated with an initially annoyed and unwilling employer, eventually persuading him to allow the refugee to return to work the next day. After many phone calls, it proved impossible to secure immediate basic assistance, such as a much needed pair of shoes and train fare to get home, from refugee and humanitarian organisations. Allowing the refugee to leave the offices barefoot, in dishevelled bloodstained clothes, would potentially draw attention and place him in a vulnerable position yet again, so staff organised an impromptu collection and accompanied him to the closest and cheapest shop to purchase shoes before seeing him on his way home.

South Africa has unacceptably high levels of violent crime. Given the violent nature of society, manifestations of discrimination are often accompanied by and expressed through violence, thereby rendering meaningless the promised constitutional protections to be free from discrimination and all forms of violence.[3] This was starkly evidenced in May 2008 when unprecedented xenophobic violence swept at alarming speed through the country, leaving in its aftermath 62 people dead, at least 100 000 people displaced, hundreds wounded and an unknown number of women raped (Misago et al, 2009). The state's failure to protect non-nationals' right to security and to be free from all forms of violence had the swift ripple effect of eroding, to varying degrees, many of their other rights guaranteed in the Constitution. This highlights how the right to security is intrinsically linked to the broader concept of human security, which extends to all aspects of life such as economic security, food security, health security, environmental security, personal security, community security and political security (UN Development Programme, 1994).

South Africa is home to many African non-nationals. Some have resided in the country for decades as migrant workers coming from neighbouring states such as Zimbabwe, Lesotho and Mozambique. Others have fled war zones and persecution across the continent, in places such as Somalia, Burundi and the Democratic Republic of Congo (DRC), and are in South Africa claiming refugee status, being legally recognised as asylum seekers before a refugee determination is made. Yet others have obtained refugee or resident status. The 1994 transition to democracy in South Africa made the country a continental magnet for those seeking a better life. Many Africans make the trip to South Africa seeking to escape conditions of extreme poverty. The past decade has seen Zimbabweans desperately flee over the border to escape the worsening political and economic situation in that country.

Many non-nationals do not report their presence in South Africa to the relevant authorities, making it difficult, if not impossible, to quantify the number. Figures from 2010 estimate that there are between 1.6 and 2 million

foreign nationals living in South Africa.[4] In 2008, the country was the largest recipient worldwide of refugee claims, with some 207 000 applications (UN High Commission for Refugees [UNHCR], 2009). The Department of Home Affairs (DHA), the government department responsible for processing these applications, is mired in allegations of fraud, corruption and inefficiency.[5] Many non-nationals who arrive in the country have the experience of waiting in long queues, sometimes sleeping through the night on the pavement outside the refugee reception centres in order to make an asylum application the following morning. Eventually they realise that bribes are necessary in order to get to the front of the queue and regularise their presence in the country. However, many have no money so they simply give up and start looking for work. Being in the country illegally is not always a matter of choice, but rather one of survival.

This chapter describes how the constitutional rights held by non-nationals living in South Africa are routinely violated, outlines the international response to xenophobia in the country and then explores the xenophobia crisis of 2008. It focuses, in particular, on the extent to which the violation of the right to security led to the effective denial of civil and political rights, as well as economic and social rights.

3.2 Non-nationals enjoy constitutional rights in theory in South Africa

The Constitution clearly states that it is applicable to everyone in South Africa. Only in clauses addressing political rights, citizenship, freedom of movement and residence, freedom of trade, occupation and profession, and rights guaranteed during states of emergency does the Constitution refer to citizens. In addition, the Constitutional Court (hereinafter the Court) has confirmed that those rights which do not refer to citizens are applicable to everyone. For example, in *Khosa and Others v Minister of Social Development and Others* (2004),[6] the Court declared unconstitutional certain provisions of the Social Assistance Act 59 of 1992 that disqualified non-citizens from receiving social grants for the aged, child-support grants and care-dependency grants.

Despite rights being applicable to everyone in terms of law, in practice this is not the case for non-nationals, many of whom remain invisible, vulnerable and open to abuse from local communities and criminals. Those whose presence in the country has not been regularised are vulnerable to crime. Should they fall victim to crime, they are unable to approach the police for assistance as this may lead to their own arrest and deportation. Police are also known to harass non-nationals, extorting bribes and sexual favours, and physically and verbally abusing them.[7] On many city streets, non-nationals are referred to as ATMs, the acronym for South Africa's automated bank teller machines. Thugs can approach them and demand, with impunity, that they hand over all their money, knowing

that the crime will never be reported. A non-national woman who is a rape or domestic violence victim will most often refrain from reporting the incident to the police as this may lead to her own arrest and deportation.

Before 2008 there had been many incidents of xenophobic violence in South Africa (Amnesty International, 2008). For example, in 1994 there were reports of attacks against non-nationals in the Gauteng township of Alexandra, in which Mozambicans, Malawians and Zimbabweans were blamed for the local increase in crime (UN Economic and Social Council [ECOSOC], 1999). By 1997 there were claims that some 20 non-nationals had been killed in and around Cape Town.[8] South Africans and the world were outraged when six police officers were shown on television setting their dogs on three Mozambican nationals (CNN, 2000). There was also the much publicised incident in 1998 when three non-nationals were thrown off a train travelling between Pretoria and Johannesburg (Braid, 1998). And throughout this period there were reports of Somali shopkeepers in townships being attacked, in some instances murdered, and their shops looted, burnt or destroyed in an effort to drive them out (UNHCR, 2007).

In 1998, in response to high levels of xenophobia, the SAHRC launched the Roll Back Xenophobia Campaign in conjunction with the National Consortium for Refugee Affairs and the United Nations High Commissioner for Refugees (UNHCR). This campaign hosted extensive advocacy and media activities, and developed working relationships with key government departments to monitor xenophobia.

Parliament also addressed xenophobia by providing for anti-xenophobia measures in the Immigration Act 13 of 2002. The Act's objectives are to prevent and deter xenophobia by committing the DHA to promote education on the rights of foreigners throughout government and state institutions and in communities.[9]

3.3 International response to xenophobia in South Africa

The rise in xenophobic attitudes and incidents in South Africa did not go unnoticed at the international level. In August 2006, South Africa appeared for the first time before the Committee on the Elimination of Racial Discrimination (CERD) at the United Nations in Geneva. It presented its Country Report on progress that it was making in compliance with its international obligations in terms of the Convention on the Elimination of All Forms of Racial Discrimination. The CERD highlighted the treatment of non-nationals as an area of concern and requested South Africa to report on four of the committee's recommendations within a year, indicating the seriousness with which they were viewed (UN CERD, 2006).[10] Three of these recommendations addressed issues of xenophobia. In the first recommendation, South Africa was advised to 'adopt legislation and other effective measures in order to prevent, combat

and punish hate crimes and speech';[11] the second recommendation addressed the need for South Africa to accelerate its programmes to reduce the asylum application backlog;[12] and, the third, while noting the Roll Back Xenophobia Campaign, urged South Africa to strengthen measures to prevent and combat xenophobia and prejudices that lead to racial discrimination.[13] Thus the CERD recommendations to South Africa specifically highlighted xenophobia as a problem and called for more to be done to challenge such attitudes.

A few months later, in November 2006, South Africa appeared before the UN Committee against Torture (CAT). This was the country's first appearance before this UN treaty body in which its initial and first supplementary reports were reviewed. Once more, concerns were raised and recommendations made in relation to non-nationals. The committee had particular concerns about South Africa's non-adherence to the principle of *non-refoulement,* the principle that a person may not be returned to his or her country of origin if there are substantial grounds to believe that the person would be subjected to torture or sentenced to death (UN CAT, 2006). South Africa was requested to provide the committee with detailed information on all such cases (UN CAT, 2006). The committee also made specific recommendations that South Africa take 'all necessary measures' to prevent the ill-treatment of non-citizens in repatriation centres and to ensure that non-citizens were provided with information about their rights and any legal remedies available to address a violation of their rights (UN CAT, 2006). There was also a recommendation that measures be taken to reduce the backlog of asylum applications (UN CAT, 2006).

Less than a month before the outbreak of xenophobic violence in May 2008, South Africa appeared before the UN Human Rights Council to be reviewed under the new Universal Periodic Review (UPR) mechanism. South Africa was one of 12 countries to be the first to participate in the UPR which, operating on a peer-review basis, reviews the fulfilment of the human rights obligations of states with the aim of improving the human rights situation on the ground. The UPR also assesses developments and challenges in relation to a state's human rights obligations and identifies areas where technical support and cooperation can be provided by UN agencies in order to assist in the promotion and protection of human rights.[14]

During the dialogue session the South African delegation, in response to questions, acknowledged that xenophobia was a problem.[15] Canada recommended that South Africa follow up on and implement the CERD recommendations that were made in relation to both documented and undocumented migrants. A number of countries raised concerns with the South African delegation on steps being taken to protect migrants, refugees and asylum seekers from Zimbabwe, who were reportedly experiencing increasing violence in South Africa. Other countries highlighted allegations of ill-treatment towards

non-nationals by law-enforcement officials and specific reference was made to xenophobic attacks and the measures being taken to counteract these attacks. In the final UPR recommendations, South Africa was requested to follow up on CERD's recommendations and to ensure that the rights of migrants are respected, particularly by law enforcement officials, and that South Africa's procedures for recognising refugees be improved to prevent abuses.

Despite initiatives to address xenophobia within society, and despite advice and recommendations from the international community, the extent of xenophobia among ordinary South Africans continued to grow.

3.4 The 2008 xenophobic crisis

The scale and rapid rate at which the 2008 disaster unfolded were unexpected. Those in government tasked with the responsibility to respond were caught off guard and were unprepared and ill-equipped. In a flash, South Africa was dealing with a complex disaster involving tens of thousands of non-nationals.[16] The displaced persons were from many countries across the African continent, speaking different languages and having different religious and cultural practices, adding to the complexity of the situation.

The outbreak of violence began in Alexandra township in Gauteng on 11 May 2008. It quickly spread to neighbouring and surrounding townships. South Africans appeared to be organised in groups that swept through townships, chanting anti-foreigner sentiments, chasing the non-nationals out, looting and burning their homes and shops and inflicting violence on those who resisted or could not flee quickly enough. News of the violence spread quickly throughout the country. Within days, non-nationals in Cape Town were reporting that South Africans were singing on the trains in the mornings, warning the foreigners to leave by Friday, 18 May 2008. There were also a number of isolated incidents of xenophobic attacks. The police had a few days to prepare in Cape Town and mobilised relevant government departments and civil society. Despite these efforts, on Thursday evening, 17 May 2008, there was an incident of xenophobic violence in Du Noon township. During the course of the following day, reports of violent attacks started coming in and by nightfall the reports were so numerous that it was impossible to keep up. By the following day it was estimated that almost 20 000 non-nationals had been displaced in the Cape Town area.

3.5 The SAHRC's response to the xenophobic crisis

Within the chaos, the SAHRC was called upon to respond. The SAHRC is a constitutionally enshrined, independent state institution created to support constitutional democracy and mandated to promote, protect and monitor human rights.[17] In addition, being recognised as South Africa's national human

rights institution (NHRI) at the UN level, it is expected to cooperate with UN agencies. However, the xenophobic violence of 2008 was the SAHRC's first foray into responding to a significant complex disaster.

It became immediately clear that displaced non-nationals demonstrated high levels of trust in, and expectations of, the SAHRC. Many were suspicious and scared of the police and government officials. Without any preparation or training, the SAHRC responded by being visible on the ground, acutely aware that it is the primary responsibility of the state to provide humanitarian assistance. While the disaster unfolded rapidly throughout the country, the commission had to determine, within its limited resources, its role. It drew upon whatever guidance was available, which amounted to one paper that had been delivered at an international conference on the response by the NHRIs to the 2004 tsunami in South East Asia.

The SAHRC set about interacting with various government officials, international agencies and civil society, pointing out and emphasising the constitutional obligations to promote and protect the human rights of non-nationals. The SAHRC used its independent status to bring different parties together to discuss and facilitate outcomes to the crisis that were supportive of human rights. It also conducted monitoring and human rights awareness training in the various safety sites where displaced non-nationals were being accommodated, developed reports with recommendations on the conditions in the safety sites and provided these to relevant government officials. Most importantly, time was spent facilitating interaction between safety site officials and non-national leaders in order to enhance communication and access to information for displaced persons.

Involvement in the crisis demonstrated how the right to security is inherently connected to the enjoyment of many other fundamental rights and freedoms. The violation of the right to security impacts profoundly on a person's civil and political rights, as well as on economic and social rights. In its most extreme form, the violation of the right to security can result in death. This was vividly portrayed by the horrific picture of a Mozambican national, Ernesto Nhamuave, who was burnt alive by a mob in Ramaphosa informal settlement; this picture was splashed across the front pages of many newspapers in South Africa and abroad (*The Times*, 2008).

3.6 The impact on economic and social rights

The mass displacement of non-nationals resulted in the denial of the most basic economic and social rights enshrined in the South African Constitution, such as the right of access to housing, healthcare, food, water and education.[18] In an instant, non-nationals lost their homes and possessions and were exposed to the bitterly cold winter elements with no access to food or water. The government

response took time to kick in and victims were dependent on the goodwill of ordinary citizens, civil society organisations, churches and mosques. Many were left with only the clothes they were wearing the morning they had left their homes for work or the night they were driven from their homes by marauding mobs of youths who systematically moved through the country's townships and chased the 'foreigners' out. In panic, those with cars bundled their families and few possessions into their vehicles, placing their lives at risk as they drove through streets filled with South Africans chasing them out and banging their vehicles. Under police escort and still coming under attack, others were bused out of townships. In the chaos, the bus drivers were not always certain where they were taking their passengers, driving from one 'allocated' venue to the next during the night, only to be turned away as the halls were already full.

Arriving at police stations, barren halls and empty camp sites, the process of waiting and not knowing, amidst chaos, began. Confusion and disarray set in, with bouts of pandemonium due to rumours of further attacks. Government officials, being South Africans themselves, were perceived as potential attackers rather than those responsible for attending to basic needs and safety. Levels of fear ran high and distrust led to conflict between non-nationals and the government officials trying to assist them. In more than one safety site, non-nationals were given tins of food many years past the recommended expiry date. These had been donated by well-intentioned South Africans, who opened their kitchen cupboards and cleared them out. In the chaos there was no time to do the necessary expiry date checks before handing the food out. The non-nationals, paralysed by a fear that, for some, invoked the trauma that caused them to flee their countries of origin, were convinced that this was yet another strategy by South Africans to kill them.

For some, dispossessed of everything and receiving only food, hunger strikes became a means to express their dissatisfaction with the situation in which they found themselves. In at least two instances, the SAHRC found itself facilitating the end to hunger strikes. At the Soetwater site, situated at a municipal campsite on a beach close to Cape Point, the Somalis commenced a hunger strike almost immediately. No one, not even women and children, was spared. Food was snatched out of children's hands and the parents rebuked, leading to rising tensions within the group, bordering on violence. This, in turn, alerted the attention of police officials, whose presence simply increased tensions rather than diffused the situation, due to the severe distrust of the police. At one point, a Somali in distress jumped into his motor vehicle, revved the engine, put his foot on the accelerator and drove towards crowds of people, slamming on brakes just in time; then he reversed and repeated the exercise. SAHRC officials were warned by other Somalis to leave as their safety and vehicles were in danger. However, after hours of facilitation and imparting knowledge to the Somali leaders about

their situation and the official processes to be recognised as refugees, the SAHRC was able to move the leaders towards taking the decision themselves to end the hunger strike. The male leaders conducted a simple ceremony amidst the sand dunes, with the winter winds howling in the background, where they were able to explain their reasons for ending the hunger strike and impart some of the information they had received, without losing face, and thereby restore some of their dignity.

The most basic services such as toilets and showers took time to organise. There were constant concerns with their levels of cleanliness and the location of toilets within safety sites. For women, there were particular issues such as feeling too insecure and scared to venture out of their tents in the middle of the night to use the toilets. Some women developed painful urinary tract infections as a result of not going to the toilet regularly or the lack of access to private sanitation facilities.

In some of these halls and safety sites, pregnant women gave birth to their babies. The disempowerment of fathers, being unable to provide in any way for their wives at such a significant moment in their lives, was evident in their faces. There were often no nappies and the provision of milk formula remained a constant challenge.

Children of school-going age were unable to attend classes, too fearful to venture out of their safety sites. Many recounted experiences of how, prior to the violence, they were shunned and excluded at their schools by their South African peers, taunted on the trains by passengers as they travelled to school and made to feel unwelcome at every turn. Many had desperately tried to fit in, learning to speak the local languages such as Afrikaans and isiXhosa, but to no avail. However, they tolerated these abuses due to their overwhelming desire to receive an education.

Gay non-nationals huddled together in safety sites, afraid that their sexual orientation might be discovered and evoke homophobic discrimination from other displaced non-nationals in the sites. Gay and lesbian organisations on the outside were unsure how they could assist until the connections were quietly made through the SAHRC and civil society groups.

3.7 The impact on civil and political rights

The denial of rights was not limited to economic and social rights. Civil and political rights were also denied to the victims of the xenophobic violence. The right to privacy was taken in a flash, with hundreds of people being crammed into halls and hastily erected tents, forced to sleep among strangers.[19] As clothing was delivered by relief agencies, there were few places to change in private. Families had no privacy to discuss their situations and intimate disagreements became public.

The right of freedom of movement was absent because of the fear of venturing outside of the places of safety.[20] The police were unable, due to the sheer scale of the violence, to guarantee non-nationals their safety in the initial days after the outbreak of the violence. Without freedom of movement, victims were unable to report for work, set up their small pavement stalls, guard cars for tips or sell goods at traffic lights. While there are many accounts of South African employers taking non-national workers into their homes and providing them and their families with a place of refuge, there were others who were less caring and tolerant, simply dismissing these workers without any due process in terms of South African labour laws. The constitutional guarantees of fair labour practices, which take time and resources to access, were distant and inaccessible.[21] Having lost all their possessions, non-nationals were further denied the opportunity to work or seek any means to earn an income in order to survive. As soon as they could return to their communities, survival dictated that alternative employment be secured.

In the chaos, women and children were placed at particular risk. For example, at the Youngsfield Military Camp in Cape Town, it was brought to the attention of the SAHRC that motor vehicles would arrive and pick up women and children, who were then driven away. Clearly, some kind of work arrangement was being made. Concerned about the possible risk of trafficking in persons, military and campsite officials were briefed by the SAHRC on these dangers and the need to implement adequate entrance and access-control systems.

For many non-nationals, the displacement resulted in all their worldly belongings being stolen. While there were reports of some communities actively going out and retrieving and returning goods that had been removed from non-nationals' homes, most of the non-nationals returned to their shacks to discover that they had been vandalised or gutted and their possessions removed. For many, they had already had to flee traumatic and violent situations in their own countries, escaping to South Africa because their lives were at risk. Now, having begun to rebuild their lives, all that had been achieved was destroyed.

Such multi-layered removal and denial of rights has a significant impact on the right to dignity.[22] In the chaos of the crisis, those involved in alleviating the situation concentrated on attending to basic needs such as the provision of food and clothing to the displaced persons. However, the manner in which this is carried out can be critical to upholding dignity. Too often, opportunities to sustain and demonstrate respect for dignity were unintentionally lost. Despite the poor material conditions in which non-nationals found themselves, their primary concern was the lack of communication with government officials and not knowing what was happening due to a lack of access to information. Few government officials came to the safety sites to answer questions and impart information. Non-nationals were not always included in the daily running of the

places in which they found themselves and some did not even know at what time of the day they would receive their next portion of food.

By failing to provide the non-nationals with information that would alleviate the psychological stress of their situation, officials indirectly failed to protect their right to dignity. The right to dignity can be supported in such a situation by ensuring the right of access to information through effective communication. By constantly communicating relevant information to displaced persons and affording them the right to participate in decisions that affect them, they are empowered and provided with a basis upon which to reconstruct their dignity, and from there, their lives. Having lost everything and all control over basic life decisions, such as whether and when the next meal would arrive, information became the building block upon which to regain security and control of their lives.

While non-nationals were struggling to survive and keep safe, some fleeing the country assisted by their governments, South African public discourse grappled with what was occurring. Rather than confront and speak out against xenophobia, the violence was downplayed and attributed to crime. President Thabo Mbeki came out stating that what was occurring was not xenophobia but rather the work of common criminals.

The police themselves denied that there were many police officers who were xenophobic, despite television footage showing a police officer cheering the crowds on as they attacked non-nationals. In addition, many non-nationals said that when they had approached the police for assistance, they were turned away, crimes against them going unreported, reflecting a culture of impunity for South Africans who perpetrated the crimes.

South Africans who are economically privileged and do not live in poverty-riddled townships were able to shake their heads in disbelief and disassociate themselves from the perpetrators of the xenophobic violence. They failed to appreciate that their business practices of employing cheap, non-national labour and circumventing the labour laws that seek to protect vulnerable workers from exploitation fuelled the growing resentment in the country's townships, where South Africans and non-nationals are competing for survival and scarce resources. Not wanting to recognise how their actions had contributed towards the conflict, many privileged South Africans distanced themselves from the violence, claiming not to be xenophobic. This was somewhat akin to the many white South Africans who claim not to have supported the apartheid state pre-1994.

3.8 Victims of xenophobia have little access to remedies

Access to justice for non-nationals is illusory in South Africa. Recourse through the criminal justice system is denied to those non-nationals who have either

failed, or been unable to, regularise their presence in the country. They are unable to turn to the police for assistance when they are victims of crime as this would place them at risk of being arrested and deported. Also, many non-nationals have complained that the police themselves display xenophobic attitudes and refuse to assist them when they attempt to report crimes.

Access to civil remedies is also denied due to lack of knowledge about the South African legal system and how to access it, and, more immediately, the lack of financial resources to afford a private attorney. Legal Aid South Africa (formerly known as the Legal Aid Board) provides only limited assistance to indigent persons for civil matters. The majority of its resources are directed towards assisting the criminally accused in order to give effect to their constitutional rights to a fair trial.

Even the remedies provided for victims of unfair discrimination, harassment and hate speech in the constitutionally premised PEPUDA are largely inaccessible to and had been unused by non-nationals prior to 2008. The Act aims to provide for civil redress that is accessible, effective and cheap. In 2003, Equality Courts were established in some 220 magistrates' courts throughout the country. However these courts have been underused and some have now been closed down by the Department of Justice and Constitutional Development. The Regulations to PEPUDA, which are necessary to bring the promotional aspects of the Act into effect and popularise the use of these courts, are yet to be passed. Thus most perpetrators of violence and acts of discrimination against non-nationals have operated with impunity due to the lack of access to effective legal remedies.

In addition, hate crimes are not formally recognised within the South African criminal justice system so police statistics do not reflect crimes perpetrated on the basis of xenophobia. Police can therefore state, and politicians relying on police information can confidently claim, that xenophobia is not a problem in South Africa.

3.9 Few perpetrators were held accountable for the xenophobic violence

The right to security becomes meaningless if impunity is tolerated by government and society. Despite the enormity and extent of the violence in 2008, a year later only 137 people had been convicted of crimes (*The Times*, 2009). The SAHRC, concerned that perpetrators of the violence were not being brought to justice, conducted an inquiry, specifically into this issue. Its report, entitled *Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity Arising out of the 2008 Public Violence Against Non-Nationals,* evaluated the responses by various government departments to the violence and made a number of recommendations. The report found that during the xenophobic violence there

was limited respect for the rule of law in informal settlements, exacerbated by poor infrastructure, under-capacitated police and poor political leadership at local level. Citizens feel that they are responsible for resolving the economic and social challenges they face, without the assistance of government, and that this, by extension, includes resolving social conflict in a context of impunity. Resolving this quagmire requires a holistic intervention by all government departments that must be adequately capacitated and resourced, backed by strong leadership at a local level.

3.10 Conclusion

It seems incongruous that a country that has rejected its dark and brutal history of racial discrimination and become a democratic state, founded on the values of human dignity, freedom, non-racialism and non-sexism, can become a place where xenophobia is perpetrated. Even more incongruous is that in this new democratic dispensation, xenophobia is perpetrated against non-nationals from the African continent— sisters and brothers who helped to ensure the downfall of the apartheid regime. However, non-nationals are not the only vulnerable group in South Africa who fail to enjoy the right to security and suffer the accompanying multifold denial of rights due to prejudice-based crimes. In recent years, South Africa has attracted notoriety for the so-called hate crime of 'corrective rape', in which men rape lesbian women to 'cure' them from being lesbian.

Intolerance and prejudice need to be understood and addressed so that the right to security can be enjoyed by everyone. The past still shackles the consciences of many South Africans, lurking and metamorphosing within a culture of violence into new expressions of discrimination. Even youth who did not live during apartheid are likely perpetrators of xenophobia. Dealing with the past is relevant to those who experienced it directly and to the new generation who learn about the past from their parents and families. Not everyone has been able to deal with the past in a manner that creates social cohesion and a human rights culture. Consequently, discrimination in different forms will continue to thrive in South Africa and shackle the consciences of many, denying them and others the constitutional right of freedom.

Prejudice-based crimes continue to occur in South Africa. It is predicted that violence and displacement of non-nationals is likely to happen again.[23] There is a collective responsibility to express intolerance towards prejudice. Political leaders need to lead by example and speak out regularly against xenophobia, and condemn all acts of violence perpetrated against non-nationals on the basis of prejudice. Building a human rights culture in South Africa needs to become a greater focus of the national agenda. There are external factors that will place social cohesion and the realisation of social and economic rights under greater

strain in South Africa, creating a fertile platform for prejudice. Africa remains fraught with political conflict and civil wars in which people become displaced and flee to South Africa for safety. Climate change and environmental disasters will also force people south in search of access to food and water. The current world financial crisis will lead to less aid being sent to Africa, placing further strain on the resources on the continent. Poor communities will bear the impact of these global issues. Thus, the inability of the world to deal effectively with poverty and deepening inequality will fuel social conditions in which discrimination and violence increase. Human security is reinforced by human rights. The right to security is, therefore, intrinsically linked to the development of a strong human rights culture in South Africa, which could be realised by narrowing the inequality gap and improving the socio-economic conditions of those who are poor and vulnerable.

End notes

1 Judith Cohen was the senior manager responsible for coordinating the Western Cape provincial response to the 2008 xenophobic outbreak. The examples used in this chapter are based on her experiences and observations during the 2008 xenophobic crisis in Cape Town.

2 The term non-nationals is used throughout the chapter to refer to persons other than South African citizens. The term 'foreigner' is specifically not used as it has developed many negative connotations, not only in South Africa but also throughout the world.

3 See the South African Constitution, Chapter 2, Bill of Rights, ss 9 and 12, which deal with 'Equality' and the 'Freedom and security of the person'.

4 See Polzer (2010). Forced Migration Studies Programme's fact sheet, *Population Movements in and to South Africa*, which states that 'Based on the FMSP's extrapolations from census data, the overall foreign population is likely to be between 1.6 and 2 million ...'

5 The inefficiency of the Department of Home Affairs in relation to the processing of documents was highlighted in an article by Catherine Rice (2011) in *Eyewitness News*. See also Evans Mukhuthu (2010) in *The Times* and Staff Reporter (2010) in *The Citizen Online*.

6 *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development* CT13/03 and CT12/03 [2004] ZACC 11.

7 In particular, read the submission made by Lawyers for Human Rights to the Minister of Home Affairs on behalf of civil society organisations working on the refugee and asylum seekers' human rights issues in South Africa, entitled, 'The documented experiences of refugees, deportees, and asylum seekers in South Africa: A Zimbabwean case study'.

8 For a timeline of xenophobic attacks see 'Xenophobia timeline', taken from Southern African Migration Project (SAMP). (2008).

9 See ss 2(1)*(d)–(f)* and 47(1) of the Immigration Act, which instruct the Department of Home Affairs to ensure cooperation to deter xenophobia, and provide for internal monitoring controls within the department to prevent, deter and detect xenophobia.

10 It should be noted that while the committee requested in its 'Concluding Observations

and Recommendations' that South Africa report on its progress regarding hate crimes, hate speech, xenophobia and racist behaviour by 15 August 2007, the report, as well as the next periodic report (which was due on 9 January 2010), had not yet been submitted at the time of writing (August 2011).

11 Paragraph 14 of the UN Commitee on the Elimination of Racial Discrimination's (CERD's) (2006) Concluding Observations stated:

> *While acknowledging the provisions of section 16(2) of the Constitution, sections 7 of the Promotion of Equality Act, 8 of the Regulation of Gatherings Act, and 29 of the Films and Publication Act, as well as the ongoing discussions started in 2000 on a bill on the prohibition of hate speech, the Committee is concerned about the frequency of hate crimes and hate speech in the State party and the inefficiency of the measures to prevent such acts (article 4).*
>
> *In the light of its General Recommendation 15 (1993) on organized violence based on ethnic origin, the Committee recommends that the State party ensure the full and adequate implementation of article 4 of the Convention, and that it adopt legislation and other effective measures in order to prevent, combat and punish hate crimes and speech.*

12 Paragraph 21 of the CERD's (2006) Concluding Observations stated:

> *While noting the recent Refugee Backlog Project, the Committee is concerned about the substantial backlog of asylum seekers' applications (article 5*(d) *and* (e)*).*
>
> *In the light of General Recommendation 30 (2004) on discrimination against non-citizens, the Committee encourages the State party to accelerate its measures to reduce the backlog of applications for asylum.*

13 Paragraph 27 of the CERD's (2006) Concluding Observations stated:

> *While acknowledging the 'Roll Back Xenophobia' campaign, the Committee remains concerned with the persistence of xenophobic attitudes in the State party and with negative stereotyping of non-citizens, including by law enforcement officials and in the media, as well as with reports of racist behaviour and prejudices, in particular in schools and farms, and with the inefficiency of the measures to prevent and combat such phenomena (article 7).*
>
> *The Committee recommends that the State party strengthen its existing measures to prevent and combat xenophobia and prejudices which lead to racial discrimination, and provide information on the measures adopted with regard to promoting tolerance, in particular in the field of education and through awareness-raising campaigns, including in the media.*

14 For more information see Resolution 5/1. Available at: http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_5_1.doc.

15 See the UN General Assembly. (3 May 2008). Universal Periodic Review: Report of the Working Group on the Universal Periodic Review, South Africa, which stated:

> *The Department of Home Affairs recognized that xenophobia has become an issue that needed attention. A Counter-Xenophobia Unit has been established with other stakeholders and was mandated by the Immigration Act as amended, which stipulated that in terms of refugees, South Africa needed to promote a human rights-based culture in both Government and civil society in respect of its approach to immigration control. In this regard, the Government has started introducing various training programmes for officials interacting with refugees and migrants.*

16 Among the victims were nationals of Bangladesh, Burundi, the DRC, Kenya, Malawi, Mozambique, Nigeria, Pakistan, Somalia and Zimbabwe. See Monson, T. et al. (2009). *Humanitarian Assistance to Internally Displaced Persons in South Africa: Lessons Learned Following Attacks on Foreign Nationals in May 2008*.
17 See s 184 of the Constitution of the Republic of South Africa Act 108 of 1996.
18 Sections 26, 27 and 29 of the South African Constitution protect, respectively, the right to housing; healthcare, food, water and social security; and education.
19 Section 14 of the South African Constitution guarantees that 'Everyone has the right to privacy'.
20 Section 21(1) of the South African Constitution guarantees that 'Everyone has the right to freedom of movement'.
21 Section 23 of the South African Constitution guarantees that 'Everyone has the right to fair labour practices'.
22 Section 10 of the Constitution guarantees that 'Everyone has inherent dignity and the right to have their dignity respected and protected'.
23 'It is likely that large-scale displacement, whether man- made or caused by natural disaster, will occur in South Africa again. It is therefore crucial that lessons are learned from this experience.' See Monson, T. et al. (2009).

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Chapter 4

Custom and constitutional rights: An impossible dialogue?

Mazibuko K. Jara

4.1 Introduction

This chapter argues that two post-1994 laws on customary law and traditional leadership[1] effectively tilt the balance of power and militate against the full and substantive enjoyment of constitutional rights for rural dwellers in the former homeland areas in South Africa. These laws are the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA) and the Communal Land Rights Act 11 of 2004 (CLRA).[2] This chapter shows that these laws are founded on the same logic, structures and boundaries as apartheid-era tribal authorities. In addition, these laws tilt the balance of power away from constitutionally enshrined democratic citizenship in favour of paternalistic chiefly control by vesting significant developmental, governmental, law-making and judicial powers and roles to traditional leadership institutions, which are not fully democratised. These newly legislated powers and roles go far beyond historically accepted customary roles for traditional leaders. Other provisions of the TLGFA also attack the right to property of entities previously referred to as community authorities, as well as the constitutionally protected freedoms of association and expression. This chapter also argues that the intended transfer of the administration of justice to traditional leaders, as intended by the TLGFA and entrenched in the proposed Traditional Courts Bill 15 of 2008 (TCB), is a further direct attack on a range of constitutional and established rights and principles, including the separation of powers doctrine, the right to a fair hearing, equality, the rights of women, the right to legal representation, the right to appeal, security of tenure and the right to be protected from forced labour and cruel, inhuman or degrading punishment.

This chapter contends that these post-1994 traditional leadership laws are founded on a frozen and distorted interpretation of customary law that was inherited from colonial and apartheid regimes. This version is at variance with pre-colonial customary law and the grounded, organic and evolutionary nature of customary law. In this sense, customary law is a living body of practice that continuously develops in the diverse, lived realities that characterise rural villages in the former homelands. By adopting the colonial and apartheid scheme of customary law, the traditional leadership laws have become a constitutional and customary aberration, which hinders the required dialogue between the

Constitution and customary law in the context of ongoing social, economic and political changes.

In order to illustrate the analysis of these traditional leadership laws and related government measures, this chapter uses evidence from four poverty-stricken villages (Masakhane, Ndlambe, Prudhoe and Rabula) in the Ciskei, a former apartheid homeland (bantustan).[3] By the time of the transition from apartheid to a democracy, tribal authorities had collapsed in these villages. They were replaced by diverse, community-based systems and rules for a range of issues, including local governance, administration of justice, dispute management, development, management of common property and aspects of customary systems. In the four villages, these community-driven developments were also consciously connected to what was seen as a broader and irreversible popular enactment and political process of becoming part of one united and democratic South Africa in which every citizen would be equal and have the same rights as any other. These community-based regimes were subsequently reinforced by post-1994 policy discourse and legislation on local government and development planning, which introduced elected municipal government throughout South Africa. This post-1994 policy and legislative framework also legitimated, entrenched, systematised and codified the content and parameters of democratic citizenship and participatory governance. The roots of this framework are established in section 152 of the Constitution, which defines the objects of local government as, among others, providing 'democratic and accountable government for local communities' and encouraging 'the involvement of communities and community organisations in the matters of local government'.

These case studies show that the post-1994 traditional leadership laws create a tension between elected local government and traditional leadership institutions, which are effectively being entrenched as a fourth tier of government, even though the Constitution does not provide for such. This conclusion is confirmed when one compares the thrust and assumptions of the democratic framework established in the Constitution and local government policy and law against that of the traditional leadership laws.

This chapter argues that the roots of the resurgence of traditional leaders are to be found in the open-ended and ambiguous formulations of the provisions of the Constitution on the recognition of customary law, as well as the status, role and functions of the institution of traditional leadership. The roots of traditional power were not eradicated by the Constitution. Arguably, the Constitution opened the door to ongoing contestation that has been used by traditional leaders to claw back rights.

This chapter starts with a profile of each case study. This is followed by a history of the evolution of tribal governance into the post-apartheid period and

an examination of democratisation of rural local government and its impact. Throughout these discussions, reference is made to the relevant village case study. The conclusion reviews the impact of post-apartheid legislative measures regarding traditional leaders and local government on rural governance, as well as contestations over power, rights and equality and, in particular, control over land, natural resources and local economic development.

4.2 Village case studies

In terms of post-apartheid demarcations, the former Ciskei homeland was dissolved and its territory is now part of the Amathole District Municipality of the Eastern Cape province. Hendricks (2003) shows that about 63 per cent of the population in the Eastern Cape is non-urban and that this is one of the poorest — if not the poorest — provinces in the country. Of the country's 30 poorest magisterial districts, no fewer than 28 are to be found in the Eastern Cape (Hendricks, 2003); poverty is centred in the former homelands of the Ciskei and Transkei. In the Amathole district, black Africans make up 90 per cent of the population and 53 per cent are women. In 2007 the Amathole district had the highest unemployment rate of all districts in the Eastern Cape (PROVIDE Project, 2009). This situation is obviously not static, as people have circulatory migratory patterns between urban and rural areas, but these patterns of poverty, unemployment and migration characterise all four villages in the study.

These case studies, with the exception of Rabula, discuss communal land tenure. Land tenure and administration systems were created and shaped in the apartheid era and have resulted in functional disorganisation and uncertainty. This has acted as a disincentive to investment and is a major constraint on development (Hendricks, 2003). There is no clear policy on communal tenure and free tenure, which co-exist in the case of the Rabula village. These circumstances have led to the current tension between tribal authorities and community-based organisations in rural areas.

4.2.1 Masakhane

The Masakhane area is located in the old Victoria East district of the former Ciskei, about 15 km from the University of Fort Hare. The Masakhane area consists of four villages on former white-owned farms that were taken over by the apartheid homeland governments. The overwhelming majority of the residents of the villages are former farmworkers and/or descendants of farmworkers. The Masakhane villages came together in 2001 to lodge a legal claim for the land that had once belonged to white farmers in the area. They consist of about 250 families spread over about 7 000 ha. They formed the Masakhane Communal Property Association (CPA). To date they have still not received the title deeds to the

land. In terms of ethnic identity, the majority of the Masakhane community are part of the imiNgcangathelo tribe, which is under the leadership of a traditional leader, Chief Tyali. The tribe occupies 22 other more densely populated villages adjacent to the Masakhane farms.

The CPA is currently involved in a long-running legal case about the ownership, use and benefit of bio-prospecting aromatic oils from the indigenous *Pelargonium* species of flowering plant. The case is complicated because Chief Tyali has established the imiNgcangathelo Community Development Trust, which signed a benefit-sharing agreement with Schwabe, a Swedish drug multinational, over cultivation and harvesting of the pelargoniums (ACB, 2010). In terms of the agreement, one of the Masakhane villages has been placed under the jurisdiction of this trust. This was done without the participation, consultation and consent of residents of the village. The agreement is not available for public scrutiny.

4.2.2 Ndlambe

The Ndlambe village is in the Peddie magisterial district of the former Ciskei. At the instigation of the then Ciskei homeland government, the Makinana royal family in Tshabho, about 90 km from the village, appointed one of their sons to be chief of Ndlambe village in 1982 (Mbelekane interview, 2010). This imposition was not accepted by a section of the people of Ndlambe. This division saw ongoing strife and tension in the village, including court cases, violence and deaths (Mbelekane interview, 2010). This worsened during key political moments in the transition from apartheid to democracy in South Africa.

Chief Makinana has created a Mhala Heritage Trust, which many residents believe is a vehicle for accessing resources and economic opportunities (RPM, 2010). There are disputes over community initiatives for development, the revival of the Tyhefu Irrigation Scheme (350 ha adjacent to the perennial Fish River) and an eco-tourism scheme associated with local caves and other heritage sites. The disputes are over who has control of these potentially lucrative natural resources and development initiatives: is it the community farmer associations or is it Chief Makinana personally?

4.2.3 Prudhoe

The village of Prudhoe is also in the Peddie area. The people who live in Prudhoe were labour tenants on farms long before the Ciskei homeland was granted 'independence' from South Africa (Tom interview, 2010). In the early 1980s, the South African Development Trust, an entity established by the apartheid regime to 'hold land in trust for black tribes', bought out the commercial farmers. For a few years, these communities were left on the farms to farm for themselves. The Ciskeian government later moved them to the Prudhoe farm (Tom interview,

2010). This farm was not under the jurisdiction of any tribal authority. The Ciskei government intended to turn Prudhoe into a formal township (Tom interview, 2010). The then Dabi Tribal Authority, under Chief Njokweni, extended its jurisdiction to incorporate these communities (RPM, 2010). This meant that the people of Prudhoe had to follow the decisions of the tribal authority, which included the payment of dues and levies for the rental of housing sites and for the use of land for grazing and cultivation (Tom interview, 2010).

With the advent of democracy in South Africa in 1994, the Prudhoe village sought to reclaim its independent status from Chief Njokweni (RPM, 2010). They used post-apartheid laws to claim rights of 'beneficial occupation' as former labour tenants. The chief's authority was dislodged and replaced by an elected civic committee (Tom interview, 2010). The Prudhoe community also asserted that the Dabi Tribal Authority is largely for people of Mfengu origin, whereas the people of Prudhoe are not of Mfengu origin (Tom interview, 2010). With the passing of new laws, the tribal authority has sought to reassert its authority over Prudhoe (Tom interview, 2010). The community has mobilised a petition against this attempted re-incorporation. Of about 250 households in the village, more than 200 have signed the petition.

4.2.4 Rabula

Rabula is in the Keiskammahoek district of the former Ciskei. In this village, freehold title has a 150-year history: 186 properties were surveyed between 1865 and 1870 (Kingwill, 2008). Not all the land in Rabula was allocated to private owners; significant portions were left open for commonage land (used for grazing), forestry and communal occupation. The history of land occupation in Rabula gave it an ethnically diverse population. These two factors (freehold ownership and ethnic diversity) meant that Rabula was not under a tribal leader for a large period of its 150-year history. This changed with the advent of the Black Authorities Act 68 of 1951 (BAA) (discussed later). With this law in place, the Ciskei homeland government imposed a tribal authority on the village, the majority of whose residents did not live on communal land (Mgunyasi interview, 2010).

In the past in Rabula there were headmen. Since 1990 an elected residents' committee has governed community affairs, including the common property (Mgunyasi interview, 2010). From 2008 there has been a sub-chief from a land-owning family who is linked to a tribal authority (Mati interview, 2010). The jurisdiction of the residents' committee and the sub-chief does not include the function of land allocation on freehold land. It is accepted that freehold land is owned by families and devolves according to family norms (Kingwill, 2008). Some of the private landowners have encroached on the common property (Mgunyasi interview, 2010). In general, the private owners are not excluded

from the common property; yet the communal dwellers are excluded from the private lands. With population growth, housing settlements have taken over larger areas of the common property — the residents' committee allocated these sites (Mgunyasi interview, 2010). The new sub-chief wishes to assert his authority over land allocation (Mati interview, 2010).

Rabula shows a concept of family property and succession that has far more in common with customary principles of property ownership and devolution than with the formal registration system, despite the presence of title deeds (Kingwill, 2008). In other words, freehold tenure has been adapted to accommodate existing customary practices (Kingwill, 2008). Customary principles survive within families, yet the involvement of the residents' committee and the sub-chief in private land administration is excluded (Kingwill, 2008). However, common property is contested between residents living in the communal part and those in the private freehold land. Another point of contestation is over control of local heritage sites, which include a historic mountain on which the Ciskei homeland government built a 'national monument', which is now used for an annual heritage festival organised by an elected committee. The dispute is over whether the sub-chief should lead this process.

4.3 Historical evolution of tribal governance

4.3.1 Apartheid co-option of traditional leaders

The status, role and authority of traditional leaders under apartheid were preserved by the use of communal land tenure in the native reserves to which black people were confined by colonial and apartheid laws (Southall & De Sas Kropiwnicki, 2003). These native reserves later evolved to become homelands. When larger tracts of land were still available before the advent of colonial and apartheid land dispossession, traditional leaders did not have exclusive power in land allocation. They were one level of consultation in a multi-layered system of accountability (Southall & De Sas Kropiwnicki, 2003). However, with the increased population densities in the reserves, the apartheid state needed traditional leaders to play a major role in social control and control over land was central to this.

Under apartheid, traditional leaders were statutorily conferred with governmental powers over Africans in 'black areas', particularly at local government level. In terms of the BAA, those powers and the statutory structures within which they were exercised formed the building blocks of the homeland system.

This co-option of traditional leaders, through a process of conferring statutory powers on them (Claassens, 2008), had significant outcomes. In the first instance, native/black law and custom meant whatever served the state

at the time. A crucial element of co-option was the centralisation of all power within the tribal system in a powerful tribal ruler, thereby minimising and even deleting systemic checks and balances that characterised pre-colonial customary systems and structures. These statutory powers were defined primarily in terms of the instrumental role traditional leaders were to play as a central cog in the countryside within the context of an industrialising society which required cheap labour from the rural reserves (Legassick, 1977).

However, centralising power in this way was relative. The tribal leader was powerful within a tribal zone that was subordinate to the overall system of colonialism and apartheid. This was power that conferred relative sovereignty: a sovereignty that was conferred as it was taken away or circumscribed (McClendon, 2010). The co-option also included turning traditional leaders into agents that controlled movement, collected levies and taxes, and mobilised migrant labour on behalf of the colonial state (Zulu, 2011). These roles built on some cultural practices insofar as there were pre-existing fees and payments based on reciprocal roles and claims between the traditional leader and his subjects.

Another important outcome was fixed tribal boundaries that were shaped by land dispossession and were actively determined by the interests of the colonial and apartheid state. The fixed tribal boundaries saw different ethnic groups mixed together under the rule of a traditional leader approved by the state. This led to some groups of people becoming structural minorities within tribal polities of which they were not necessarily part, either by choice or historically. Limited land due to land dispossession and fixed tribal boundaries also limited indigenous forms of accountability, which had included secession when people were not happy with a particular traditional leader. The co-option of tribal leaders saw several cases of depositions of traditional leaders who did not agree with the aims of the state and their replacement with more pliant chiefs, as well as the appropriation and worsening of pre-existing undemocratic, sexist and repressive elements in the pre-colonial structure, customs and traditions. This appropriation allowed their articulation into the reproduction processes required by the new modern economy (Wolpe, 1972).

Consequently, traditional leaders increasingly subjected their people to colonial and apartheid systems of statutory control — their powers included some basic local government, judicial and social control roles. Ultimately, this devolution of relative power to traditional leaders and the propping up of statutorily recognised tribal structures formed the building blocks of the homeland system. It was on this basis that the notorious BAA located local tribal authorities as the basic nuclei of the homeland system: the Act connected several local tribal authorities into a regional territorial authority; several such territorial authorities then combined to form a self-governing territory, which subsequently became the homelands.

Authors such as Weiner and Levin (1991) and Maloka (1995) regard the chieftaincy as a profoundly undemocratic institution that was granted highly repressive powers by apartheid laws. Like Mamdani (1996), Ntsebeza (2006) regards the role and position of traditional leaders in colonial and postcolonial Africa as decentralised despotism that resist the deepening of democracy in the countryside. Therefore, according to Mamdani (1996), the achievement of democracy in rural areas must start with the dissolution of the traditional leadership system. In the context of apartheid-era legislation in South Africa, Ntsebeza (1999) further problematises the credentials of traditional leaders when he points out how traditional leaders used the powers and authority given to them by the apartheid-era BAA. These powers and authority exacerbated the profoundly undemocratic elements of hereditary governance. In many instances this led to widespread abuse of power and corruption by the traditional leaders. Through this law, traditional leaders became 'the local arm of the central state' (Ntsebeza, 1999: 2) and they used the laws to advance their own interests.

4.3.2 Rural democratic struggles

The roles played by traditional leaders under apartheid led to the erosion of their legitimacy (Southall & De Sas Kropiwnicki, 2003). By the late 1980s and early 1990s the mass mobilisation that characterised most urban areas of South Africa during the 1970s and 1980s had also spread to rural areas. Tribal authorities became the main target. In vast areas of the Ciskei the tribal authority system collapsed and the more democratically formed and controlled civic associations took over. The rural struggles targeted corrupt, abusive and extortionist behaviour by chiefs in the Ciskei and other parts of the country (Ntsebeza, 1999; Claassens, 2001). As a result, the late 1980s and the early 1990s were a period 'of relative "liberalization" in terms of the tribal system' (Claassens, 2001: 38). The tense political transition from apartheid to democracy was a major factor. This transition also saw a reduction of institutional, financial and administrative support from the state, the police and the army to the traditional leaders (Claassens, 2001).

It was in the immediate aftermath of this instability in rural areas of the Ciskei that the ANC took office in the newly established province of the Eastern Cape, which incorporated the Ciskei and Transkei bantustans, as well as a large portion of what were the former white districts of the old Cape Provincial Administration. In its first years, this ANC provincial administration was involved in intense conflicts with traditional leaders in both the former Ciskei and Transkei (Southall & De Sas Kropiwnicki, 2003). Initially, the ANC was biased in favour of the residents' associations, many of which were affiliated with the ANC-aligned South African National Civics' Organisation (SANCO). The ANC government also bypassed the chiefs when it started to implement

new development projects in the rural areas. This coincided with disagreements over fiscal allocations to the provincial House of Traditional Leaders and salaries to be paid to chiefs, all of which led to resentment on the part of the traditional leaders. Without a resolution to these problems, they threatened to deny election campaigners access to rural communities before the first-ever democratic local government elections in 1995 (Southall & De Sas Kropiwnicki, 2003). Ultimately, these battles were settled decisively by the TLGFA and CLRA, laws that were decided at a national level by the ANC government after years of tension between government and traditional leaders. Several authors argue that these laws were passed with minimal consultation with ordinary rural dwellers and a wide array of organised rural formations (for example, Claassens, 2003).

In the 1994–2003 period, the ANC provincial government in the Eastern Cape was determined to exert its power over the countryside by containing the powers and ambitions of the chiefs. According to Maloka (1995), the tensions in the Eastern Cape centred on three issues: securing a place for traditional leaders in local government structures; the establishment of a House of Traditional Leaders; and the retention of headmen. The TLGFA resolved these tensions in favour of positions advanced by traditional leaders.

With the passing of the TLGFA in 2003 and CLRA in 2004, the ANC provincial government turned away from confrontation to significant accommodation with traditional leaders. The provincial government finances the infrastructure, assets, personnel and operations of the provincial and local houses of traditional leaders and local tribal authorities. Salaries have been increased and the local status of chiefs confirmed. These fiscal allocations are only one source of wealth as many traditional leaders are also increasingly seeking commercial deals with the private sector on the basis of economic opportunities and natural resources available in the areas under their jurisdiction. The cases of Ndlambe and Masakhane present evidence of these commercial deals.

4.4 Traditional leadership in the Constitution

South Africa's Constitution of 1996 was negotiated and passed at a time when the ANC provincial government still had a confrontational stance towards traditional leaders. The institution of traditional leadership and associated customary law are given recognition in the 1996 Constitution in sections 211 and 212 (see Boxes 4.1 and 4.2), based on similar provisions in the 1993 Interim Constitution. Sections 211 and 212 may appear ambiguous when it comes to the recognition and role of traditional leaders. In the view of Levin (1994: 47), the provisions that were contained in the 1993 Interim Constitution — and upon which sections 211 and 212 of the 1996 Constitution are based — allowed chiefs to continue with their contested roles in 'land allocation and development issues'. Levin (1994) saw these constitutional provisions as setting the stage for ongoing struggles in rural areas

Box 4.1: Section 211 of the 1996 South African Constitution: Recognition of traditional leaders

1. The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
2. A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
3. The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

Box 4.2: Section 212 of the 1996 South African Constitution: Role of traditional leaders

1. National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
2. To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law —
   (a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and
   (b) national legislation may establish a council of traditional leaders.

and as biased against mass-based initiatives and alternative rural governance systems.

For Levin (1994), these constitutional provisions raised serious questions about the possible success of participatory processes of transformation. Levin (1994: 48) cites a regional leader of the ANC in the Mpumalanga province who believed that traditional leaders should not play political roles or have powers over the allocation of land:

> *The chieftaincy is a long established institution, and, although the roles of the chiefs were changed, and more powers given to them, like over land allocation, the ANC maintains that the chieftaincy should not be done away with. The existing reality is that the chiefs play a political role, and there are chiefs who want to retain political power ... Chiefs should organise traditional functions and not deal with land allocation because it is a political issue.*

An analysis of the TLGFA and evidence from the four village case studies presented in this chapter support Levin's caution.

It is important to stress that when the 1996 Constitution was certified, it was not apparent that later legislative development would open the door to governance roles for traditional leaders. In its judgment to certify the 1996

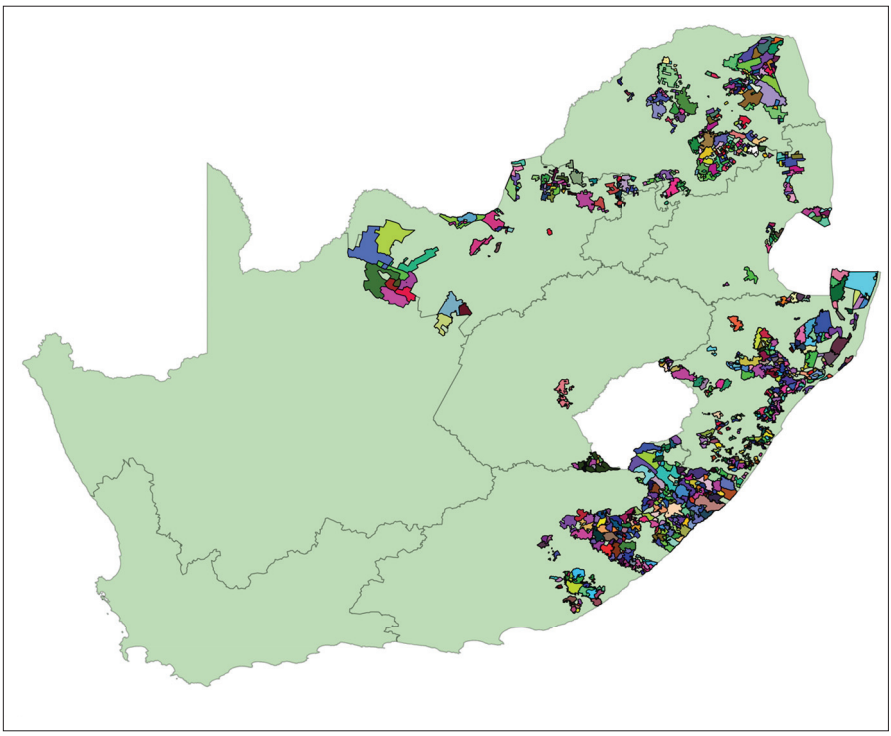

Figure 4.1 Traditional councils in South Africa, 2010. There is a marked similarity between the borders of the tribal authorities and those of the apartheid homelands (see Figure 4.2) suggesting that one system has simply supplanted the other.

Map by Michael O'Donovan using Municipal Demarcation Board data

Constitution, the Constitutional Court held that the 'role' of traditional leaders did not include a governmental role, and, therefore, national legislation providing for the role of traditional leaders may not include governmental powers and functions for traditional leaders. However, this was not enough to even resolve the open-ended ambiguities in the Constitution. The Constitution did not specify what it meant by customary law. Given the well-documented history of the perversion and distortion of customary law, the Constitution's failure to define customary law allowed chiefly narratives to dominate. At the heart of this is the question about the source of traditional leadership authority: is it the people? Is it the Constitution? What should be the relationship between custom and the Constitution? In this regard, the Constitution subjects customary law to its supremacy. But this is still not adequate to address the concerns raised. Further, leaving the definition of the exact roles and functions to be played by traditional leaders to future legislation ducked the hard choices that had to be made: would traditional leaders also play governmental roles?

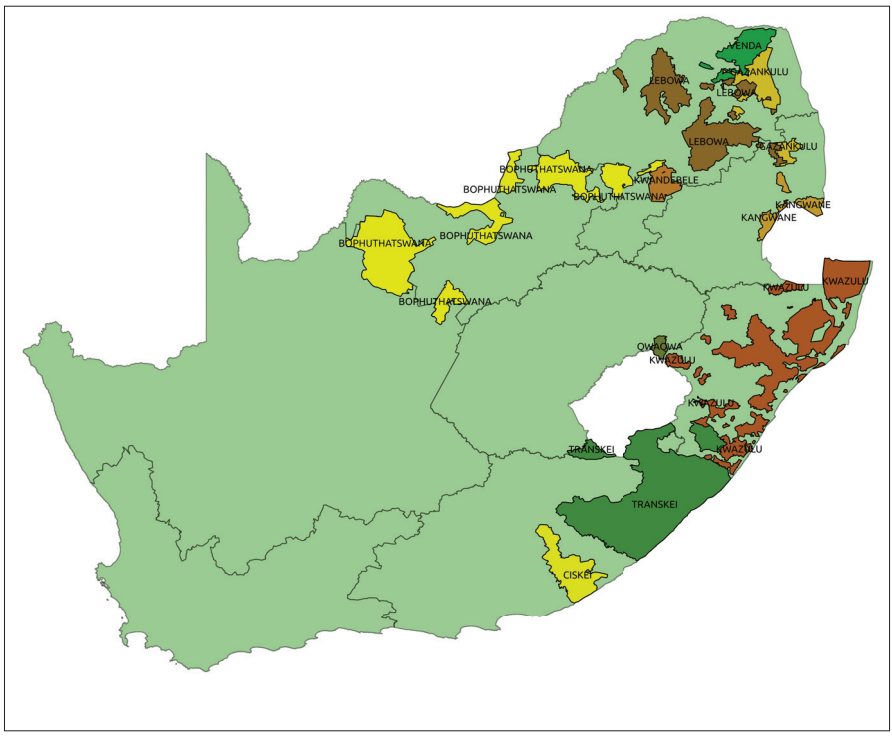

Figure 4.2 Apartheid homelands in South Africa, pre-1994

Map by Michael O'Donovan based on image at http://en.wikipedia.org/wiki/File:Southafricanhomelandsmap.png

Although the Constitutional Court's certification judgment sought to deal with these issues, this judgment does not overcome the problem that the roles and functions of traditional leaders are not defined in the Constitution. These omissions lead to more troubling questions: what are the implications of the recognition of undefined customary law and what does the open-ended formulation on the roles of traditional leaders mean for the citizenship status and rights of rural people? How would constitutional values such as equality, non-discrimination, democracy and freedom of association measure up against predominant codified customary law? Are rural people citizens of a new, united and democratic South Africa or rural subjects? What is the substantive impact of the constitutional recognition of undefined customary law and what does unqualified traditional leadership mean for the exercise of rights, equality, democracy and governance by rural dwellers?

Through the TLGFA, the former homeland boundaries and their authority structures are preserved without democratisation or regard for the will of rural citizens. These same structures are given extensive powers over the lives of rural

people, including the power of taxation (see Box 4.3). The accountability of these authorities to rural people is not adequately provided for and there is no mechanism to enable groups to withdraw from a community that was wrongly constituted under apartheid.

The preservation of tribal boundaries and authorities, established in terms of the BAA, means that South African citizenship and depth of rural democracy are dependent on geography. The TLGFA subjects rural people to a separate form of governance from other South Africans — those living in former homelands are tribal subjects. Effectively, therefore, the TLGFA preserves the apartheid system of two separate South Africas. This is shown graphically in Figures 4.1 and 4.2, which show how the pre-1994 boundaries of homeland territories coincide with those of the newly reconstituted tribal authorities (now called 'traditional councils' under the TLGFA).

In essence, the TLGFA provides the framework for traditional leaders to assume, to quote Mamdani (1996), all 'moments of power' — making laws for rural governance, control over development, control over land and other natural resources, and assuming responsibilities for administering rural areas, including the administration of justice (see Box 4.3).

Box 4.3: Key provisions of the TLGFA

The TLGFA is the central post-apartheid law that sets the framework of boundaries and institutions for rural governance.

Section 20 of the TLGFA describes the powers that may be granted to these institutions as affecting every sphere of socio-economic life in rural areas. These include: land administration; agriculture; administration of justice; safety and security; health; welfare; arts and culture; tourism; registration of births, deaths and customary marriages; and the management of natural resources. The door is left open in the TLGFA for traditional councils to levy taxes. Sections 4(2) and (3) of the TLGFA speak of traditional councils accounting for 'gifts' and 'levies' received by them.

4.5 Impact of the TLGFA in the four villages

With the advent of the TLGFA, each of the villages, except for the Masakhane CPA, has been incorporated under the jurisdiction of a tribal authority. In terms of the TLGFA, the land rights of those on communal land have now become defined exclusively by their tribal allegiance, even if they choose otherwise. This restricts the land rights of Prudhoe and Ndlambe residents, who are actively mobilising against the extension of chiefly jurisdiction over their land. Any battles they fight with Chiefs Njokweni and Makinana, respectively, will now have to be on the basis of ethnic affiliation. Their rights to their homes, fields and access to development opportunities are now dependent on them

remaining loyal and respectful 'tribesmen' and 'tribeswomen'. One of the leaders of the residents' committee in Ndlambe was taken to court for 'disrespecting' Chief Makinana (Mbelekane interview, 2010).[4] It is striking that the residents' committees explained and justified their actions on the basis that, as South African citizens, they are entitled to independent land rights. They do not assert their claims and actions on the basis of their tribal identity and allegiance. They are seeking to benefit from what they see as communal resources that have now been privatised for the chief's exclusive benefit (Mbelekane interview, 2010).

The main problem with traditional councils in Ndlambe is that they are seen as illegitimate. The March 2010 elections for the 40 per cent elected quota of the councils were fundamentally flawed and did not comply with the provincial regulations governing them.[5] The traditional council elections were held under conditions that fell far below acceptable standards for elections. In Ndlambe, the communities did not know of the proclamations by the Premier of the Eastern Cape of their community's traditional community status or the purpose of their traditional council. They also were not aware of the Premier's announcement of traditional elections, nor of his call for the nomination of candidates, as required by the provincial regulations governing traditional council elections. In all these areas, there is no evidence that community meetings were held on traditional council elections that met the 50+1 per cent quorum threshold required in terms of the provincial regulations. These villages rejected the traditional elections through objection letters sent to the Member of the Executive Council (MEC) for Local Government and Traditional Affairs (MEC Sicelo Gqobana, who was in this position at the time). The MEC publicly admitted that government 'failed to properly inform communities about the provincial traditional council elections'. He did this at a press conference held a week after the traditional council elections had taken place (Mxenge, 2010). The people of Ndlambe village wrote to the Ngqushwa Municipality asking for someone to come and explain what these elections were about. The municipal councillor then brought a government representative to the village to explain, but the representative did not answer questions from the community. Instead, he promised to send a Mr Mayekiso, his senior, to address the community. But Mr Mayekiso never came. When the Independent Electoral Commission (IEC) came to run elections, people in the Ndlambe village refused to participate. On 6 March the elections went ahead in the Ndlambe village but only 31 people voted.

The examples presented here suggest that the institution of traditional leadership lacks popular support. Any authority they do have comes from the support they receive from the state. This raises questions about the extent to which the post-1994 democratic state has transformed political and governance relations in the rural areas of the former bantustans beyond colonialism and apartheid.

Another problem in all four village case studies are the conflicting boundaries: in other words, TLGFA boundaries for traditional councils revive the exact tribal boundaries imposed by apartheid legislation while the new local government system has different boundaries. In addition, these conflicting boundaries also have impacts on land-use and development planning at the ward level. How can a municipality drive an effective consultation and planning process if the same ward is divided into two tribal authorities? Which interests will be heeded? In the case of Masakhane, the land owned by the CPA is private land and local governments are reluctant to develop private land (Claassens, 2003).

Another effect of the TLGFA has been to expand the power and prestige of traditional leaders in each of the four villages. With this expanded power and prestige, there have been attempts by the traditional leaders in the cases of Masakhane, Ndlambe and Prudhoe to ensure exclusive control over development opportunities, natural resources and related revenue bases.

Traditional leaders have no role in land allocation and administration in Ndlambe — this is the responsibility of an elected committee of residents. Applicants for land pay R30 to this committee. This money is seen as contributing to the 'residents' fund' used for activities of the committee. People loathed the past system where they had to pay the traditional leader in kind, primarily in bottles of brandy, and regarded the current system as more accountable and transparent. This was informed by the fact that the new system allocates land to new categories of people, including single women and men.

Much land administration in all the villages takes place at the local level, with key roles played by the residents' committee in Ndlambe and Rabula, and the CPA in Masakhane. The key unit of social and political organisation for land administration is the sub-village. Disputes over land or natural resources are resolved at local level first, and it is only when they cannot be resolved there that they are referred to the residents' committee.

The TLGFA and CLRA create opportunities for traditional leaders to assert unprecedented rights over land for grazing, cultivation and housing, as well as natural resources. In the case of Rabula, the sub-chief has not yet secured exclusive control over land. Prudhoe and Masakhane residents are concerned about the encroachment on their land by the traditional leaders under whom they have been put. In Prudhoe there have been conflicts over the role played by the traditional leader in the allocation of sites for housing. In the case of Ndlambe, the disputes show a power battle between the elected residents' committee and the traditional leader over the control of land, an irrigation scheme and local heritage resources. In all these cases, traditional leaders assert that they are given clear powers by the law. In response to this claim, residents' committees point to the constitutional language of rights and democracy, as well as legislative measures that introduced democratic, developmental local government. In all

the case studies, traditional leaders have the edge over ordinary people: they have the support of the law, and they have been able to work the system to their advantage. The disputes also underline significant public confusion about the actual content and status of various government policies and programmes, existing land laws, the powers and status of traditional leaders and the roles of elected rural government.

4.6 Traditional leaders and the democratisation of rural local government

Rural local government has also been affected by the 1996 constitutional framework and new policies of the post-apartheid government (Kepe, 2001). Both the Interim Constitution of 1993 and the final Constitution of 1996 dismantled the homeland system and removed governmental powers given to traditional authorities at national and provincial level. This boosted the prestige of elected residents' associations in each of the four villages. In addition, the Local Government Transition Act 209 of 1993 dismantled the homeland local government system and removed governmental powers given to traditional authorities at local level.

In 1997, the Eastern Cape provincial legislature passed the Regulation of Development in Rural Areas Act, which effectively stripped traditional leaders in the Eastern Cape of their development duties, including the allocation of land (De Sas Kropiwnicki, 2001). This was partly informed by ongoing struggles between residents' associations and headmen in the Ciskei and Transkei (De Sas Kropiwnicki, 2001).

The 1996 Constitution establishes wall-to-wall elected municipalities across South Africa. Before the passing of the Constitution, rural areas in the former homelands were under the traditional leaders and did not have elected local government. In addition to its service delivery, control and regulatory roles, local government has been granted 'development functions' by the Constitution. Section 151(1) of the Constitution states that the local sphere of government consists of municipalities, which must be established in all territories of the Republic. In the new local government system, a municipality is legally defined as comprising not only the councillors and administration, but the local community as well. Among the objectives of local government are 'to provide democratic and accountable government for local communities' and 'to encourage the involvement of communities and community organisations in matters of local government'. Local government must 'structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community and to promote the social and economic development of the community' (s 153).

The Municipal Structures Act 117 of 1998 and the Municipal Systems Act 32 of

2000 consolidated the post-constitutional legal framework for the restructuring of local government. The Structures Act made provision for the participation of traditional leaders in municipal councils, although this was to be on a non-voting basis and was not to exceed 10 per cent of the total membership. The 1998 White Paper on Local Government was built on the premise that African customary systems could be merged with elements of modern democracy. The White Paper appealed to the need for creative institutional arrangements that would combine the 'natural capacities of both traditional and elected local government to advance development of rural areas and communities', thereby opening the door to significant roles for traditional leaders in local rural governance and development (Ministry for Provincial Affairs and Constitutional Development, 1998: 75–79). The White Paper also located this within the concept of 'cooperative governance' in terms of which all spheres of government work and cooperative with one another in a spirit of mutual trust and shared interests and mandates (DPLG, 2000). For their part, traditional leaders regarded the emphasis on democracy as a threat to their powers and status inherited from apartheid (Kepe, 2001). These included land allocation and conflict resolution powers in the communal areas. Chiefs also generated lucrative income derived from the fines imposed in the cases and disputes they handled (Kepe, 2001). These were specifically outlawed in the White Paper.

In terms of the Municipal Systems Act, a municipality 'must develop a culture of municipal governance that complements formal representative government with a system of participatory governance'. There is no similar provision in the TLGFA. The Municipal Systems Act makes it clear that residents have the right to contribute to the municipality's decision-making processes. They also have the right to submit recommendations and complaints to the council and are entitled to prompt responses to these. They have the right to 'regular disclosure of the state of affairs of the municipality, including its finances'. In order to encourage residents to pay promptly for their services, municipalities are required to inform them about the costs of providing the services, the reasons for the payment of the fees and the uses to which the monies raised are put. Residents also have the right to give feedback to the municipality on the quality and level of services offered to them. There were attempts to roll out these provisions in the Eastern Cape, including in all the villages in our case studies. These attempts were met by challenges of limited resources and, sometimes, inefficient elected councillors. It is remarkable that in none of these villages was there opposition from traditional leaders to the roll out of democratic local government structures.

The new local government system also provides for ward committees to be set up in each ward of a municipality to 'enhance participatory democracy.' A ward committee may make representations on any issue affecting a ward to the councillor or through the councillor to the council. It can also exercise any

duty or power delegated to it by the council. A ward committee comprises the ward councillor as the chairperson and up to 10 other people representing a 'diversity of interests in the ward'. Women have to be 'equitably represented' in a ward committee. Since the 2000 local government elections, all four villages in our case studies have had elected ward committees. From March 2010, all the villages took part in elections for traditional councils established in terms of the TLGFA. Field research shows that in each village the traditional council elections violated provincial regulations in terms of quorums for nomination meetings, other nomination procedures, extremely low polls (in all the villages less than 5 per cent of residents voted) and the control of local election machinery by the traditional leader. It is still too early to observe disputes about shared authority between ward committees and traditional councils.

An important element of the new local government framework is the provision for democratic developmental local government to play a role in poverty eradication through local economic development. This constitutes a remarkably progressive framework for advancing socio-economic rights, consolidating citizen's popular participation at the local level and transforming local economies.

This new local government mandate was a break with the colonial and apartheid periods when local government was in the form of concentrated 'administrative, judicial and executive power in a single functionary, the Tribal Authority' (Ntsebeza, 1999: 2). The establishment of the new local government system is part of the constitutional doctrine of the 'separation of powers', and has created a potential basis for democratic control over development, land use planning and control of local resources.

However, this framework is challenged in rural areas given the contradictory thrust of the TLGFA, which seeks to locate traditional leaders as the primary institutions of power in rural areas. Indeed, it is also important to note the general crises affecting the performance of this framework: limited budgets, cost-cutting measures, the lack of capacity in many municipalities, particularly in rural municipalities, and extremely poor implementation of public participation measures. Without adequate resources and capacity, the new democratic local governments have struggled to provide effective services in rural areas. In the initial 1995–1999 transitional period, there was limited support provided to newly elected rural councillors. Unlike urban municipalities, the rural municipalities had a lower tax base, lower levels of development and had to work in geographically dispersed and often inaccessible villages. These problems emboldened traditional leaders to reclaim space and power they had lost to democratised local government. In the case of Ndlambe, the elected ward councillor has been told directly by the tribal authority that the council cannot organise meetings without the authority's permission and that the authority

is now responsible for development (Mbelekane interview, 2010). Mbelekane believes that 'the chief is a stumbling block to development'. In Masakhane and Rabula, the ward councillors are central in development, even though the Rabula sub-chief has attempted to undertake development initiatives. This has not yet resulted in tension between the councillor and the sub-chief.

4.7 Who makes customary law?

The above analysis raises an important question about how customary law should be understood. In other words, which version of customary law applies? Is it the codified version with all the colonial and apartheid distortions? Is it chiefs or government who make and define customary law? What is the role of courts? What about the directly affected people? What is the relevance and reality of actual practices on the ground? What space is there for an ongoing dialogue and localised experiments? What parameters will determine the process of evolution of customary law?

As Gasa (2011) argues, we should not forget that much of the 'official' (but distorted) customary law abrogates human rights and equality:

> *The restoration of those marginalised cultural practices forms part of South Africa's nation-building project and needs to be alive to the contradictions that have always existed within these cultures and communities … legislative attempts to address this complex area, falls into the same traps of colonial and apartheid sensibilities, boundary formation and definitions. Many debates, literature and policy processes that claim to restore the dignity of African cultural and customary systems and leadership fall into essentialist representation, treating these dynamic processes as static.* (Gasa, 2011: 23–24)

Gasa provides useful parameters under which customary law could develop and evolve in line with the Constitution as a fully established system of law and institutions in its own right. This formulation also allows bottom-up experiments and post-1994 innovations on the ground.

A Community Agency for Social Enquiry (CASE) research survey showed that rural women have relied simultaneously on the idiom of custom and the discourse of the Constitution to undertake local contestations, which have led to single women being granted land in their own name (Budlender et al, 2011). Indeed, there is evidence of anti-constitutional practices too. In this regard, recent Constitutional Court judgments have interpreted customary law in ways that have begun to undo its colonial and apartheid distortions. The Court has promoted the principle of constantly changing 'living law' that develops as society changes. These judgments also argue that customary law derives its authority from the Constitution and must be interpreted in terms of the Bill of Rights.

Key judgments include *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC), *Bhe and Others v Magistrate, Khayelitsha, and Others* 2005 (1) BCLR 1 (CC) dealing with male primogeniture and inheritance, and *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC). In *Shilubana* (para 45) the Court said:

> *As has been repeatedly emphasised by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and* the free development by communities of their own laws *to meet the needs of a rapidly changing society must be respected and facilitated.* [emphasis added]

The Court's jurisprudence on customary law enables the embodying and deepening of democratic principles in customary law where '*Inkosi yinkosi ngabantu*'[6] becomes a popular provenance of the legitimacy of traditional leaders. In this logic, customary law does not become static. Instead, it becomes what it always was: multi-layered, adaptable, living, organic and contestable.

4.8 Democracy and tradition: the permanence of co-option

Kepe (2001) shows that the constitutional recognition of both modern democratic principles and traditional authorities in rural areas has led to intense conflict. This is borne out by evidence from all the case studies. Ntsebeza (1999) regards the constitutional foundation of modern democratic principles as being fundamentally contradicted by the recognition of unelected traditional leaders in the same Constitution. According to Ntsebeza (1999), while the Constitution is based on democratic principles, including the election of government at national, provincial and local levels, the same Constitution gives significant recognition to, and confers significant governance roles on, unelected traditional authorities. Ntsebeza (1999) warned that the Constitution opened up far-reaching space for traditional leaders to later claim and secure significant control over land allocation and rural local government.

Weiner and Levin (1991), Maloka (1995) and Ntsebeza (1999) also bemoaned the patriarchal nature of chieftaincy and cautioned about how this would affect land allocation decisions that negatively affect women. This was a common concern in all four case studies. A submission to parliament by the Rural People's Movement (RPM) cites cases of violations of women's rights under traditional governance in the cases of Ndlambe and Prudhoe (RPM, 2010).

In agreement with Ntsebeza, Levin (1994: 48) quotes an ANC leader in the Mpumalanga province: 'People accept the chiefs, but they are seen as largely irrelevant and not given much allegiance. This is because the people are now

too developed to accept hereditary leadership.' A rural activist, who was leading a civic association in the same Mpumalanga province, told Levin that 'the institution is being eroded by the developing environment. If the ANC did not have this [accommodationist] strategy, it is possible that the chieftaincy would have been eroded by now' (Levin, 1994: 47).

Mamdani (1996) has shown how the daily lives of rural dwellers are patterned around extra-economic forms of coercion through traditional leaders. Levin (1994) prefers a model of rural democracy and development based on participation and territoriality. Levin (1994) sees participation as both a means and an end through which communities are in control of processes of governance. Important here is the need for bottom-up processes without the imposition of processes from above (Levin, 1994). The Ndlambe case study speaks to this aspect. Levin (1994) also recognises that this idealised participation is mediated by social differences of class, gender and generation. When it comes to territoriality, Levin (1994) refers to notions of locality, as well as social and power relations that occur within a place and which shape rural communities and their interaction with the environment, as can be seen in the Masakhane case study. In all four case studies, the effect of the TLGFA has been to slow down the democratisation of rural local government. With the TLGFA, traditional leaders have begun to circumscribe the power and agency of the majority of rural dwellers, whose decision-making is key to effective systems, rules and mechanisms for the management of common property. This analysis strongly suggests that the post-1994 traditional leadership laws have made permanent and legitimated the co-option and perversion of customary law and traditional institutions.

Other authors have taken a less critical approach to traditional leaders: for example, Claassens (2001) recognises instances of clear advantages that pre-existing customary systems have over new local government structures. These include familiarity, predictability and a measure of stability in rural areas where there is minimal presence of the state in the form of the police, the courts and other state services. However, Claassens (2001) recognises that the very absence of the state allows these systems to operate with differing degrees of support and legitimacy. Claassens (2001: 84) describes this as a 'delicate and unstable equilibrium between the legitimacy of the institution of traditional leadership and its coercive underpinnings'. In the case of the selected case studies, there is a stronger inclination for the expansion of democratic local government with traditional leaders playing lesser roles in development and control over land.

Without falling into the trap of a sweeping generalisation, it is important to acknowledge that there are some traditional leaders who exercise their power through participatory processes and, as a result, are respected and legitimised by their followers (Claassens, 2001). Communities should have

the space to determine their own systems of rural governance appropriate to their circumstances (Claassens, 2001). Such a process will take time as people work out their interests and power balances, and how to accommodate these. However, for such a dynamic process to take root, it is important that the law does not put up significant barriers (Claassens, 2001). The TLGFA is one such significant barrier as it has tilted the balance towards 'coercion' and away from voluntary participation.

The dominant logic of the post-apartheid laws is confirmed by common phrases and repeated words in them, that is, the '*recognition* and *promotion*' of the '*institution* of traditional leadership'. In other words, these laws are about '*institutionalising* traditional leadership'. It is revealing to underline what discourse is absent from these laws. The discourse does not include phrases that became hegemonic in the 1980s era of democratic rural struggles, such as 'rural democratisation', 'democratic transformation of rural social relations', 'empowering communities', 'self-agency, self-empowerment of rural communities', 'sustained mass participatory organising/social mobilisation of rural communities' and 'people-driven rural development'.

The developmental, land administration and governance roles that traditional leaders now have in terms of the law have entrenched features similar to those provided for by apartheid legislation. These roles do not sit well with the constitutional doctrine of the separation of powers. The control of land by the traditional leader undermines other alternatives in land administration that had begun to develop in each of the four case studies following the late 1980s/early 1990s collapse of apartheid tribal authorities.

Rising tensions between traditional leaders and democratic systems in rural areas militate against conditions that are conducive for the successful and sustainable, equitable and fair use management of land and other common property resources. There are already 'gate-keeping' roles played by traditional leaders in ways that undermine collective interests. In the case of Ndlambe, Chief Makinana's battle with small farmers over the control of the irrigation scheme and over local heritage resources is a typical example. The unfolding contestations are likely to continue and deepen beyond the four villages discussed here. The outcomes of these contestations will affect rural governance and the power equation between rural dwellers and traditional leaders. These contestations imply ongoing rural instability that may negatively affect how land, natural resources and development pan out in communal rural areas across South Africa. For the four villages, this may delay the onset of the require stability to ensure the sustainable management of common property resources and sustainable development.

Maloka (1995) also pointed to the potential dangers of tribal consciousness and ethnic division that are associated with traditional leadership. He saw

these as tools that could be open to anti-democratic populist mobilisation by disaffected chiefs. This dynamic is present in the tensions between the Prudhoe community and Chief Njokweni. This is a complicated matter in the ethnically diverse Rabula, with anecdotal evidence of differentiations among subsections of the residents — between those who endorse the return of tribal leaders and those who do not necessarily accept this return.

4.9 Conclusion

The retreat to 'tradition' is a step backwards, which moves away from addressing crises of democracy and development in rural areas. It reinforces narratives that stunt the deepening of democracy and the democratic evolution of customary systems in ways that are consistent with the supremacy of the Constitution. This narrative ignores the reality that rural areas are not frozen and fossilised political, social and economic spaces under unchanging customs and cultures, and the unchallengeable sway of unelected, traditional elites. This underlines the need for critical, committed and engaged research and scholarship that can surface the diversity of popular narratives from rural dwellers themselves. South Africa also needs legal and human rights practitioners who do as rural people do, that is, they take from both the idiom of custom and the discourse of the Constitution to give local meaning to the interplay between rights, custom and democracy. Policy-makers must learn before it is too late that the imposition of tradition from above is leading to low-intensity rural conflict.

End notes

1 The terms 'traditional authorities' and 'traditional leaders' are all-encompassing terms used to refer to 'chiefs' of various ranks. In this chapter the term 'traditional leaders' refers to people and not structures. The term tribal authorities refers to structures. Tribal authorities were the formal structures set up under the apartheid-era Black Authorities Act 68 of 1951 and comprised chiefs and headmen, appointed councillors and a tribal secretary. The Act set up the framework for the establishment of homelands.

2 As discussed later, in May 2010 the Constitutional Court struck down the CLRA as unconstitutional in its entirety. The discussion will demonstrate that despite this Court ruling, there is evidence of increasing chiefly control over the ownership, use, sale and administration of communal land in the former homeland areas. Arguably, this trend is reinforced by the cumulative impact of the TLGFA, the symbolic impact of the enactment of the CLRA and other governmental measures that reinforce chiefly power at the expense of the deepening of popular democracy at the roots of rural society.

3 Homelands were created by apartheid legislation. In terms of the homeland scheme, each black person in South Africa was assigned their homeland on the basis of their ethnicity and language. Black people could not be citizens of South Africa itself but were citizens of the homelands. The homelands occupied only 13% of the land mass of the country.

4 This also emerged during a residents' meeting held in Ndlambe in July 2010.
5 Section 3(2)*(c)* of the TLGFA stipulates that 60% of a traditional council must comprise traditional leaders and community members selected by the chief, while the remaining 40% must comprise traditional community members that were democratically elected by the traditional community. The relevant provinces have each promulgated regulations which stipulate the processes by which these democratic elections are to be run.
6 This is translated as 'a chief is a chief by the people', which means that a chief's power is derived from the people.

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Chapter 5

Access to social security: The case of mining diseases in South Africa

Meryl du Plessis

5.1 Introduction

The South African mining industry has a poor health and safety record. Between 1900 and 1993, 69 000 people died in mining accidents and over a million were seriously injured. In the 1990s nearly two miners died underground every working day. It is difficult to assess the incidence of occupational diseases, because former mineworkers return to the remote rural areas from which they come (Eweje, 2005: 165) and, in some instances, it may take a while for such diseases to manifest. Mineworker deaths rose by 25 per cent in the first quarter of 2011 compared to 2010 (Reuters, 2011), with the statistics focused on accidents and not diseases. Inadequate information means that we do not know how many miners or ex-miners are dying from diseases contracted while they worked on the mines. It is recognised that the labour-intensive nature of the industry, the depth of mines, low literacy rates and a lack of capacity in the mining inspectorate contribute to the problem (Eweje, 2005: 170).

This chapter focuses on miners who have contracted, or are in the process of contracting, occupational diseases, and on their dependants. It examines some of the gaps in the occupational health and safety framework for mines and how these impact on affected persons' constitutionally enshrined right to access to social security. Particular attention is paid to the role of important stakeholders and the small, yet important, contribution courts can make. The case of *Mankayi v AngloGold Ashanti Ltd*[1] is discussed extensively, because it highlights some of the issues that may arise in this context, particularly the role of rights litigation in providing principled, sustained support to vulnerable workers more generally. As the personal accounts related in research done by the Health Systems Trust (Roberts, 2009) show, there may be thousands of Mr Mankayis out there.

Mr Thembekile Mankayi worked in a gold mine from 1979 to 1995. While performing that labour, he inhaled dust and gases which caused him to contract tuberculosis and chronic obstructive airways disease. His illness prevented him from working again and he died, unemployed, on 25 February 2011 (South African Press Association, 2011). The compensation awarded to him in 2004 — in terms of the Occupational Diseases in Mines and Works Act 78 of 1973 (ODMWA) — to assist him in supporting himself and his dependants was a lump sum of R16 320. The Constitutional Court (hereafter the Court) described

the compensation awarded to Mr Mankayi as 'seemingly paltry and inadequate' (*Mankayi v AngloGold Ashanti Ltd*). Many people would agree, which is why the Court's decision that Mr Mankayi should be allowed to claim damages from AngloGold Ashanti appears to be very good news. The National Union of Mineworkers (NUM) expressed 'excitement' at the judgment, with General-Secretary Frans Baleki stating that '[t]he outcome of the case is indeed a huge achievement for ex-mine workers and mine workers in general' (SAPA, 2011).[2]

However, a closer reading of the judgment suggests that unqualified celebrations are premature, if not altogether misguided. First, the judgment merely allows Mr Mankayi and, by implication other similarly situated miners, a claim; it is by no means certain that such a claim will succeed. Second, the time and money necessary to succeed in such a claim raise questions about the advisability of relying on a remedy secured through litigation as the *principal* measure to protect vulnerable workers. In social security terms, a properly planned, financed and administered statutory scheme seems to hold more advantages for miners and the sustainability of the mining industry, provided its design favours equity and it is determined through a participative policy-making process. Third, if we adopt a more nuanced understanding of success in rights litigation, it is possible that even a lost court battle can provide much-needed political momentum in creating awareness and contributing to the mobilisation necessary to achieve real social change (Hunt, 1990). However, the case was not preceded or accompanied by grassroots mobilisation and one is left wondering whether the manner in which the case was argued, and in which the Court considered the issues, would have been more sensitive to social realities had Mr Mankayi's concerns been framed within the context of better social security for all miners and their dependants.

While recognising that the *Mankayi v AngloGold Ashanti Ltd* case came before the Court as an exception to a damages claim and that the executive and the legislature are the primary policy-makers, the reasoning adopted by the Court in this case is impermissibly narrow and is not articulated within a rights-based framework, as required by the Constitution. The explanation of why mineworkers should be able to sue their former employers when they contract occupational diseases cannot be only formalist — normative, substantive reasons need to be provided in order to advance the social security interests of vulnerable workers in an economically sustainable manner. Thus, while the Court cannot, on its own, create a statutory scheme that would provide relief to sick workers and their dependants, the interpretation of rights is not the concern of lawyers only. By setting out what rights require in the context of miners who contract lung diseases while contributing to our economy, the Court can help to set the parameters for the societal conversation about government's and employers' obligations in ensuring social protection for miners and other vulnerable

workers. The Court, therefore, has a limited but integral role to play in setting out the rights framework within which policy formulation has to occur.

5.2 The right to access social security and compensation for mining diseases

The Court was emphatic in its assertion (*Mankayi v AngloGold Ashanti Ltd*, para 13) that the issue of whether Mr Mankayi should be able to claim compensation from AngloGold for his occupational disease implicates the right to bodily integrity. This right seeks to protect everyone from all forms of violence from public or private sources. While it is clear that Mr Mankayi's physical security is implicated, the characterisation of the dispute as one implicating the right to bodily integrity only, is disappointingly anaemic. Moreover, it is not consistent with the Court's own reasoning, government's policies in respect of occupational health and safety or international law.

The Court (para 81) stated: 'Employees who suffer occupational diseases are not compensated in respect of the disease itself, but for temporary disablement, temporary partial disablement and permanent disablement.' Put differently, the focus is not so much on the disease as it is on the resultant inability to earn a living. The Court's decision as to whether Mr Mankayi could sue AngloGold would, therefore, first and foremost, implicate his right to access social security, as enshrined in s 27 of the Constitution. Cheadle et al (2005: 501) write the following about the content of this right:

> *The term 'social security' is a broad term which may be used to include both social insurance, directly contributed benefits of workers and their families, and social assistance, which includes needs-based assistance from public funds for the most vulnerable who have indirectly contributed as members of society.*

Section 27 of the Constitution guarantees everyone's right to access social security, which includes social insurance schemes that cover workers against the risk of occupational diseases. It further obligates the state to take reasonable measures, within its available resources, to achieve the progressive realisation of the right. The Constitution thus foresees the development of a social safety net for everyone in a financially viable manner (Olivier, 2003: 58).

Workers' compensation is a form of social insurance, although it is usually the employer who pays the relevant assessments.[3] Workers' compensation schemes, thus, have to comply with both international and domestic law on social security.

5.2.1 International law

International human rights instruments recognise the social security dimensions

of occupational injuries and disease, both explicitly and implicitly. Article 25(1) of the Universal Declaration of Human Rights states:

> *Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family … and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*

Article 9 of the International Covenant on Economic, Social and Cultural Rights of 1996 (ICESCR) provides: 'The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.' The International Labour Organisation's (ILO) Convention 102 on Minimum Standards of Social Security, 1952, includes provisions relating to occupational accidents and occupational diseases. Although South Africa has not ratified the ICESCR or ILO Convention 102, every court, tribunal or forum is, nevertheless, obligated by s 39(1)*(b)* of the Constitution to consider international law when interpreting the Bill of Rights.

5.2.2 Domestic policy

Domestic policy reports and documents in the area of occupational health and safety have interpreted workers' compensation as implicating the right to access social security. The Taylor Committee of Enquiry into a Comprehensive Social Security System for South Africa (hereinafter 'the Taylor Committee') stated the following in its report (2002: 43):

> *Clearly evident from the wording of section 27(1)*(c)*, is that the intention* [is] *access to social security in the comprehensive sense, and the specific issue of social assistance. The former would also incorporate the social insurance system* [for example, contribution-based systems such as Compensation for Occupational Injuries and Diseases Act (130 of 1993) (COIDA), the Road Accident Fund (RAF) and Unemployment Insurance Fund (UIF), as well as occupational retirement schemes] *… Adopting a purposive approach towards the interpretation of fundamental rights, the underlying rationale and purpose of the right to access to social security and to social assistance is to provide to everyone an adequate standard of living.*

Similarly, a Draft National Occupational Health and Safety Policy (2003: 34) accepted that the workers' compensation system implicates the right to access social security. Although this was only a draft policy, a final policy has not been forthcoming, despite South Africa acceding to the ILO's Occupational Safety and Health Convention 155 of 1981 in February 2003, which requires the development and implementation of a national occupational health and safety

policy. Government's failure to meet this international law obligation will be discussed in the section on what its social security obligations are in terms of the Constitution.

5.3 The significance of the right to social security

Why does the characterisation of Mr Mankayi's case as a social security issue matter? Does it make a difference to those affected by mining diseases? One's answers to these questions rest on one's conception of rights in general and on one's interpretation of the social security right in the Constitution. Rights can have various meanings, one of which is 'the formally announced legal rules that concern relationships among individuals, groups and the official state' (Minow, 1987: 1867). They may have a second meaning that is neither limited to, nor synonymous with, those rules included in the first definition. In this second sense, 'rights represent articulations — public or private, formal or informal — of claims that people use to persuade others (and themselves) about how they should be treated and about what they should be granted.' In this way, rights 'construct relationships — of power, responsibility, trust, and obligation' (Nedelsky, 2008: 114). If this reality becomes the focus of the concept of rights, we can ask what relationships we want to foster, what the values at stake in that fostering are, and how different concepts and institutions will best contribute to that fostering. On this interpretation, rights are aspirational, but also become tools in political processes and are not relegated only to the formal legal sphere. The practicalities of progressive realisation are best determined through these processes, with courts performing a gatekeeping function.

Courts, therefore, have to be able to locate the issues before them in their social and economic context. By insisting that he should be able to claim from AngloGold, Mr Mankayi was asserting that his treatment in relation to the development of and compensation for his occupational disease was not satisfactory. If one were to ask him why his treatment was unacceptable, he would likely have mentioned his broken body, but he would also have mentioned his inability to provide for himself and his dependants, which is at the heart of the right to access social security. By ignoring the social security aspects of Mr Mankayi's claim, the Court failed to address the relationships of power and responsibility in the mining sector and in society in general.

5.4 Social security in respect of mining diseases: what it requires

Compensation for occupational injuries and diseases has to be seen against the South African mining industry's poor health and safety record, discussed earlier. This becomes apparent if one locates the analysis in social life-cycle theory,

which recognises that a social issue may be addressed in three phases (Ejewe, 2005: 165). In the first period the issue does not receive much consideration. The second phase sees increased awareness and the development of expectations for actions. The final period sees new standards for dealing with the issue becoming ingrained in the normal functioning of institutions. It seems that occupational health and safety issues in South Africa are in the second period and it is in this period (and the third phase) that rights discourse may contribute to progress. What does the right to access social security demand?

The right to access social security is enforceable, because s 2 of the Constitution states that all the obligations imposed by it must be fulfilled, while s 7(2) requires the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.

The Constitution states that courts, tribunals and forums must consider international law when interpreting the Bill of Rights (s 39(1)*(b)*). 'International law' in this context includes binding and non-binding law (*S v Makwanyane* 1995),[4] although the weight to be attached to any particular principle or rule of international law will vary if it does not bind South Africa (*Government of the RSA v Grootboom* 2000).[5] For this reason it may be useful to measure our occupational health and safety policy and systems against international benchmarks.

5.4.1 Reasonable legislative and other measures

The reasonableness, or otherwise, of a particular state programme or scheme has to be determined on a case by case basis (*Government of the RSA v Grootboom* 2000, para 92). Although considerable academic debate has raged over the desirability of such an open-ended standard against which to test government's performance of its s 27 obligations, it is clear that some general principles can be distilled from the Constitutional Court's jurisprudence. For present purposes, it bears noting that a scheme has to be reasonable in both its inception and its implementation (*Government of the RSA v Grootboom* 2000, para 42). It is, therefore, not just legislation that will be subject to constitutional scrutiny, but also state policies, as well as programmes and schemes that are implemented in terms of those policies. This does not mean that the Court will substitute its opinion for that of the executive and the legislature; it recognises that there may be a variety of measures that are reasonable and that courts are ill-suited to adjudicate upon matters that may have multiple social and economic consequences (*Minister of Health v Treatment Action Campaign* 2002, para 38).[6]

5.4.2 Progressive realisation

The Court declined to set a minimum core for each of the socio-economic rights (*Soobramoney v Minister of Health, KwaZulu-Natal* 1998;[7] *Government of the*

RSA v Grootboom 2001), which means that the Court will not order a minimum benefits package for miners who contract occupational diseases. The injunction to progressively realise the right means that it is accepted that the right may not be immediately realisable. However, as the Court stated in *Grootboom* (para 45): 'It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time.' The Constitution thus requires a realistic, comprehensive plan to progressively facilitate the realisation of the right.

While mining is a private enterprise, the state still bears the obligation of progressively ensuring the right to access social security. This means that it has to regulate mining health and safety, even if it decides to make the mining industry primarily responsible for the health burdens of that industry.

5.4.3 Within available resources

The Court on numerous occasions has reiterated the fact that the realisation of socio-economic rights in ss 26 and 27 of the Constitution is constrained by a lack of resources (*Soobramoney v Minister of Health, KwaZulu-Natal* 1998*; Government of the RSA v Grootboom* 2001). Generally courts are not likely to decide whether resources are available for particular schemes or whether certain resources should be employed to achieve certain desired goals, but where it is clear that resources are available and that a specific action is required and can be taken, a court may order that such action be taken (*Minister of Health v Treatment Action Campaign* 2002; Olivier, 2003: 76).

These general principles can be used to test the constitutional compliance, or otherwise, of the current occupational injuries and diseases scheme available to miners such as Mr Mankayi. One important aspect is the coverage of a scheme. Coverage does not connote only the number of persons affected, but also the risks covered, whether basic needs are satisfied, and benefit levels (Van Ginneken, 2003: 281). Successful extension of coverage depends on the design and choice of benefits, the financing structure of the scheme and the quality of its administration (Van Ginneken, 2003: 281).

5.5 Elements and weaknesses in the mining compensation system

5.5.1 Scheme design and benefit levels

One of the primary issues raised by the *Mankayi* case is the low benefit levels offered in terms of the Occupational Diseases in Mines and Works Act 78 of 1973 (ODMWA). This appeared to be a consideration in the Court's decision that Mr Mankayi should be able to claim damages from AngloGold, although the Court offered technical legal justifications — which are discussed later — in

its judgment. However, ultimately the choice of how to balance the protection offered by the compensation scheme, on the one hand, and common-law claims, on the other, has to be made by the legislature and the executive (*Jooste v Score Supermarkets* 1999).[8] Statutory no-fault schemes by their very nature are rooted in compromise and almost never provide full compensation (Larson, 1970). While the setting of a minimum core for the right to access to social security in the workers' compensation context is not feasible, nor constitutionally required, it may be helpful to seek guidance from the international instruments that have set standards in respect of compensation for occupational injuries and diseases. It is also necessary to hold government to its own policies on what needs to be done to ensure reasonable compensation.

The international conventions referred to above yield the following general principles with regard to compensation for occupational injuries and diseases (Smit, 2003: 465):

- Employment injury benefits must be financed by employers, in contrast with other forms of social security for which governments may require of employees to match employer contributions.
- Compensation must generally be in the form of a periodic payment which lasts throughout the contingency, as opposed to a lump sum benefit.
- The appropriate scheme's scope must extend to at least half of the national workforce or 20 per cent of residents.
- Minimum compensation levels are provided for — set at 50 per cent of lost wages for an eligible worker with a family (spouse and two children), and 40 per cent for a surviving spouse and two children.

For the former miner whose disease has been diagnosed, the lump sum benefit in terms of the ODMWA is the equivalent of 18 months' wages if his lung function is impaired by 10 per cent to 40 per cent and 36 months' wages if his lungs are impaired by 40 per cent to 100 per cent. Only these two levels of impairment are recognised and it is not clear on what basis this categorisation has been made. The lump sum is capped at R84 000, a figure that has not been revised for more than a decade (Salgado, 2009). If impairment is not 100 per cent (which would imply death), the amount is usually far less than that. No provision is made for payment of a periodic pension. This means that once the lump sum received has been depleted, former miners are likely to revert to the non-contributory social assistance system and will have to support themselves and their dependants through old-age grants, disability grants, child-support grants and the like, which not only relegates them to a cycle of poverty but has fiscal implications for government.

The first concern is that the amount of the benefit is clearly not 50 per cent of the miner's lost wages, as required by international law. It is highly likely that the

calculations used to determine benefits are based on unrealistic assumptions. For example, how long is the working life of the average miner? Is it much shorter than the span used to determine benefit levels? If so, that surely has to be revised. Similarly, is it appropriate that wages, rather than the extent and seriousness of the health risks miners face, are the primary determinant of benefit levels? It may be argued that it is too costly to attain such high benefit levels, but actuarial assessments would have to be provided and a workable plan for the progressive realisation of miners' social security has to be shown.

Secondly, spouses and surviving children are not entitled to benefits as dependants, although they may claim the lump sum that would have been payable to their breadwinner who has died. If the miner has already received the lump sum, the dependants get nothing, even if they are children (s 80(4) of the ODMWA).

Tripartite discussions between organised labour, the Chamber of Mines and government are currently under way to amend the ODMWA to remedy some of the shortcomings in benefit structures (Smit, 2010). Formal amendments to the Act have not been tabled yet.

A third challenge, to be discussed below, is the disparity between the compensation afforded to industrial workers, on the one hand, and miners, on the other. As noted by Justice Khampepe in the *Mankayi* judgment (para 83), '[e]mployees who suffer permanent disability for the purposes of the COIDA as a result of an occupational disease are in a much better position than the ones restricted to the ODMWA compensation.' She goes on to explain that had Mr Mankayi been compensated under the COIDA, he would have received R24 480 if he had been found to be 30 per cent disabled, instead of the R16 320 he received in terms of the ODMWA. If he had been permanently disabled, he would have received a monthly pension of R1 224 under the COIDA and by March 2011 would have received in excess of R70 000. However, there are areas in which the COIDA affords less favourable protection; for example, beneficiaries have their medical expenses covered for only two years, while, theoretically, beneficiaries under the ODMWA are covered for life.

The reasons for the disparity are historical and will be discussed below. For now, it is important to note that Cabinet, as far back as 1998, had committed itself to a process that would include the rationalisation of the two compensation systems (Taylor, 2002: 454), but the mines and government could not agree on who would bear the increased costs of ensuring better compensation to miners (Bateman, 2010). Furthermore, having two different compensation regimes also means that occupational health and safety administration is fragmented. The Department of Health is responsible for the administration of the ODMWA, but the Department of Labour is responsible for the administration of the COIDA. The Department of Minerals and Energy takes responsibility for the Mine

Health and Safety Act 29 of 1996, while the Department of Labour takes final responsibility for the COIDA. There is no central, national occupational health and safety body that oversees and coordinates activities, as was suggested in the Draft National Occupational Health and Safety Policy in 2003.

5.5.2 Assignment of responsibility and poor administration

The tension between government and the mines as to who should bear responsibility for mining disease compensation is reflected in the legal action taken by the Chamber of Mines in November 2010 to prevent the Compensation Commissioner for Occupational Disease (CCOD) from forcing mines to pay increased levies to make up the deficit in the Mines and Works Fund, from which workers are compensated (Anderson, 2010). The deficit in the fund stood at R610 million in 2003 and actuarial assessments showed that R414 million would have to be collected to cover existing beneficiaries. The Chamber of Mines objected to this money being raised through increased levies, arguing that government has not administered the fund properly.

It appears that the administration of the fund has been shambolic. The ODMWA (s 18) requires the establishment of a Risk Committee for Mines and Works that will assess risk at controlled mines and works. A mine has to be declared controlled by the Minister of Health in terms of s 9 of the ODMWA before its risk can be assessed. No mines have been declared controlled since 1996 and the reason for this is unclear (Matomela, 2010). This means that many mines at which risk work is performed are not contributing to the Mines and Works Fund. In similar vein, the Risk Committee has been functioning sporadically. By November 2010, the committee had not met for more than three years and had even been disbanded at some stage (Matomela, 2010).

The passing of the buck between government and the Chamber of Mines, as well as the poor administration of the compensation system, has meant that 13 years after Cabinet decided to improve the compensation systems, miners, their families, their mostly poor, rural communities and the already overburdened public health and social assistance systems have to carry the health and social costs of a resource-rich industry (Bateman, 2010). It appears that the requirements of the Mine Health and Safety Act are not being enforced by the mining inspectorate. Roberts (2009: 88) found that in a sample of 45 men who left the mining industry after the commencement of the Mine Health and Safety Act due to ill health, only six had received an exit medical examination.

A fourth challenge is the building of infrastructure that would allow miners to effectively make use of the benefits available to them. The ODMWA does provide for biennial medical examinations for ex-miners at public health facilities, but it is doubtful whether miners are able to make use of these benefits, as research commissioned by the Health Systems Trust (Roberts, 2009) suggests. A doctor

who has worked in the mining sector for more than 20 years wrote (Roberts, 2009: 10–11):

> *Many employees have little or no understanding of the processes that lead to occupational lung disease, their consequences, how to protect themselves from the conditions, the mechanisms of compensation, the Acts that apply, and what their rights and responsibilities are. This coupled with a high level of misinformation and complicated by low education levels amongst miners is a recipe for confusion and frustration.*

Roberts (2009: 12), who conducted interviews with miners in 2008, argues that although differential treatment based on race was removed from the ODMWA in 1993, the infrastructure to achieve equity has been lacking. Public health screening facilities are typically located in urban areas, not in the rural migrant-sending areas of southern Africa. She describes (2009: 12) the near-impossible battle faced by sick miners who have returned to their rural homes without having been certified as suffering from an occupational lung disease, which is often the case due to long latency periods:

> *The former mineworker who is ill but not yet diagnosed faces an arduous process of, firstly, accessing medical surveillance for diagnosis of his condition. Once his disease has been detected, he must apply to the Medical Bureau for Occupational Disease (MBOD) for certification of a 'compensatable' disease. Certification is centralised in Johannesburg and the claimant must himself forward the relevant documents to Braamfontein. Once certified, by the Certification Committee of the MBOD, as suffering from an occupationally acquired 'compensatable' disease, the claimant then awaits his statutory entitlement to compensation payment from the Compensation Commissioner for Occupational Disease (CCOD). The CCOD is also centralised in Johannesburg. All communication must be followed up with these two agencies in Gauteng. The MBOD and the CCOD are a function and responsibility of the National Department of Health.*

This reality for thousands of miners means that they live with social insecurity, an inability to provide for themselves and their loved ones and, more often than not, a painful death. Some attempts have been made to build the necessary infrastructure. The Department of Health has extended benefit examinations to ex-miners where ex-miners' clinics have been established and has undertaken capacity building programmes by training nurses in occupational health and safety (Taylor, 2002: 454). The impact of these initiatives has not been systematically assessed. However, research done by the Health Systems Trust (Roberts, 2009) in the Eastern Cape does not paint a rosy picture:

> *The first of the specific interviews with medical personnel was with the Medical Superintendent of a Regional Hospital. Although this doctor was aware of silicosis, he was not aware of the ODMWA … He additionally commented that the occupational health nurses were mostly focused on attending to the occupational health needs of the regional hospital employees with there being extremely limited capacity for implementation of the ODMWA, and that it was largely due to this human resource limitation that the hospital was not diagnosing and 'not seeing such high rates of silicosis'.*

Knowledge of the ODMWA at district hospitals was similarly poor (Roberts, 2009: 145–146). As a result, doctors and nurses do not advise ex-miners of their right to claim compensation or of their right to have regular benefit medical examinations. One doctor, who was aware of the ODMWA, stated that he could not refer miners because there was no one to whom they could be referred.

A R42 million investment by the Chamber of Mines in 2008 aimed to improve public health facilities utilised by former mineworkers in South Africa and neighbouring countries (Wait, 2010). The Department of Health undertook to take over the funding of the initiative in 2010, but it is not altogether clear who is responsible for the management of the initiative.

5.5.3 Policy gaps and prevention

Good practice in social security recognises that prevention, compensation and rehabilitation are linked (Taylor, 2002: 456). Any scheme that wants to decrease its compensation burden has to promote prevention of occupational accidents and the creation of healthy work environments. To this end, the ILO recently adopted the Promotional Framework for Occupational Safety and Health Convention 187 of 2006. This Convention stresses the importance of a holistic approach to occupational health and safety and requires member states to, inter alia, promote continuous improvement of occupational health and safety (art 2(1)); take active steps to achieve a safer, healthier working environment (art 2(2)); formulate a national policy on occupational health and safety (art 3); establish, maintain and periodically review a national system for occupational health (art 4); and formulate, implement, monitor, evaluate and periodically review a national programme on occupational health and safety (art 5).

The ODMWA provides very little incentive for preventive activities and the provision in the Mine Health and Safety Act (s 23(1)*(a)*) that miners can refuse to work if their health is at risk rings hollow if miners are not aware of the health risks they face and are not in the financial position to forego wages for even a short period of time.

The National Union of Mineworkers (NUM) has attempted to educate miners through a manual that explains the various health risks faced by miners, as well

as steps to minimise those risks and gain compensation (Wait, 2010). However, its budget in 2010 allowed for only limited awareness campaigns. The efficacy of these measures is also hampered by low literacy rates and, as noted, the fact that miners are not in a financial position to forego wages.

The Report of the Committee of Inquiry into a National Health and Safety Council (Benjamin & Greeff, 1997) concluded that the systems under both the COIDA and the ODMWA have not promoted prevention activities optimally. It noted, inter alia, that:

- Occupational accidents and work-related ill-health impose a considerable cost on the South African economy and society (the dearth of data results in this cost being underestimated).
- Prevention policies to promote and enforce compliance with occupational health and safety (OHS) legislation are inadequately developed.
- With the exception of the mining industry, a dwindling level of resources is devoted to the prevention of occupational accidents and work-related ill-health.
- There is a critical shortage of personnel to develop OHS policy and to enforce OHS legislation while, at the same time, existing human resources are inefficiently utilised.
- The programmes of prevention and compensation agencies are insufficiently coordinated. Compensation agencies do not adequately promote the prevention of occupational accidents and work-related ill-health.
- There is generally a low level of employer compliance with obligations in terms of compensation legislation and a low level of employee awareness of rights in terms of compensation legislation.
- There is inadequate reporting of occupational accidents and, to a greater extent, work-related ill-health. This prevents the determination of the full extent of these problems and the effective development of preventive strategies and deprives employees of compensation benefits.
- There is insufficient research on OHS and no coordinated research programme.
- There is a severe shortage of skilled OHS personnel and no coordinated skills training strategy to address this shortage.
- There is no coordinated communication strategy to raise public awareness of OHS and to promote active approaches among employers and employees.

The Leon Commission of Inquiry into Safety and Health in the Mining Industry (1994) also noted that the emphasis of mine health and safety has been on the regulation of compensation for occupational diseases and not the prevention thereof.

The findings of these committees of inquiry are clear, but it is difficult to assess the progress made in remedying the shortcomings they outlined, partly because of the dearth of research in the area. Roberts (2009: 31) mentions that it is remarkable that only two major studies have been done over the last 70 years on the health status and compensation outcomes of ex-gold miners who have returned to their rural homes. We therefore do not know what the coverage of the ODMWA scheme is, how many miners and their dependants are affected, how they are affected, how they survive despite being unable to work, etc. Despite this lack of information, some aspects of the system bear mention, most notably the lack of policy formulation and implementation in the area of occupational health and safety.

As noted earlier, a draft National Occupational Health and Safety Policy was circulated in 2003, but that policy has not been finalised. Various policy initiatives have touched upon occupational health and safety, but such initiatives have been fragmented and uncoordinated. The White Paper on Transformation of the Health System (Department of Health, 1997) proposed a legislative framework to create a national health and safety agency with provincial components (Taylor, 2002: 453). Such an agency has not yet been established.

The fragmented administration of occupational health and safety has meant that no government department has taken overall responsibility for the overhaul of occupational health and safety policy and legislation. An interdepartmental task team has now been set up to consider such changes as part of a dramatically changed social security system, but no proposals have been made public yet (Wait, 2010).

Criticism of the current system has centred on the lack of incentives for mines to improve health and safety and the adverse impact proper preventive measures would have on the mining sector's profitability and even its viability. Richard Spoor (quoted in Bateman, 2010), who represented Mr Mankayi in his claim against AngloGold, has argued:

> *The gold industry only operates because it's cheaper to maim and kill people. If every time you made a man sick you paid R2.5 million, 1 000 such men would cost you a billion* [rand] [sic]. *Then you'd do something about the ventilation* [that leads to many lung diseases]. *As long as you're paying around 5% of that actual harm, why should you change?'*

Alan Fine, spokesperson for AngloGold, countered that the statutory compensation mechanisms set up by government were a compromise (Bateman, 2010). As Benjamin (2009: H1-3) explains, a no-fault workers' compensation system aims to strike a balance between the competing interests of employers and workers. While the fairness of a particular system requires a cost-benefit analysis, in principle, both employers and workers can benefit:

> *The employer is relieved of the prospect of costly damages claims and in return is required to make regular contributions to the Compensation Fund. The employee, on the other hand, is able to receive compensation without having to prove that any person's negligence caused the accident or disease and without the worry that the employer may have no assets to satisfy a successful claim for damages.*

What is left out of this assessment is whether sufficient incentives exist for improvements in occupational health and safety. It seems that the mining industry is attempting to improve occupational health and safety in mines but it is doubtful that appropriate incentives exist for sufficient research and development in this area. Government has to take final responsibility and cannot leave miners at the mercy of employers, whose primary interests are likely to be profitability and the sustainability of the industry, rather than the health and safety of the workforce, especially in light of the delayed onset of many occupational lung diseases.

The analysis above suggests that various aspects of the compensation system for diseased miners and their dependants do not pass constitutional muster. In this regard, the lack of a national policy and implementation plan, the amount and structure of benefits, the disparity between benefits for industrial workers and miners, the poor prevention mechanisms and the lack of health infrastructure that will improve sick miners' access to benefits promised by the ODMWA, are of particular concern. It is clear that countless miners who contract occupational diseases, as well as their dependants, are not socially secure. There is little evidence of a reasonable, comprehensive legislative, policy and implementation plan to realise, even progressively, these vulnerable people's access to social security.

5.6 The *Mankayi* judgment

Having considered some of the challenges that need to be addressed by the legislature, the executive, employers and employees, it is necessary to reflect on the role of the courts in ensuring that all stakeholders comply with their constitutional obligations. The leitmotif of this part of the chapter is captured partly by Spoor's statement to the effect that even if compensation is not awarded in terms of the common law in the *Mankayi* judgment, at least the case may 'jog the legislature' to equalise the legislation between miners and industrial workers (Bateman, 2010). It is submitted that this objective is laudable but underinclusive. The case, especially in the Constitutional Court, had the potential to establish new, constitutionally sanctioned normative frameworks within which the overhaul of the occupational health and safety and mining compensation systems has to take place.

By not engaging with the rights aspects of Mr Mankayi's claim and AngloGold's objections to that claim, the Constitutional Court missed an opportunity to contribute to the social conversation about how mineworkers ought to be treated when they become ill as a result of their work. Justice Sachs recognised in *Minister of Home Affairs and Another v Fourie and Another* (2005, para 138)[9] that while the law may not immediately change social conditions, 'it serves as a great teacher, establishes public norms that become assimilated into daily life and protects vulnerable people from unjust marginalisation and abuse.' In light of the history of labour, and particularly labour in the mining sector, it is imperative that those public norms be developed. The formalist reasoning of the Court in *Mankayi* adds very little to such development. It is no answer to say that the Court should adopt a minimalist approach — especially because the case came to it as a preliminary, procedural matter — for minimalism may be appropriate where there are established principles from which societal actors can discuss and negotiate their rights and obligations (Woolman, 2007: 764–765). Those principles do not yet exist in many functional areas in South Africa, including occupational health and safety. A counter-argument may be that it is precisely because the principles are not yet established that courts should be wary of overstepping their bounds. However, setting out the content of rights is not synonomous with unduly activist judgments. The Court in *Mankayi*, thus, could have discussed relevant rights and what they required of various stakeholders without insisting that such rights have to be realised in particular ways.

The Court's failure to engage with the rights of miners means that the Court not only failed to contribute to the conversation on the social insecurity faced by vulnerable groups of people, but that its silence may be interpreted as acquiescence in the inertia that has marred occupational health and safety policy-making after 1994. In that sense the Court has removed the urgency from the social struggle for miners' socio-economic rights by not aiding awareness of what is at stake for miners and the rest of South African society, and by not lending more legitimacy to claims that vulnerable workers may have against their employers and government.

5.6.1 The Court's reasoning

As mentioned in the introduction, Mr Mankayi had instituted a delictual claim against AngloGold, his previous employer. He alleged that during his employment he was repeatedly and negligently exposed to toxic dust and gases, which caused him to contract tuberculosis and chronic obstructive airways disease. His illness had rendered him unemployable. He had received R16 320 as compensation under the ODMWA but maintained that he was also allowed to sue AngloGold in terms of the common law. AngloGold argued that s 35(1) of the COIDA prevented him from suing them.

The decision as to whether Mr Mankyi could sue his former employer turned on the interpretation of s 35(1) of the COIDA, which reads:

> *Substitution of compensation for other legal remedies. No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.'*

Mr Mankayi argued that s 100(2) of the ODMWA[10] precluded him from claiming damages under the COIDA, which meant that the s 35(1) abrogation of common law claims did not apply to him. He was, therefore, entitled to sue the mine for damages in delict because it had negligently caused his illness in breach of its common law and statutory duty to provide him with a safe and healthy work environment.

The Constitutional Court considered the parties' claims and determined that the following two issues had to be determined by the Court: first, does the word 'employee' in s 35(1) of the COIDA include employees covered by the ODMWA, notwithstanding that s 100(2) of the latter Act bars them from claiming under the former? Second, does the exclusion of a common law action by s 35(1) of the COIDA apply to Mr Mankayi?

In respect of the first issue, Justice Khampepe (para 72) decided that, since the plain meaning of a statutory provision must be the starting point, it is clear that an 'employee' as defined in the COIDA would include an employee such as Mr Mankayi, who may potentially claim under both the COIDA and the ODMWA. The definition of 'employer' also does not exclude persons who may claim in terms of the ODMWA.

The Court further reasoned that Mr Mankayi's disease qualified both as an 'occupational disease' under the COIDA and as a 'compensatable disease' under the ODMWA. However, s 100(2) precludes him from claiming compensation under the COIDA and restricts him to the ODMWA compensation. It is the impact of s 100(2) that led the Constitutional Court to disagree with the reasoning of the Supreme Court of Appeal (SCA). Justice Khampepe states that ss 100(1) and (2) of the ODMWA expressly insulate or separate employees who are entitled to the COIDA benefits and the ODMWA benefits, respectively. Section 100(1) prohibits double dipping, that is an employee benefiting fully from both funds if they contract a disease that would qualify for compensation under both enactments. Section 100(2) goes further and expressly prohibits employees who qualify for the ODMWA compensation from claiming under the COIDA.

The Court traced the historical origins of the compensation legislation in the mining sectors and in other sectors, respectively, and reached the conclusion that, while the two schemes were related, the legislature clearly intended for them to remain separate. Thus, contrary to the approach preferred by the SCA, the Constitutional Court accepted that the ODMWA regime was separate from that provided for under the COIDA. Justice Khampepe substantiated this conclusion as follows: workers who claim for a disease under the COIDA would be considerably better off than if they had claimed for that same disease under the ODMWA (paras 79–89); s 35 of the COIDA makes no reference at all to the ODMWA claims, despite the fact that it was enacted 20 years after the ODMWA, and it is located within a cluster of provisions that deal with only occupational injuries and diseases that are 'compensatable' under the COIDA; and the two schemes are separate for historical reasons — South Africa's history of mining and the diseases that can arise because of mining, justified the distinct treatment of the mining sector.

The Court interpreted the applicable provisions to mean that Mr Mankayi could sue AngloGold because the clear wording of the COIDA, the structure of the COIDA and the historical context of the COIDA and the ODMWA dictated that the legislature intended for that to be the case. Justice Khampepe does not give any normative substantive reasons why the interpretation preferred by the Court is the constitutionally acceptable interpretation. Put differently, if one could dilute the reasoning of the Court to one question and answer, the question would be: 'Why should Mr Mankayi be allowed to sue AngloGold?' and the answer is, 'because the relevant legislation says he can'. The problem with such an approach is that the Court does not do what the Constitution requires it to do, which is to ensure that when it interprets a statutory provision, such interpretation promotes the spirit, purport and objects of the Bill of Rights (s 39(2)). Furthermore, the parties (para 69) both submitted that the interpretations suggested by themselves were most consistent with s 39(2) and the Court therefore did not deal with an important aspect of the parties' submissions.

5.6.2 Limitations of the Court's approach

The Constitution envisions that the Bill of Rights should permeate all law and conduct. Courts, forums and tribunals have to ensure not only consistency between the law and the Bill of Rights when it is alleged that the law is in conflict with the Bill of Rights; they must do so even when there is no alleged conflict between the law and the Bill of Rights (Currie & De Waal, 2005: 51). The Court in *Mankayi* should have considered the right of access to social security, not because the relevant legislative provisions had to be tested directly against the right, but because the right, like all rights, is 'a particular institutional

and rhetorical means of expressing, contesting and implementing' (Nedelsky, 2008: 145) the values in the Constitution. Engaging with the right brings the Court's interpretation of the legislative provisions closer to the reality that while we may agree about abstract values such as equality, dignity and freedom, the terms that capture these values shift and there is a constant need to define our relationships — of power, of responsibility, of trust and of obligation (Nedelsky, 2008) — to give effect to those values.

Had the Court considered the issue of whether its preferred interpretation promotes the spirit, purport and objects of the Bill of Rights, particularly in light of the right to access social security, it would likely have reached the same conclusion, namely that Mr Mankayi should be allowed to claim damages from AngloGold. Its reasoning, however, would have been much more substantive and would have reflected that, while the Court's primary remedy in the case before it was clear, there is an obligation on government to review the workers' compensation system generally and in the mining sector in particular. The legislature has chosen to provide for a statutory scheme because it recognises that remedies accessed through litigation are generally not effective in the workers' compensation context. The Court's remedy can, therefore, only go so far in improving miners' access to social security.

Furthermore, the Court would have been more cognisant of the impact of its judgment in defining the roles and responsibilities of the various stakeholders in the process. Are miners in this dire position because government has failed to overhaul the statutory compensation system or because mines are not contributing sufficiently, or for both these reasons? It was impossible for the Court to tell, which is why a consideration of the policy issues that caused Mr Mankayi's and many other ex-miners' predicaments could have contributed greatly to the creation of some sense of urgency in the process to ensure social security for miners and their dependants. Had the Court considered the social security implications of the system, it would have identified at least some of the systemic issues that needed to be addressed by government and other stakeholders.

In this respect, the Court could have taken a leaf out of the book of Justice Plasket in *Vumazonke v MEC for Social Development and Welfare, Eastern Cape* 2005.[11] In this case, the applicants had their applications for disability grants cancelled without the relevant government department offering reasons for such refusal. The social assistance system suffers from large-scale inefficiencies and the courts were overwhelmed with applications from disgruntled applicants. Justice Plasket reasoned that it would not be sufficient to simply order the respondent to consider the applications of the litigants before the Court. He aimed to address the systemic problem in some way by ordering the Registrar of the Court to serve copies of the judgment on the Premier of the Eastern

Cape, the Chairperson of the Social Development Standing Committee in the Eastern Cape Provincial Legislature and the chairpersons of the Human Rights Commission and the Public Service Commission.

It may be argued that the issues in *Vumazonke* were materially different in that government officials there simply refused to obey the law, whereas in *Mankayi* there was compliance with the applicable statutes. Such an approach, however, is unduly formalistic. Both miners and social grant recipients are vulnerable groups whose basic social security is imperilled if the executive and the legislature fail to perform the duties entrusted to them by the Constitution. The courts, in turn, have to hold government to account where there are infringements of rights and failures to perform constitutional duties.

By sending a copy of a broadly reasoned, rights-centred judgment to the Minister of Labour, the Minister of Health, the compensation commissioners under the COIDA and the ODMWA and other relevant stakeholders, the Court would not have changed the relief to Mr Mankayi and could thus not be accused of overstepping its bounds, but it would have showed that it cared about the establishment and maintenance of an equitable and sustainable statutory compensation scheme. After all, the legislature has chosen to make the statutory scheme the first line of defence against social insecurity resulting from mining diseases. Government therefore bears an obligation under s 27(2) of the Constitution to ensure the progressive realisation of the right to access social security. The delays in rationalising the two workers' compensation systems, the failure to administer the social insurance schemes properly and the resultant social insecurity of vulnerable people are constitutionally unacceptable. A judgment that engaged with the rights claims more broadly would also have shown affected miners and their dependants that the Constitution envisages a society in which their well-being is considered and in which they can assert their rights in forums other than courts. In this way, the Court would help to build a constitutional order instead of imposing it or abandoning its obligation to ensure constitutional compliance (Liebman & Sabel, 2003: 281).

Justice Khampepe noted s 19 of the Pneumoconiosis Compensation Act 64 of 1962, which essentially captures 'the officially promoted climate of opinion' (Atwood, 2005: 53) at the time: we do not have to care about black workers' health. An excerpt from an article on South African mining in the *New York Times* (Lelyveld, 1981) provides a glimpse of the social realities of mining in the 1970s and early 1980s:

> *Between 1973 and 1975, the years in which the industry granted the first significant wage increases to blacks and some mining houses began efforts to ease the lot of the migrant laborer, there was a series of riots at the mines in which 132 people were killed and 496 injured. The public explanation for these upheavals was usually that they were tribal*

> *'faction fights'. But in studies circulated privately at the Chamber of Mines they were frankly recognized as 'incidents of resistance' by black workers.*
>
> *The rise in mine wages, coupled with a scarcity of employment opportunities in rural areas, means that increasing numbers of workers are committing themselves to mining as a lifetime career. A system of re-employment bonuses tends to bind them to the mines at which they were first hired. The result is an increasingly stable work force of unorganized blacks who return year after year by the tens of thousands to the same mines, to live at close quarters in an all-male society under constant supervision, usually by whites.*

While the Court recognises this lamentable history to some extent and expresses sympathy for the plight of vulnerable workers, it effectively writes those workers out of its account of how the law has developed. The Court chose to focus on what the legislature intended when it drafted various workers' compensation statutes. This mode of historical accounting is decontextualised and constitutes little more than a barren recitation of legislative provisions. Is it a coincidence, for example, that the ODMWA was enacted in 1973, a period that marked a rapid escalation in labour unrest on the mines (Crush, 1989: 7–8)? Was it merely a tool to placate workers or was it a genuine attempt to ensure that workers were socially secure? The results of its provisions point toward the former. Can it be unquestioningly accepted that the 2006 amendments to the ODMWA have removed the discriminatory basis on which compensation was to be calculated and that equalisation of benefits between black and white workers was upwards rather than downwards? The Court notes the paltry amounts awarded to workers, but does not get beyond vague assumptions about how such a lamentable situation has developed.

In similar vein, the Court assumes that the ODMWA and the COIDA are separate compensation systems because mining diseases require special consideration in light of the importance of mining to our economy and the toll mining takes on mineworkers' health. This reasoning is illogical because one would have expected that, if mining diseases were of such grave concern, the benefits awarded under the ODMWA would be more favourable than those awarded under the COIDA. The Court was at pains to point out that this was not the case. Furthermore, the Court does not engage with the fact that Cabinet, as far back as 1998, had committed itself to a process that would include the rationalisation of the two compensation systems (Taylor, 2002: 454). Consequently, it expresses no concern that such a process has not commenced 13 years after Cabinet called for such rationalisation.

It is arguable that it would have been advantageous to Mr Mankayi, as well as the legitimacy of rights claims, if more extensive social mobilisation had

occurred prior to the claim being instituted or even while litigation proceeded. Richard Spoor, attorney for Mr Mankayi, is in the process of collecting miners' details for a possible class action suit against AngloGold (*Legalbrief*, 2011), but it is unclear whether this process will also lead to the development of social structures that can represent sick miners' interests beyond the litigation. It was noticeable in the manner in which *Mankayi* was argued, as well as the Court's approach to the issues, that broader societal developments, including policy, were not considered. More sustainable social structures would have been helpful in giving voice to sick miners' and their dependants' interests and concerns beyond Mr Mankayi's claim. It may be that the current class action process will offer opportunities for social mobilisation, but it will not achieve this if the primary purpose is seen only as finding litigants to join the class action suit.

Very often in the past few years we have heard about the transformative potential of the Constitution (Klare, 1998; Langa, 2006). We would do well to consider what that transformation means in the context of occupational diseases in mines. Section 19 of the Pneumoconiosis Compensation Act is a stark reminder of where we come from. It reads: 'No person (other than a Bantu person) shall perform work in a dusty atmosphere at a controlled mine, unless he holds a current initial or other certificate of fitness.' This blatant disregard for black mineworkers may have been removed from the statute books, but it has destroyed and still affects bodies,[12] lives, families and communities.

Some struggles cannot be articulated in terms of rights and are fought beyond language (Minow, 1987: 1880), but rights can be interpreted in ways that recognise those struggles, aim to alleviate some of the burdens and ultimately seek to improve our society. Courts cannot do this by themselves because the question of how we treat people with dignity 'must lie in the intricate texture of daily life' (Brennan, 1988: 22). It is, thus, imperative that courts frame their judgments to form part of a societal conversation, that they acknowledge the interests and concerns of the people affected by the law in their formulations of the law (not in mere rhetorical flourishes) and that they recognise the value of rights discourse to people who might not be heard in democratic political processes.

5.7 Conclusion

The treatment of miners who contract occupational diseases ultimately has to be regulated by the state, even though multiple actors have to assume some responsibility and mining companies, in particular, will have to invest more in mine health and safety. By establishing and administering a statutory compensation scheme, government is making a social security policy choice. The scheme has to be constitutional and government must take reasonable measures to realise, progressively within its available resources, the right of miners with

occupational diseases to access social security. Common law damages due to negligently caused harm perpetrated by mining companies may be allowed as an alternative to, or over and above, statutory compensation, but it must be clear that government has planned the scheme and the policy has been negotiated through participative processes.

The Constitutional Court will be seen as legitimate only if it can influence public morality in a way that leads to the expression of care and concern for people who have contributed enormously to the economic wealth in this country. At what is still the relatively early stages of South Africa's transformational project, the Court, through its public reasoning, can play an important role in the development of public consensus on how miners should be treated. It has to engage in a process of substantive reasoning that transcends polemical observations as much as it shows awareness of the Court's limited role in the formulation of programmatic solutions to complex social problems.

The Court in *Mankayi* did not engage with the social realities faced by miners who claim workers' compensation and it did not test its interpretation of s 35(1) of the COIDA against the values and rights in the Bill of Rights, as it is required to do by s 39(2) of the Constitution. It therefore missed the opportunity to catalyse a societal conversation about the social security of vulnerable workers and the role of government and other stakeholders in attaining a reasonable measure of social security for workers who contract occupational diseases. Had it done so, it would have affirmed its place in the South African community, it would have reaffirmed our collective commitment to real social change and to the equality, dignity and freedom of affected miners and their dependants, and it would have brought to life the requirements of s 27 of the Constitution.

End notes

1 *Mankanyi v AngloGold Ashanti Ltd* 2011 (3) SA 237 (CC).

2 Now that Mr Mankayi has passed away, any monies awarded in a successful legal action would form part of his estate.

3 It is recognised as the oldest form of social insurance, with the first tabulated provision for workers' injuries occurring in ancient Sumeria in 2050 BC (Guyton, 1999: 106).

4 *S v Makwanyane* 1995 (3) SA 391 (CC).

5 *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC).

6 *Minister of Health v Treatment Action Campaign* 2002 (5) SA 703 (CC).

7 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

8 *Jooste v Score Supermarkets* 1999 (2) SA 1 (CC).

9 *Minister of Home Affairs v Fourie and Another* (CCT 60/04) [2005] ZACC 19.

10 Section 100(2) of the ODMWA reads:

> *Notwithstanding anything contained in any other law, no person who has a claim to benefits under this Act in respect of a compensatable disease as defined in this Act, on the ground that such person is or was employed at a controlled mine or a controlled*

works, shall be entitled, in respect of such disease, to benefits under the Workmen's Compensation Act, 1941 … or any other law.

A 'compensatable disease' is defined in s 1 to include specified respiratory diseases such as pneumoconiosis, tuberculosis contracted in defined circumstances, etc. Many of the diseases are compensatable only if a certification committee, established in terms of the Act, finds that such diseases are attributable to the performance of work that has been declared to be 'risk work' by the minister in terms of s 13(1) of the Act. A 'controlled mine' is one that has been declared to be such due to the risk work performed and the number of people performing such work (ss 9 and 10 of the Act).

11 *Vumazonke v MEC for Social Development, Eastern Cape* 2005 (6) SA 229 (SE).

12 For a review of occupational respiratory diseases in mining, see Ross, M.H. & Murray, J. (2004).

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Chapter 6

Judicial appointments: Do procedural shortcomings hinder access to justice?

Chris Oxtoby and *Abongile Sipondo*

6.1 Introduction

In order to make good on the Constitution's promise that every person has the right to equality before the law and to equal protection of the law, it is necessary that there be the greatest possible access to the law, its institutions and services. It is also essential that judges, who interpret and apply the Constitution and other laws, possess suitable qualities, such as technical competence, independence and an appreciation of the rights and values of the Constitution. This makes it crucial that the judicial appointment process allows candidates possessing these qualities to be identified and appointed.

Writing in 1959, William Rehnquist, later to become Chief Justice of the United States, complained that confirmation hearings of Justice Charles Whittaker had established that he had paid for some of his schooling with money earned from trapping skunks, and that, as Whittaker 'had been born in Kansas but now resided in Missouri, his nomination honoured two states'. Rehnquist decried the failure of the Senate committee to shed light on Whittaker's views on topical issues of the time, such as racial segregation or communism. However, Rehnquist subsequently backtracked at his own confirmation hearings, remarking that he had not fully appreciated 'the difficulty of the position that the nominee is in' (Liptak, 2010).

While no interview for judicial appointment in South Africa has yet canvassed the issue of skunk trapping, the process of judicial appointment under the constitutional dispensation has certainly thrown up more than its fair share of controversy. The Judicial Service Commission's (JSC) practice of conducting public interviews with candidates for judicial appointment means that issues about the suitability of questions asked of our prospective judges are always a pertinent subject for public interest.

But the issue of how judges are selected, and the appropriateness of the questions put to them during their interviews, is important not simply for its own sake. It is important that judicial selection is effective because once they are selected, judges have a real and meaningful impact on people's lives. The Constitution demands an independent and impartial judiciary; it also demands a judiciary that will be accessible to the general public. And if the transformative

vision of the Constitution is to be fulfilled, judges must be appointed who have the mentality and the aptitude to apply and give content to the rights in the Constitution. Thus, it becomes crucial to scrutinise the 'judicial philosophy', outlook and experience of candidates for judicial office.

This chapter focuses on the question of whether the procedures and processes that are currently followed to appoint judges are conducive to ensuring that South Africa has a judiciary which is capable of giving effect to the promise of the Constitution. However, the JSC interview process that precedes the appointment of judges has suffered from a number of flaws that threaten to hamper the identification of the best candidates. This chapter identifies the gap between the rights guaranteed by the Constitution and the reality of an appointment process that often may not bring out these qualities in aspirant judges. This can result in judges being appointed to the Bench who may not always be best placed to deliver on the Constitution's promises.

6.2 The Constitution

The Constitution is intended to '[h]eal the divisions of the past', to 'establish a society based on democratic values, social justice and fundamental human rights', and to '[i]mprove the quality of life of all citizens' (Preamble). The supremacy of the Constitution and the rule of law are established as foundational values of the Republic (s 1*(c)*). What distinguishes the Constitution of 1996 from many older constitutions is that, in addition to traditional civil and political rights, it also contains socio-economic rights, including rights of access to adequate housing, healthcare, sufficient food and water, and social security, as well as a right to basic education (ss 26, 27 and 29).

Adjudicating any issue touching on fundamental rights is a weighty matter, but adjudicating socio-economic rights can be particularly complex. Many of the socio-economic rights contain qualifications, whereby the state is required to take 'reasonable legislative and other measures, within its available resources', to 'achieve the progressive realisation' of those rights (see, for example, ss 26(2) and 27(2)). Making decisions on matters such as what constitutes reasonable legislative measures and the availability of resources brings the courts face to face with issues of policy. It presents the significant challenge of how to properly respect the separation of powers by giving appropriate deference to the executive and legislature, while, at the same time, ensuring that the constitutional rights are properly enforced so that full effect may be given to them. (See the Constitutional Court's discussion of issues of deference in the context of socio-economic rights in *Minister of Health v Treatment Action Campaign* (No 2).)[1] It is, therefore, essential that those appointed as judges have the ability to navigate these challenges to give effect to the rights in the Constitution, without exceeding the boundaries of the judiciary's powers.

The transformative goals of the Constitution must also be implemented within a legal system in which the common law is strongly entrenched. The common law provides a culture of legal thought, which, while not necessarily inimical to the Constitution, can tend to overshadow it. An example of the tendency for a common law-based approach to be followed is seen in the principle of avoidance. This principle of constitutional interpretation is one that requires courts to decide cases without reference to a constitutional issue if it is possible to do so (*S v Mhlungu*; *Zantsi v Council of State, Ciskei*).[2, 3] There are good reasons for following such an approach — it may give space to Parliament to reform the law and to give effect to the Constitution (De Waal et al, 2001: 67–68). But in doing so, it is necessary for courts to guard against being hypnotised by the common law to the extent that they fail to give full expression to the rights in the Constitution. It is worth remembering that the Constitution empowers the courts to develop the common law if it is necessary to give effect to rights in the Bill of Rights (s 8(3)*(a)*).

In order to benefit from the rights found in the Constitution, it is important that people are able to access a legal system that is empowered to enforce and uphold those rights. Thus, access to justice, which is often seen as a component of the right to a fair hearing, is a basic human right, forming a cornerstone of the justice system. Democratic governance is undermined when access to justice for all citizens is absent. Access to justice can be defined both broadly and narrowly. A broader definition addresses issues such as social and economic justice, whereas a narrow definition refers to access to legal services and other state services. The more prevalent of the two definitions is the narrow one. Traditionally, legal commentators have viewed access to justice to mean the practical availability of competent counsel to all persons, regardless of their ability to pay for legal costs. This means that, at its most basic, access to justice requires that people should be provided with a lawyer if they cannot afford legal representation. It is typically discussed in terms of legal process, rules, doctrines and institutions (Bhabha, 2007: 144). It is further understood to require the availability of judges, court facilities and court personnel, and can 'relate to the degree and ease with which citizens obtain legal services' (Vickrey et al, 2009: 1147). Thus, this view sees access to justice as encompassing access to the system of justice, and to legal advice more generally (Pepper, 1999: 270).

However, it is the broader definition of access to justice that is most pertinent for this chapter. Scholars argue that to treat access to justice as if it were only about affording access to proficient lawyers means missing other dimensions of the right. These include available access to competent judicial officers, safe court facilities and legal provisions to assist those who cannot afford legal fees (Vickrey et al, 2009: 1154). This approach has also found support at the regional level. The Inter-American Court of Human Rights has held that the lack of

effective remedies for violations of the American Convention on Human Rights is, in itself, a violation of the Convention. Remedies should not only be formally recognised in law, but should be 'truly effective' in establishing human rights violations and providing redress. The Court held that: 'A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective' (*Advisory Opinion* of 6 October 1987*)*.

Thus the trend is towards viewing access to justice as comprising three different, yet mutually supporting, components:

> [S]*ubstantive justice which concerns itself with an assessment of the rights claims that are available to those who seek a remedy; procedural aspects which focus on the opportunities and barriers to getting one's claim into court; and the symbolic component of access to justice which steps outside of doctrinal law and asks to what extent a particular legal regime promotes citizens' belonging and empowerment*. (Bahdi, 2007)

The right of access to justice has been described as one of the fundamental components of the rule of law by the Southern African Development Community (SADC) Tribunal in *Mike Campbell (Pty) Ltd and Others v The Republic of Zimbabwe*,[4] and by the South African Constitutional Court in *Zondi v MEC for Traditional and Local Government Affairs*.[5] And the rule of law, in turn, is a foundational value of South Africa's constitutional democracy (s 1*(c); Zondi*). Section 34 of the Constitution provides that: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.' Thus the Constitution envisages courts functioning so as to resolve disputes fairly and transparently.

We contend that this must mean more than simply being able to have a case heard in court. We argue, in line with the broad definition of access to justice set out earlier, that access to justice under the South African Constitution also has a substantive component — in other words, litigants have the right to have their disputes determined fairly and in terms of the law by competent judges. Indeed, as is apparent from the earlier discussion, this suggestion is not novel and has been widely accepted. In his keynote address to the Second Judicial Conference of South African judges, President Jacob Zuma remarked that transformation of the judiciary and access to justice meant that litigants must have access to a high standard of justice (Cowen, 2010).

Having established the strongly transformative vision of the Constitution, including the substantive requirements of access to justice, we now examine the function and structure of the South African judiciary.

6.3 The role of the judiciary under the South African Constitution

It is important to recognise the significant power vested in the judiciary under the Constitution. Before the Constitution came into force, the prevailing doctrine of parliamentary sovereignty meant that courts had limited power to review legislation. Review was possible only on narrow procedural, but not substantive, grounds. There was no scope for courts to invalidate an Act of Parliament for violating human rights (De Waal et al, 2001: 2–3). It is, in any event, debatable whether, given the composition of the judiciary before 1994, many judges would have taken the opportunity to strike down legislation for violations of human rights had it been available to them. Sir Sydney Kentridge (2011) has commented that the independence of the apartheid-era judiciary was 'undermined by a policy of political appointments to the Bench', and that, in detention cases, 'executive-minded judges sympathetic to the objectives of the government refused to intervene in cases concerning detainees, anxious only to ensure that court proceedings should not interfere with the interrogation process'. This illustrates how important the quality of judges, as well as the content of the substantive law, is for legal rights to be upheld.

The Constitution clearly mandates a different approach to that which the courts took before 1994. Section 2 establishes the Constitution as the supreme law of the land and any law or conduct inconsistent with it is invalid. Courts deciding a constitutional matter are required ('must') to declare any law or conduct inconsistent with the Constitution to be invalid (Constitution, s 172(1)*(a)*). This means that courts have the power to strike down legislation or executive decisions that do not comply with the Constitution; therefore, to this extent, the courts are the ultimate repositories of power in South Africa.

In order to regulate the relationship between the different branches of government, most democratic states provide for a separation of powers, and for mutually reinforcing and containing checks and balances, in governance. The principle of separation of powers establishes three separate and independent branches of government: the executive, the legislature and the judiciary. This is reflected in the South African Constitution (ss 85, 43 and 165(1)). The Constitution's system of separation of powers and checks and balances seeks to ensure that government is subject to controls, but yet does not diffuse power so completely that government is unable to act effectively in the public interest (*De Lange v Smuts*).[6] In order to ensure that the courts are able to exercise their role as the ultimate arbiters of the exercise of power by the different branches of government, the Constitution makes explicit provision for the protection of the courts. It provides for the protection of courts' independence, dignity,

accessibility and effectiveness. The Constitution places an obligation on other organs of state not to interfere with the functioning of the courts, and requires that these organs, in fact, protect the courts to ensure that they function independently, impartially and effectively (ss 165(2), (3) and (4)).

The judiciary is thus an independent branch of government, subject only to the Constitution and the laws of the country, and the Constitution vests the judicial authority in South Africa in the courts (s 165).

6.4 Judicial selection in South Africa

The process of appointing judges has changed radically under the new constitutional dispensation. Before 1994, judges were appointed by the State President acting in Cabinet — a process that took place entirely in private, without any outside scrutiny (Bruce & Gordon, 2007: 16). It was widely thought that, in effect, appointments were made by the Minister of Justice and the State President acted merely as a 'rubber stamp'. Towards the end of the apartheid era, appointments were usually made on the recommendation of either the Chief Justice or the Judge President of the relevant court (Wesson & Du Plessis, 2008: 3). Appointments were often seen as political — either in terms of political ideology or party loyalty (Cowen, 2010: 14). Judges were appointed exclusively from among advocates, were almost exclusively male, and, until some black judges were appointed shortly before the 1994 election, were exclusively white. In 1990, the judiciary was entirely white and, with one exception, male (Ismail Mahomed, the country's first black judge, was appointed in 1991). At the date of the country's first democratic election in 1994, there were only three black male judges and one white female judge — the remainder of the judiciary comprised white men (Wesson & Du Plessis, 2008: 3).

This situation has changed significantly since the beginning of the constitutional era. Perhaps the most fundamental change has been the creation of the JSC. The JSC plays a significant role in the appointment of judges in South Africa and advises government on any matters relating to the judiciary and the administration of justice (Constitution, s 178).

The JSC consists of:

- the Chief Justice, who presides at meetings of the Commission
- the President of the Supreme Court of Appeal
- one Judge President designated by the Judges President
- the Minister of Justice or his/her alternate
- two practising advocates nominated by the advocates' profession and appointed by the President
- two practising attorneys nominated from within the attorneys' profession and appointed by the President
- one teacher of law designated by teachers of law at South African universities

- six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties
- four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces
- four persons designated by the President after consulting the leaders of all the parties in the National Assembly
- when considering matters relating to a specific High Court, the Judge President of that court and the premier of the province concerned, or an alternative designated by each of them, are added.

The significant number of politicians and political appointees on the Commission has led to concerns about politically motivated appointments (Kendal, n.d.). Up to seven of the members of the JSC from the National Assembly and National Council of Provinces may be members of the ruling party. The Minister of Justice is appointed directly by the President (Constitution, s 91(2)). Eleven members of the JSC are either appointed by the President with some degree of consultation with, or prior election by, other bodies, or are members by virtue of positions to which they are appointed by the President (although many of these require input from other bodies — for example, from the JSC itself in the case of the three judges). It is therefore easy to see how the JSC is perceived as a politicised body dominated by the ruling party. However, the Constitutional Court has found that executive involvement in judicial appointment does not infringe judicial independence or the separation of powers, in light of other provisions of the Constitution. The Court noted that the Constitution vested judicial authority solely in the judiciary, and protected the judiciary against interference from other branches of government. The Court characterised the JSC as 'a broadly based selection panel for appointments to the judiciary', which 'provides a check and balance to the power of the executive to make such appointments' (*First Certification of the Constitution Judgment*;[7] Bruce & Gordon, 2007: 50).

The JSC advises the President on the appointment of the Chief Justice and Deputy Chief Justice, and must be consulted by the President regarding the appointment of the President and Deputy President of the Supreme Court of Appeal (s 174(3)). For the appointment of judges to the Constitutional Court, the JSC is required to prepare a list of nominees, three more than the number of vacancies, from which the President makes the appointments (Constitution, s 174(4)). For other courts, the President must appoint judges 'on the advice of' the JSC (s 174(6)). (The appointment of magistrates is not dealt with by the JSC.)

Section 174 of the Constitution provides broad criteria against which judicial appointments are made. Subsection (1) provides that 'any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer'. Subsection (2) then provides that 'the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered

when judicial officers are appointed'. The section is deceptively simple. Questions of what makes a candidate 'appropriately qualified', what it means that the need to reflect racial and gender composition 'must be considered', and how the two subsections interrelate, are keenly debated (see Cowen, 2010: 21–60 for a full discussion of the two subsections).

Before making recommendations for appointments, the JSC conducts interviews which are open to the public, although its deliberations occur in closed session and it does not give reasons for recommending or not recommending candidates for appointment (although the decision in *Judicial Service Commission v Cape Bar Council*[8] means that the JSC is, as a general principle, obliged to give reasons for a decision not to recommend a candidate's appointment if properly called on to do so). In addition to increasing the openness and transparency of the appointment process, the pool of candidates from which appointments are made has been widened to include attorneys, magistrates and, sometimes, academics. This goes some way to meeting the vision for which the JSC was introduced: to guard against judicial appointments being made in the style of the apartheid era — that is, to avoid politically motivated appointments being made in private by the executive, without the input of the public or the legal profession (Bruce & Gordon, 2007: 24; Cowen, 2010: 14). Cowen (2010: 14) argues that 'the very purpose of establishing a broad-based commission to select judges was to counterbalance executive power and thereby preserve judicial independence'. Open judicial appointments, free from party political considerations, are said to be an incidence of the transformation of the judiciary contemplated by the Constitution (Wesson & Du Plessis, 2008: 5).

This change in the process of how appointments are made was felt to be a necessary requirement to ensure that black and female candidates were appointed to the Bench. And the judiciary has slowly but surely been transformed. As discussed, before 1994 the Bench comprised, almost entirely, white men. By June 2004, there were 76 black judges, 126 white judges and 26 women judges (13 of whom were white and 13 black) (Judicial Service Commission, 2004; Wesson & Du Plessis, 2008: 2). By 2011, 135 of the country's 226 judges were black and 91 white. Of the 226, 59 were women (O'Regan, 2011), illustrating that the transformation of the demographics of the Bench has proceeded more quickly along racial than along gender lines. Deputy Chief Justice Moseneke (2010) has remarked that, 'whilst more needs to be done, much has been achieved in procuring remarkable diversity as to race, class and gender'.

However, we suggest that there is a value and a deeper underlying imperative to transformation than simply changing demographics. The scope and ambition of the Constitution, as discussed earlier in this chapter, suggests as much. Chief Justice Mogoeng Mogoeng also appears to take a view of transformation that goes beyond representation alone. In his first public speech after his appointment, the

Chief Justice said:

> [W]*e would be naive to assume readily that competence and colour pigmentation or gender without more would satisfy this constitutional requirement* [that the judiciary broadly reflect the racial and gender composition of South Africa] *in relation to judicial appointments ...* [W]*e would do well to continue to recognise that it takes a whole lot more than just being a competent lawyer with a dark pigmentation to represent black people and a competent woman lawyer to represent women.* (Mogoeng, 2011)

While the suggestion that judges 'represent' a particular section of society is concerning, the Chief Justice is, in our view, correct to argue that transformation is about more than demographic representivity. Of course, such an argument leads to the question of exactly what we mean by judicial diversity and, indeed, by 'transforming' the judiciary. If, as has been suggested, it is correct that transformation of the judiciary is about more than superficial compliance with s 174(2) of the Constitution, then it is about more than merely ensuring that the Bench has a representative racial and gender composition. As important as this is, what more might 'transformation' mean in respect of the judiciary?

Transformation of the judiciary has been divided into three categories. On this understanding, the first category is transformation in terms of demographics. The second category is transformation in terms of underlying attitudes, and the third is that the judiciary 'must be responsive to the goals of the democratically elected government'. The 'change in underlying attitudes' is understood as requiring the judiciary to embrace and enforce the principles of the new legal order ushered in by the Constitution (Budlender, 2005: 716). Other commentators have identified aspects of the transformation of the judiciary as including the appointment of judges; the need for diversity in the judiciary; the need to change attitudes within the judiciary; the need for greater judicial accountability; and the need for a more efficient judiciary (Wesson & Du Plessis, 2008: 2).

This illustrates how much broader a nuanced understanding of transformation can be than a narrow interpretation of it being nothing more than racial and gender composition. Concepts such as judges' underlying attitudes and their responsiveness to government policy (which we interpret as meaning a responsiveness to government policies designed to advance constitutionally mandated goals, not a blanket deference to any government policy without testing its constitutionality) cohere with the argument, previously advanced, that judges appointed to the Bench must have the skills and capacity to advance and develop constitutional rights.

The current Deputy Chief Justice has identified the benefits of increased diversity on the Bench — beyond fulfilling the transformative requirements

of the Constitution — as including the potential for diversity to overcome prejudiced attitudes and to improve the quality of decision-making (Moseneke, 2010). We agree that decision-making will be improved by appointing judges from diverse backgrounds, with diverse life and professional experiences (to create a Bench that is as broadly diverse as South African society). As Jackson (2007: 141) has argued, 'differences in background, culture, life experience and even work experience impact how persons perceive the law, and promote a more thorough examination of the law from different viewpoints'.

Therefore, the rationale behind ensuring that we have a representative judiciary is not just that we appear to include all races and both genders, but that the fact of coming from different backgrounds will give a transformed Bench a range and depth of perspective that an untransformed Bench would inevitably lack. Judges are not representatives of any constituency or group. Their duty is to be fair to all manner of people according to law, without fear, favour or prejudice (Evans & Williams, 2008: 300). However, we do acknowledge the need for the judiciary to reflect the society within which it operates in order to increase the confidence of the public in the judiciary. Any institution that fails to reflect the make-up of the society from which it is drawn runs the risk of losing legitimacy and, thus, the confidence of that society. In order for the public to have confidence in the judiciary, they need to feel that 'it belongs to all of us'. Because the public needs to 'identify with the judiciary' and to feel that 'it identifies' with them (Budlender, 2005: 716), it is obvious that a judiciary consisting entirely of white men is completely unacceptable (Wesson & Du Plessis, 2008: 5). In order to make a bold and decisive break from the past, we need to appoint judges from broadly diverse backgrounds, who have the ability to innovate and reason creatively to ensure that full effect is given to the Constitution.

We now examine the effectiveness of the JSC's interviewing process — which precedes the nomination of candidates for judicial appointment — to identify those candidates who meet this vision.

6.5 The JSC's interview process

How does the JSC assess candidates for judicial appointment? We focus here on the questions put to candidates during public interviews. Of course, this is not the only way in which candidates are assessed. Prospective judges are required to submit a questionnaire, which the JSC will also consider when assessing their candidature. However, the interview process is the clearest indication to the watching public of how the JSC operates and what it wants to find out about prospective judges. It is not unfair to use the interviews as a litmus test for how well the JSC appears to be fulfilling its constitutional mandate.

The authors have observed several rounds of interviews in the course of a monitoring and reporting project by the Democratic Governance and Rights

Unit (DGRU), University of Cape Town — the interviews for Constitutional Court positions in September 2009 and June 2012, and then interviews for High Court and Labour Court positions in April and October 2010, April and October 2011 and April 2012. We also observed the interview of Mogoeng Mogoeng for the position of Chief Justice in September 2011. Over this period, we observed numerous difficulties in the interview process which, in our opinion, have the potential to hinder the appointment of the best possible judges.

There is perhaps a danger, in writing critically about the JSC's activities, of making the Commission appear dysfunctional. Notwithstanding some high profile events where the JSC has been criticised and even successfully challenged in court, the JSC appears to remain generally functional and recommends some good appointments. However, an honest and critical appraisal of how such an important organisation goes about its work is appropriate and necessary in an open and democratic society. By noting difficulties with the interview process, we hope to highlight how the JSC can further improve its performance in nominating the best judges for appointment. We discuss these issues under four themes: the need for criteria for appointment; dealing with allegations of wrongdoing and poor performance; addressing issues of transformation and diversity; and the scrutinising of candidates' judgments and the judiciary's confidence in the appointment process.

6.5.1 The importance of criteria

At the time we started to monitor the interviews, the JSC had failed to articulate publically a clear vision of what criteria it regards as essential for an ideal South African judge. In response to a request made on behalf of the DGRU under the Promotion of Access to Information Act in 2009, the JSC identified a 'wide variety of factors' that are taken into account when deliberating on candidates. These include, but are not limited to:

- the Judge President's recommendation
- support from professional bodies
- the need for transformation of the Bench to reflect the ethnic and gender composition of the country
- the judicial needs of the court in question
- a candidate's age and range of experience, including experience as an acting judge, and
- the merits of candidates in relation to each other.

This was informative, but did not tell us much about what the JSC thinks makes a good judge — we do not know what, for example, the JSC thinks would constitute an appropriate judicial temperament or judicial philosophy in a South African judge.

This lack of a 'template' led to various difficulties during the interview

process. A great many questions were asked which seemed to be of little or no relevance in establishing a candidate's suitability for the Bench, while questions that might have proved more useful in assessing candidates were not asked, or were asked seldom or in insufficient depth. An example of this was seen in the interview of Judge Dunstan Mlambo for the Constitutional Court in 2009. Judge Mlambo seemed to us to have a strong chance of being shortlisted — his stature as a judge was illustrated by his subsequent appointments as Judge President of the Labour Court, and then as Judge President of the North and South Gauteng High Courts. But in the Constitutional Court interviews, Judge Mlambo fielded a large number of questions about the performance of the Legal Aid Board due to his position as chairperson of that institution. These questions seemed to us to be more appropriate to a parliamentary oversight committee, and to have little relevance to his suitability as a potential Constitutional Court judge. Yet they took up a significant proportion of the interview.[9] Coincidentally or not, Judge Mlambo was not included on the list of nominees sent to the President.

The apparent lack of standardisation of the questions asked often created significant timekeeping problems for the Commission. It was not uncommon for interviews scheduled for the early part of a day's proceedings to run progressively further and further over the allocated time. When it became apparent that the JSC was running far behind schedule, interviews in the later part of the day would speed up significantly. This apparently mundane matter of timekeeping had an obvious impact on the equality and fairness with which candidates were treated. The potential unfairness could manifest in different ways. On the one hand, candidates in a longer interview might have a problematic aspect of their track records subjected to significant scrutiny, thus undermining their prospects of appointment, whereas a shorter interview might not have revealed the problem. On the other hand, a longer interview might allow a candidate to successfully assuage commissioners' doubts about an aspect of their record, which might not be the case in a shorter interview.

It should be noted that, while we suggest that some of the questions asked may ultimately be irrelevant, they are often relevant to a point or begin from a relevant premise, but are asked in broad and general terms that do not elicit helpful answers. Furthermore, some questions can be pursued beyond a point at which they provide useful insights into candidates' abilities, and begin to take time away from other questions that may prove to be more useful. Two broad lines of questioning have been observed which, in our view, tend to sidetrack the JSC from identifying the core judicial qualities (or lack of them) in interviewees. First, there has been a tendency for commissioners to ask questions which relate to the general functioning of the judiciary and the legal system, but which often do not serve to demonstrate how a candidate would bring their individual qualities to bear on such issues if appointed to the Bench. For example, during

the October 2011 interviews, several candidates were asked about the future of the institution of Senior Counsel. While some candidates spoke passionately about the value of Senior Counsel status as an indication of peer recognition, it was not apparent that any of these exchanges identified core judicial qualities. Second, many questions are asked which tap into broader challenges and issues facing South African society, but which, again, do not leave the observer any the wiser as to how the individual candidate (or indeed any other judge) would be capable of addressing these issues if appointed.

The JSC has since publicly announced a summary of the criteria it uses when considering candidates for judicial appointments (Judicial Service Commission, 2010). These have been subjected to some criticism (Hoffman, 2010), and are currently open-ended and need to be fleshed out further. But they at least provide a starting point for an assessment of the JSC's performance in interviewing and nominating candidates, and thereby provide a basis for stakeholders to engage further with the process of judicial appointments. It is unlikely to be a coincidence that the JSC's timekeeping, and the focus of the questions asked, subsequently improved. Having a clear understanding of the criteria upon which candidates are being assessed, shared among the members of the JSC, can only help to provide a better focus for the interviews.

6.5.2 Dealing with allegations of wrongdoing and poor performance

Some of the more dramatic moments during JSC interviews take place when questions are put to candidates about aspects of their performance as (acting) judges or about complaints that had been made about them. The JSC does not seem to have a consistent approach as to what questions may be put to candidates without forewarning them. Three examples from the interviews in October 2010 demonstrate this. In an exchange that was widely reported in the media, questions were put to one candidate regarding allegations that he had overcharged for his services.[10] When the source of this information was not revealed, the questions were disallowed. It was ruled that adverse comments should be put to a candidate before the interview, so that the candidate could be fully prepared to answer the allegations.

However, in interviews of candidates for positions on the Supreme Court of Appeal (SCA), it was put to some candidates that fellow judges on the SCA had not been impressed by the candidate's performance while acting as a judge of appeal. Although this may be distinguished from the situation described in the previous paragraph, since in this instance the source was disclosed to the candidate (at least generically), there are similarities: one candidate for the SCA responded that he had not previously heard these complaints about him.[11] It thus appears that these adverse comments had not been put to the candidate before his interview. It was notable that, in a subsequent interview for a High

Court position, a commissioner put a question to a candidate about an adverse report the commissioner had received about the candidate's conduct, and remarked before putting the question that he had advised the candidate about it the previous day in order for the candidate to be prepared to respond.[12]

Arguments may be made for and against both approaches. On the one hand, it is clearly desirable to protect candidates from being hijacked by allegations that they have not previously heard and to which they may not be in a position to respond for the first time in an interview setting. On the other hand, forewarning candidates of concerns about their suitability for judicial office may enable them to prepare to avoid the allegation in a way that stops a serious concern from being ventilated and thereby avoids a more searching examination. If the JSC is to follow the approach that candidates must be forewarned, commissioners have a heightened responsibility to probe candidates' responses to such questions to ensure that important issues reflecting on a candidate's suitability are not glossed over.

Whichever approach it decides on, the JSC must be clear about its decision: failure to provide such clarity risks further unfair and unequal treatment of candidates. A clear awareness of what to expect from the JSC in questioning will help to demystify the JSC's working practices, and may help to make candidates more willing to put themselves forward for appointment.

6.5.3 Transformation and diversity

The JSC's approach to issues of transformation has also been problematic. There has been a tendency to focus only on race and gender, rather than a broader understanding of transformation, illustrated by the large number of questions that commissioners ask to determine whether candidates show a 'transformed mindset'.[13] These questions seem to be directed largely at white candidates, which is understandable in the sense that white candidates (or at least those who practised law during the apartheid era) are inevitably more vulnerable to perceptions that they may not embrace the new constitutional dispensation. But the danger with this approach is that candidates who might demonstrate a 'transformed mindset' in response to the JSC's questioning might, nonetheless, have conservative views on the Bill of Rights, on individual rights, or on the separation of powers or what level of deference is appropriate to give to the state. The current line of 'transformation questioning' is, we suggest, fairly likely to weed out an unreformed racist, but less likely to uncover problematic attitudes the cut across traditional racial and gender divisions in South African society.

Moreover, there is a danger that the type of questions about transformation the JSC asks will produce a Bench of judges with a narrowly similar view of the Constitution, or at least who profess a particular view. Clearly some views are off limits for a judge in the new South Africa — a judge holding overtly

racist or sexist views, for example, ought not to be appointed as there would be serious issues with both the symbolism of the appointment and with the likelihood of prejudice clouding such a judge's decision-making. Nor should judges be appointed who are so executive-minded that they would decline to exercise the powers of review demanded by the Constitution. But, outside of these more extreme cases, is the JSC allowing for a broad enough range of views and backgrounds to be represented on the Bench?

It will be interesting to observe whether, in light of his public comments (quoted earlier), the current Chief Justice inculcates a change of approach among commissioners in this regard. One trend, which was noticeable during the October 2011 interviews, was for advocates to be asked about the extent to which they appeared together with black counsel. The premise of this line of questioning appears to be that it will reveal a candidate's commitment to transformation. Although this may well reveal commitment to transformation, it is also worth questioning whether it will inevitably do so and whether, on its own, it shows sufficient commitment to the values of the Constitution. It is conceivable that a candidate might ensure that they appear together with black and women counsel, and yet hold, for example, views on homosexuality or gender rights that are inconsistent with the Constitution.

It must be acknowledged that some commissioners are alive to the need for the JSC to ensure that it appoints a sufficient diversity of judges, not just in terms of gender and racial representivity but also to ensure that the Bench benefits from the diversity of viewpoints which our country has to offer. During an interview in October 2010, one of the provincial premier's representatives remarked on the need for jurists from broader civil society to contribute to the South African legal system;[14] and, during another, a commissioner remarked that diversity of the Bench allowed for different perspectives.[15]

However, there has been a tendency for some commissioners to appear wary of candidates with backgrounds that suggest strong human rights activism. It seems that this is based on a perception that these candidates' backgrounds would make them likely to be predisposed to find against government in socio-economic rights cases or to place overly broad interpretations on socio-economic rights. For example, it was put to one candidate that there was a possible fear that, in the light of his background as a 'human rights activist', he might tend to go 'overboard' in favour of socio-economic rights.[16] Another commissioner told the same candidate that human rights have a very 'liberal' basis, which sometimes leads to an inability to understand the challenges faced by government.

In fairness to the JSC, the candidate in question, while initially unsuccessful, was subsequently recommended for appointment after the next round of interviews. But the concern remains, particularly as a slightly different

manifestation of the issue was raised increasingly strongly during (and since) the October 2011 interviews. Some commissioners have begun to question candidates about their approach to the separation of powers and the role of courts in making policy. These questions seem clearly to be an assertion of the need for the courts to respect the separation of powers and for the courts to avoid the policy-making arena. Mention was made (without citing specific cases) of instances in which the courts had overreached and infringed on this aspect of the separation of powers.

It must be acknowledged that this line of questioning is, at least on the surface, quite appropriate. It cannot be denied that deference is an important aspect of judicial decision-making under our constitutional system, including in socio-economic rights cases. In the context of socio-economic rights, the Constitutional Court's jurisprudence — not to mention the wording of the rights in the Constitution — makes it clear that factors such as resource constraints and the reasonableness of government policy must be taken into account in, and, indeed, are central to, adjudicating socio-economic rights cases. Thus, candidates' views on these issues form an important part of their judicial philosophy and are appropriate and relevant grounds for questioning.

Likewise, it is clearly relevant to test a candidate's understanding of a principle such as the separation of powers, and the proper relationship between the court and other branches of government. But this should not be done in a way that pressures candidates to disavow the courts' constitutionally mandated role to strike down legislation or government conduct that is inconsistent with the Constitution. Candidates should not be held back from being appointed for asserting a basic feature of the legal system under the Constitution.

Similarly, the apparent premise that a background of human rights activism might disqualify a candidate is troubling. There is an obvious danger that, were the JSC to follow this approach to its extreme but logical conclusion, the Bench could become staffed by overly executive-minded judges, lacking in a diversity of views on socio-economic (and indeed other) rights. The judiciary needs and should be given a range of perspectives — judges may take different views on socio-economic rights, but, provided that these views are within the range of established precedent and reasonable interpretations of the Constitution, this diversity of viewpoints is not only unproblematic but, in fact, healthy for our jurisprudence. We would suggest that, rather than imposing an effective 'presumption of bias' on candidates with a human rights background, commissioners should explore the detail of candidates' records to establish whether they are likely to apply the law fairly and without favour, as our Constitution requires. After all, principles of deference do not obviate the socio-economic rights in the Constitution, to which our courts must continue to give effect.

Thus, the diversity of views on the Bench, for which we argue, should not

extend to judges who would deny the courts' constitutionally mandated power of judicial review. Indeed, we submit that it is entirely defensible and proper to insist that candidates for judicial office can demonstrate a resolute commitment to the role of the courts in reviewing executive action and enforcing the Constitution.

6.5.4 Scrutinising judgements and judicial confidence

Some trends in the interview process have been positive, such as the introduction of criteria discussed in section 6.5.1. The JSC also seems increasingly willing to examine candidates' judicial track record by exploring themes that emerge from judgments they have written, and by asking them to articulate their judicial philosophy. Legitimate concerns are raised about judges being forced to justify their decisions outside the courtroom, particularly in a forum like the JSC where their answers may impact on their chances of elevation to higher office. Strong leadership from the chairperson is required to protect candidates from having their judgments 're-litigated', and there is certainly a need to be alive to this risk.

However, from our observations it appears that these questions are generally appropriately put and do not require candidates to justify decisions in an inappropriate manner. Rather, judgments tend to be used to highlight more general jurisprudential themes, which candidates are then asked to discuss. In our view, not only is such questioning appropriate but it is also effective. It can be a challenge for the JSC to establish whether a candidate is truly committed to the values of the Constitution or is merely paying lip service to them for the purposes of an interview. What better way to assess this commitment than by exploring how it comes through in a judgment — particularly as the writing of judgments would be one of the core components of the candidate's job if they were appointed. Indeed, we would like to see such questioning playing an even more central role in the JSC interviews.

An assessment of the performance of the individual judges appointed by the JSC and their performance in living up to the aspirations of the Constitution is beyond the scope of this chapter. But there are certainly indications that the appointments process does not enjoy the full confidence of the judiciary. Prior to the 2009 Constitutional Court interviews, three of the shortlisted candidates — Judges Robert Nugent, Belinda van Heerden and Shehnaz Meer — withdrew their candidacy. A retired Constitutional Court judge, Johan Kriegler, was reported to have said that Judge Nugent was 'not prepared to submit his candidacy to the deliberations of people he does not trust' (*Mail & Guardian*, 2009). When interviewed for the Constitutional Court in June 2012, Judge Nugent confirmed having made those remarks.

The ongoing complaint and counter-complaint between Western Cape Judge President John Hlophe and the judges of the Constitutional Court may have been as significant a factor in these withdrawals as the JSC's interview process — and

indeed, there may have been different reasons altogether. However, in 2012, the JSC twice had to extend the deadline for nominations for a vacancy on the Constitutional Court after receiving insufficient nominations for the position (Rabkin, 2012). It is an extraordinary situation for a vacancy on the country's highest court not to attract sufficient applicants. Whatever the reasons for this, something has clearly gone wrong with the appointments process, at least in respect of the Constitutional Court, in the eyes of many of the country's judges.

6.6 Conclusion

The South African Constitution establishes an ambitious and wide-reaching framework of rights that is intended to infuse all law and to transform society. In order to ensure that these rights are protected and fulfilled, there must be access to justice, and this right should be interpreted as providing access to a high quality justice system that is able to deliver on the promise of the Constitution, not just physical access to courts and to legal representation. A strong and impartial judiciary is a cornerstone of access to justice. This requires judges with a high degree of skills, not just in traditional 'technical' areas of the law, but also in adjudicating on matters affected by the Constitution. In order to meet these standards, a rigorous process needs to be followed in appointing individuals who will carry out the judicial function.

The JSC's interview process contains several flaws that may have, and may continue to, hamper the Commission's ability to nominate the best possible judges for appointment. These include problems of inconsistency in both the timekeeping and the focus of questions during interviews, leading to unequal treatment of different candidates. At times the JSC exhibits a narrow understanding of transformation, and there is a danger that this approach does not allow a fully diverse judiciary— in terms of important considerations such as intellect, background and judicial philosophy — to be appointed. There is a related concern that some lines of questioning might lead to the appointment of judges who are overly cautious or deferential towards government.

What should be done to improve this situation? The somewhat vague and open-ended guidelines that the JSC has made publicly available need to be formulated into clear criteria that are continually updated. These criteria need to ensure that suitable candidates are nominated for appointment, such that these judges will be able to apply and develop the Constitution and the law in a manner consistent with the transformative vision of the Constitution. Commissioners will, hopefully, tailor their questioning of candidates to focus on these criteria, drawing on candidates' judicial track records. This will help to ensure that the rights in the Constitution are capable of being claimed effectively and, thus, that the promise of access to justice (broadly defined) can be fulfilled.

End notes

1 *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) at 754–760.
2 *S v Mhlungu* 1995 (3) SA 867 (CC) at 894–895.
3 *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC) at 617–619.
4 *Mike Campbell (Pty) Ltd And Others v The Republic of Zimbabwe,* SADC (T) Case No. 2/2207, reported in *Journal of Commonwealth Magistrates' and Judges' Association*, 18(1)(2009): 40.
5 *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC).
6 *De Lange v Smuts NO and Others* 998 (3) SA 785 (CC), at 810.
7 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, *1996* 1996 (4) SA 744 (CC) (*First Certification Judgment*), at 814–815.
8 (Centre for Constitutional Rights as *amicus curiae*) *Judicial Services Commission v Cape Bar Council* (818/11) [2012] ZASCA 115.
9 Our notes from the interview reflect 12 separate questions relating to the functioning of the Legal Aid Board.
10 See Rabkin (7 October 2010). The incident occurred when Brian Pincus SC, a candidate for a vacancy on the Western Cape High Court, was asked about allegations that he had overcharged for his services. Chief Justice Ngcobo refused to allow the questions if the source of the information was not revealed, ruling that it had always been the JSC's practice that adverse comments be put to a candidate prior to their interview, to enable them to prepare fully.
11 Rabkin (5 October 2010). This exchange occurred when the President of the Supreme Court of Appeal, Lex Mpati, questioned Judge Willie Seriti about critical remarks made by other members of the court about Judge Seriti's performance. Judge Seriti expressed surprise at the comments and indicated that he had not previously heard the allegations.
12 This occurred during the questioning of Advocate James Goodey SC by Judge President Bernard Ngoepe on 11 October 2010.
13 An example of how far such questioning can extend was seen in the interview of Advocate Hendrik De Vos SC on 13 April 2010. After having been questioned about his political affiliations and his having acted for senior members of the SANDF, Advocate De Vos was questioned about the integration of the tennis club to which he belonged, and what steps he had taken to encourage disadvantaged members of the community. With the interview already running over its allocated time, the chairperson (Chief Justice Ngcobo) intervened to curtail this line of questioning.
14 Remark made during the interview of Advocate Fayeeza Kathree-Setiloane, 11 October 2010.
15 Remark by Chief Justice Sandile Ngcobo during the interview of Advocate Selewe Mothle SC, 12 October 2010.
16 Comment by Judge President Ngoepe during the interview of Jody Kollapen, 11 October 2010.

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Chapter 7

Judicial selection: What qualities do we expect in a South African judge?

Susannah Cowen

7.1 Introduction

What qualities do we expect in a South African judge? The question warrants examination because a principled public discourse about the criteria for judicial selection can strengthen our democracy, our commitment to the rule of law and the protection of human rights.

It is a question that should concern all who play a role in judicial selection. Transparency about criteria used for judicial selection serves many interests. It enables a principled public debate about the adequacy of the criteria used; it enables those who nominate candidates or comment on nominees to do so optimally; it enables those who may wish to make themselves available for judicial office to assess their own candidacy; and it enables the media to perform their responsibility to inform the public and generate informed public debate on these matters. Perhaps most critically, however, decision-making is always enhanced when decision-makers are clear about the criteria to be used and the nature of the considerations that judicial selectors must weigh against others.

The task of identifying the qualities we seek in our judges may not be illusory but it is a daunting one. While some qualities are obvious, such as independent-mindedness and integrity, there are numerous qualities that are relevant to judicial office, just as there are many types of personality that might make a good judge. And, while it is relatively easy to say that a candidate for judicial office must have integrity, for example, what that means practically requires careful and detailed scrutiny of a vast literature and much wisdom about judicial ethics. One has to also acknowledge that there is no algorithm that can be applied to test whether a candidate will be a good judge, nor how any particular criterion should weigh against another when assessing a particular candidate. This chapter therefore cannot be either definitive or comprehensive. Rather, it is a modest attempt to explore some of the questions that arise and that warrant broader discussion in what is inevitably highly contested and dynamic terrain.

Shortly after the appointment of Chief Justice Ngcobo in 2009, the Judicial Services Commission (JSC) published a set of criteria. It did so following widespread criticism of the lack of transparency in the judicial selection process. The criteria published were a replica of those developed by the JSC in 1998.

In short, they require candidates to display integrity, energy and motivation, to be both 'competent' and 'experienced' (technically and in respect of capacity and experience in giving content to the values of the Constitution), to have appropriate potential and to project an appropriate symbolic message to the community at large. While the publication of these criteria is a helpful starting point, they are arguably insufficient, both in their lack of detailed content and because crucial qualities are omitted, such as, for example, independent-mindedness and fairness.

The starting point for any discussion about what qualities South African judges should display is the Constitution because the Constitution is the supreme law. It is to that question that we now turn.

7.2 The Constitution's general requirements

Before a South African judge takes office, he or she swears or affirms '[to] be faithful to the Republic of South Africa, [to] uphold and protect the Constitution and the human rights entrenched in it, and [to] administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.'[1] These commitments contain the essence of what we expect of our judges.

However, the Constitution deals expressly with the criteria for appointing judicial officers.[2] Two essential criteria appear from s 174(1), these being that a person must be 'appropriately qualified' and 'a fit and proper person' to be a judge. These can be regarded as essential or necessary criteria in the sense that a person who is not appropriately qualified or is not a fit and proper person may not be appointed as a judicial officer. While there may be much room for debate about how different criteria should be weighed against others in conducting the judicial selection exercise, all candidates should, at least, display the qualities identified as essential or necessary.

Because the Constitution does not expressly detail the content of these criteria, we are enjoined to interpret them. Although the terms beg many more questions than they answer, their meaning should be sourced firstly from the Constitution itself, and, more particularly, by considering the nature of the judicial function and the powers that vest in judges. Perhaps most fundamentally, the Constitution requires that the judiciary must be independent, protect the Constitution and uphold rights, and apply the law impartially and without fear, favour or prejudice.[3]

The Constitution also places important responsibilities on judicial selectors in respect of non-discrimination, diversity and racial and gender representivity. The Constitution's protection of the right to equality, in s 9, mandates that there is no room for discrimination in the process of judicial selection, and, arguably, also enables selectors to seek to enhance the diversity of the judiciary. On the

question of race and gender representivity, the Constitution is clear. It ordains specifically that when judicial officers are appointed, 'the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered'.[4]

7.3 Appropriately qualified

It is unsurprising, given South Africa's history of unequal access to the legal profession and judiciary, race- and class-based inequalities in our education system and deeply rooted racist and sexist attitudes, that public discourse about 'merit' is contested and fraught. Yet appropriate meaning, which is responsive to the challenges of the judiciary, profession, litigants and society, must be given to the idea.

The term 'appropriately qualified' raises interpretive questions. Firstly, what is meant by 'qualified'? Does it refer narrowly to the completion of a tertiary degree in law? A broader interpretation is probably the correct one, referring not only to academic legal qualification but also to skill, knowledge and experience that 'makes a person suitable for [the] particular position or task [of judging]' (Mpati, 2006). The broader interpretation is consistent both with the South African legal tradition and current practice. South African judges — as in other systems, drawing, as we do, on the Anglo-American tradition — have historically been sourced from the pool of experienced and skilled lawyers. This tradition can be contrasted with that which prevails in some continental European traditions that have 'career judiciaries', which entails specific judicial education and training. Although various judicial training initiatives are under way in South Africa,[5] we remain heavily reliant on experience as the primary means of acquiring the relevant skills.

However, even if the broader interpretation of 'qualified' is correct, what lies at the heart of the matter is what constitutes an 'appropriately' qualified candidate.

Perhaps most obviously, it is appropriate that a judge is trained and has experience and skill *in law* because the Constitution vests in judges 'judicial authority'. Because law embraces many fields, a judge serving in a court with general jurisdiction must be equipped to adjudicate disputes in a broad range of fields.[6]

Under the constitutional dispensation, all judges need to be equipped to undertake constitutional adjudication, which often requires judges to engage in moral reasoning in giving content to the normative value system underlying the Constitution and to test government action. Judge Davis of the Cape High Court has suggested that this means that judges need to be sufficiently schooled in what he terms 'the philosophical approach' (Davis, 2008: 143).[7] Sir Sydney Kentridge has suggested (in the context of the United Kingdom Human Rights Act) that

'experience of public law should count more heavily. Broad jurisprudential interests will be more desirable than ever' (2003: 55). Arguably, public law experience is now more relevant than ever before, particularly to navigate the difficult line between judicial and executive or administrative authority.

Another important dimension of constitutional adjudication and the transformative project of the Constitution is the place that it accords to customary law. As the Constitutional Court has held, while in the past indigenous law was seen though the common law lens, it must now be seen as an integral part of our law and its validity determined by the Constitution:

> *This approach avoids the mistakes which were committed in the past … and which led in part to the fossilization and codification of customary law which in turn led to its marginalization. This consequently denied it of its opportunity to grow in its own right and to adapt itself to changing circumstances. This no doubt contributed to a situation where, in the words of Mokgoro J, '*[c]*ustomary law was lamentably marginalized and allowed to degenerate into a vitrified set of norms alienated from its roots in the community*'.[8]

In order for customary law to resume its proper place in the our legal order, South African judges must increasingly be equipped to adjudicate customary law claims, insofar as customary law disputes are adjudicated in our courts.

While all judges must surely be equipped to adjudicate constitutional questions, it is arguably not necessary for every judge to have experience in every field. What is 'appropriate' will depend, in part, on the court for which a candidate is being considered for appointment and whether it is a court of specialist or general jurisdiction. On the whole, South African courts have general jurisdiction or require general experience. But while it might be ideal for candidates for judicial office to have experience in all things, it is both unrealistic and practically unnecessary in each instance. Nevertheless, it might be considered 'appropriate' for a candidate for appointment to a court of general jurisdiction to have a reasonably broad range and depth of skills and experience across legal fields. Because some fields of law arise more commonly in litigation (perhaps commercial law, public law and criminal law), skill and experience in identified areas can legitimately be regarded as essential.[9]

A dominant feature of the post-transition South African debate about judicial selection relates to the *nature* of prior experience that qualifies a candidate for appointment. Whereas historically South African judges were drawn, at least for the most part, from the ranks of advocates (usually senior counsel),[10] since the transition, and partly with the purpose of promoting diversity within the Bench, judges are now also drawn from the attorneys' profession, the magistracy and academia.[11] Although the nature of the fit between the skills required to succeed

in these professions and roles and to be a good High Court or appellate judge differ in each case, it can hardly be contested that there are skills developed in each realm that are relevant to the exercise of the judicial function.

By expanding and reconceptualising what Malleson calls 'the candidate pool', we have accepted that 'the candidate pool and the definition of merit are interdependent' (2006: 137). The benefit that we gain is to open the doors of the judiciary to a wider group of potentially qualified people. Not only does that enhance our ability to improve the diversity of the judiciary and to do so more rapidly,[12] but, in theory, it also means greater competition, which may improve our chances of selecting the best candidates.[13] We ought, however, to appreciate that the process is a dynamic one that should respond to the needs of the judiciary and the realities within any professional sphere over time.[14]

While it is no doubt true that there is a range of prior experience that may qualify a person appropriately for judicial office, we are arguably focusing on the wrong question. The fact that a candidate has experience of a relevant sort is not enough: the question must surely be whether the candidate possesses the relevant skills and in adequate measure. Drawing on qualities identified by Chief Justice Mohamed, selectors should be asking, for example, whether a candidate has the qualities or skills at 'scholarship', 'forensic skills' and 'capacity for articulation' and, if so, of an appropriate level (1998: 666).

It is this enquiry that requires us to ask what are the specific needs and challenges of the South African judiciary, legal profession and litigants, and at a given time. And we cannot assume that the definition of merit in the past is what is good for us now or in the future. The point can be illustrated with 'language skills': given that our country is one with 11 official languages, the history of dominance of English and Afrikaans in judicial culture is steeped in oppression.

Notably, the JSC's criteria do not identify what skills derived from experience are regarded as necessary or manifest from a candidate's potential. The JSC has, in effect, said very little about how it assesses merit. The danger is that candidates will not be assessed against an articulated perception of an ideal judge.

This might be contrasted with the approach adopted by the American Bar Association (ABA) to vet the professional qualifications of candidates considered for nomination by the President for federal judicial office.[15] One of the three qualities that the ABA evaluates is 'professional competence'.[16] The ABA explains:

> [This] *encompasses such qualities as intellectual capacity, judgment, writing and analytical abilities, knowledge of the law, and breadth of professional experience. The Committee believes that ordinarily a nominee to the federal bench should have at least twelve years' experience in the practice of law. In evaluating the professional qualifications of a nominee, the Committee recognizes that substantial*

> *courtroom and trial experience as a lawyer or trial judge is important. Distinguished accomplishment in the field of law or experience that is similar to in-court trial work — such as appearing before or serving on administrative agencies or arbitration boards, or teaching trial advocacy or other clinical law school courses — may compensate for a nominee's lack of substantial courtroom experience. In addition, in evaluating a nominee's professional experience, the Committee may take into consideration whether opportunities for advancement in the profession for women and members of minority groups were limited.*

The JSC's approach might also be contrasted with the approach adopted by the Judicial Appointments Commission in the United Kingdom (UK).[17] New criteria for what makes a good judge have been used since October 2006, set out in a document entitled *Qualities and Abilities*.[18] The qualities and abilities fall under five headings: intellectual capacity, personal qualities, an ability to understand and deal fairly, authority and communication skills, and efficiency. If one extracts those relevant to assessing skills that derive from or are manifest in one's training and experience, at least the following are relevant:

- a high level of expertise in a chosen area or profession
- an ability to absorb and analyse information quickly
- appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary, and
- sound judgement and the ability and willingness to learn and develop professionally.

In concluding this section, it would seem that there are at least four distinct questions that arise within the South African context.

First, we need to identify the skills that are desirable in a judge that might be manifest in or derive from training or experience. Drawing on the material dealt with earlier, the following might be used as a guide: forensic skill, intellectual capacity, writing and analytical abilities, knowledge of the law and its underlying principles, knowledge of courtroom procedures, language skills, capacity for articulation, the ability to run a courtroom[19] and breadth of professional experience. Knowledge of the law and its underlying principles ought to include knowledge of constitutional law.

It should not, however, be forgotten that it is not only skills relating to legal acumen and language that are relevant to judicial office. Administrative capacity and communication skills are also important because the way a judge administers justice and communicates with litigants has a direct impact on access to justice, especially in a context in which language and financial means remain real barriers to courts for most people. It is thus not surprising that these considerations permeate the Guidelines for Judges of South Africa , which regulates judicial conduct once in office.[20]

The criteria used by the ABA in guidelines it has developed for evaluating judges' performance in office are similarly illuminating. These are:

- punctuality and preparation for court
- maintaining control of the courtroom
- appropriate enforcement of court rules, orders and deadlines
- making decisions and rulings in a prompt, timely manner
- managing his/her calendar efficiently
- using settlement conferences and alternative dispute resolution mechanisms as appropriate
- demonstrating appropriate innovation and using technology to improve the administration of justice
- fostering a productive work environment with other judges and court staff
- utilising recruitment, hiring and promotion policies and practices to ensure that a pool of qualified applicants for court employment is broad and diverse, and
- acting to ensure that disabilities and linguistic and cultural differences do not limit access to the justice system.[21]

The UK's Judicial Appointments Commission specifically identifies 'authority and communication skills' as meaning 'ability to explain the procedure and any decisions reached clearly and succinctly to all those involved, ability to inspire respect and confidence and ability to maintain authority when challenged.'[22]

Second, we need to find a means of determining what constitutes 'sufficient' or 'adequate' skill in respect of each. Put differently, what is the threshold that we regard as appropriate? While few candidates will be endowed with all desirable skills, the objective, of course, must be to ensure that judges of a very high calibre are appointed because judging well requires skill of the sorts referred to earlier. As President Zuma stated in his keynote address to the Second Judicial Conference of South African Judges, transformation of the judiciary and access to justice means that litigants must have access to a high standard of justice (Zuma, 2009).

Third, a view must be taken on whether it is 'appropriate' that a candidate has experience with the practical workings of the courts and litigation and, if so, how much. Experience in litigation is the primary way in which a person obtains forensic skill, a practical knowledge of how courtroom procedures work and the ability to run a courtroom. It is, however, not the only way, as the US example shows: the ABA considers experience such as appearing before or serving on administrative agencies or arbitration boards, or teaching trial advocacy or other clinical law school courses as potentially relevant. The questions asked by the JSC in its questionnaire suggest that, indeed, the JSC does look for extensive litigation or equivalent experience,[23] but it is not known what general criteria are applied in the deliberations process.

Generally, a candidate for judicial office should have reasonable, and preferably considerable, exposure to litigation or other equivalent experience. It is important not only because it enables the acquisition of relevant skills but also because it engenders confidence among litigants in the legal process. Former Australian Chief Justice Murray Gleeson suggests that the choices made by parties referring disputes that can be resolved according to law,[24] to arbitration, reveal the type of judge in which a litigant has confidence.[25] In South Africa this is, most often, a senior litigator or a retired judge, in other words, those with considerable courtroom exposure. The need for judges to inspire litigants' confidence in their ability to run the courtroom cannot be underestimated and bears directly on the public's perception of the integrity of the judicial system.

If we are going to depart from this general approach in any case, there must be mechanisms in place to preserve public confidence in the system and ensure that quality justice is delivered. One option, which has unfortunately not been rigorously pursued, is to provide new judges who have inadequate litigation experience with training and support.[26]

Fourth, thought must be given to how enduring discrimination in the legal profession should affect the assessment of relevant prior experience. The practical reality remains that race and gender (among other factors) do affect what work, and thus what experience and exposure, a person in practice will get. For example, a woman who has been in practice for 20 years may have had exposure to only limited fields of law, such as family law[27] or public law.[28] It also remains the case that commercial litigators — except when these are the state or parastatals — will often brief white, male counsel. But the black and female counsel who have had limited exposure may have acquired the relevant skills and have aptitude and ability to acquire knowledge in other fields quickly. Care must thus be taken when assessing whether a candidate is appropriately qualified to ensure that the discrimination that still pervades legal practice and the profession more broadly is accounted for.[29] The principle articulated in the ABA guidelines, modified to the South African context, may thus be appropriate, namely that 'in evaluating a nominee's professional experience, the Committee may take into consideration whether opportunities for advancement in the profession for women and members of minority groups were limited.'

7.4 Fit and proper person

There is no 'correct' way to categorise those qualities that relate to fitness and propriety for judicial office. The approach suggested here draws from the express requirements of the Constitution. Five categories are identified: independence, impartiality and fairness, integrity, judicial temperament and commitment to constitutional values.

7.4.1 Independence

> *There can be no government of law without a fearless, independent, judiciary. The independence of the judge is the chief of all the cardinal judicial virtues. He must be entirely free from all external influence and subservient only to his own conscience*. (Shientag, 1944: 21)

The centrality of the quality of independent-mindedness is reflected in the Guidelines for Judges of South Africa:[30] 'A judge should uphold the independence of the judiciary … and should maintain an independence of mind in the performance of judicial duties.' Thus, a 'fit and proper' candidate for judicial office must be a person who has the courage and disposition to do so. Independent-mindedness is, indeed, an essential quality.

Independent-mindedness is a quality displayed in response to both external pressures, whether from political, commercial or private interests, and internal desires, such as a desire for popularity.[31] Thus, as Shientag warns, 'the subtlest poison to which a judge may succumb' needs not be external, but may be driven by 'pressure from within'. He writes:

> *Every man craves praise, although some call it recognition. A deep instinct of human nature is the yearning to be appreciated. Within normal limits that craving is not only natural, but desirable. It becomes reprehensible when the judge woos popularity by his decisions, or by his conduct on the Bench*. (Shientag, 1944: 23–24)

Although judges may have to resist attempts at influence from political, commercial and private interests alike, the need for independence is perhaps most stark when judges are called upon to decide cases with political consequences[32] or to make unpopular decisions.[33] As held by Justice Chaskalson in *S v Makwanyane*:[34] 'This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.' The same point may be made about favour with politicians or the ruling party.

7.4.2 Fairness and impartiality

Because courts are obliged to adjudicate between competing rights and interests impartially and 'without fear, favour or prejudice',[35] judges, if they are 'fit and proper', must not only act independently but must be able to act fairly and impartially. A disposition towards fairness and impartiality are thus essential qualities for a judge, derived from the Constitution.

According to Shientag, '[i]mpartiality implies an appreciation and understanding of the differing attitudes and viewpoints of those involved in a controversy' (1944: 50). He regards it as one of the most important but most difficult virtues to attain:

> [The virtue of impartiality], *one of the most important of all the judicial virtues, is undoubtedly the most difficult to attain. I am not speaking about conscious partiality, favoritism or prejudgment, for no judge of moral integrity would be guilty of any such offence. No judge worthy of his office would knowingly permit any cloud of prejudice to darken his understanding or to influence his decision … It is precisely through … blind faith in his impartiality that* [a judge] *lulls himself into a false sense of security. He has failed to take into account the limitations of human nature. He has overlooked the difficulty of bringing to consciousness hidden motives, ideas and prepossessions. The partiality, the prejudice, with which we are concerned is not an overt act, something tangible on which you can put your finger.* (Shientag, 1944: 49)

Shientag writes about what we can expect from an impartial judge:

> *The suppression of personal emotion, the willingness to suspend judgment until a comprehensive survey of the ground has been made, a hospitable receptivity to the viewpoints of others, a disposition, in the language of Justice Holmes, 'to learn to transcend our own personal convictions,' a distrust of the spontaneous conclusions of so-called common sense or happy conjecture, unchecked and unverified by reflective thought and deliberation — all these play their part in enabling us to approximate impartiality with a high degree of probability. That is all we can expect, human nature being what it is; that is all that modern science expects.* (1944: 52–53)

7.4.3 Judicial integrity

Moral integrity we take for granted. It is more than a virtue: it is a necessity; it is elemental. All that the judge thinks and does is dependent upon it (Shientag, 1944: 20). The standards of integrity that are required of judges are best articulated in the various documents setting out the ethical standards that govern the judicial system. Two important sources are the Bangalore Principles of Judicial Conduct, 2002, and the Guidelines for Judges of South Africa. They include the following principles, among others:

- A judge should comply with the laws of the land applicable to both judicial office and extra-judicial conduct.[36]
- A judge should recuse him or herself if there is a conflict of interests or a reasonable suspicion of bias based on objective facts.[37]
- A judge should act in a manner that minimises the potential for conflicts of interest.[38]
- A judge should in respect of judicial activity refrain from conduct that may be interpreted as personal advancement.[39]

- A judge must observe the limits on the holding of other office of profit and the receipt of gifts.[40]

While these principles govern how judges should behave once in office, the underlying values can guide the selection process. For example, a candidate should display an acute understanding of the rules and principles designed to avoid conflicts of interest. Indeed, this is a prominent feature of the system for vetting candidates for federal judicial office in the USA.

The ABA's understanding of 'integrity' sheds some further light. It understands 'integrity' to refer to 'character, reputation, industry and diligence'. Character includes considerations such as whether a candidate is 'honest, truthful, trustworthy' and whether they 'keep their word'.[41]

7.4.4 Judicial temperament

> *There may be a place for arrogance. I'm not sure what that place would be, but I am sure that it is not on the bench. The courts do not belong to us. We are holding a public trust. The courts belong to the people. They need to be made to feel welcome, that this is a place for resolution of their disputes … Our job is to administer the law fairly and impartially. It is not our place to assume a sense of power which we do not possess, a sense of superiority which we simply do not have. We are administering a public service.*[42]

Judicial temperament is a helpful, if somewhat elastic, term that refers to 'the manner of thinking, behaving or reacting'[43] expected of a judge. It, too, is an essential quality, yet its contours and the weight of some of its aspects in the judicial selection exercise might reasonably admit of debate. It might embrace characteristics dealt with elsewhere in this chapter, and regarded as necessary, such as fair-mindedness or independent-mindedness. Thus, the ABA, when evaluating 'judicial temperament', 'considers the nominee's compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias, and commitment to equal justice under the law.'[44] The term is used here in a narrower sense to cover the following characteristics: humility, open-mindedness, courtesy and patience, and decisiveness.

The quality of humility is highlighted in Judge Wright's testimony to the Senate Judiciary Committee quoted above and derives from the fact that a judge, when adjudicating disputes, is performing a public service. It is perhaps best understood by its antithesis, humorously described in American legal culture as 'robitis',[45] this being a propensity on the part of a nominee or judge to attach too much importance to the judicial robe and tending to think that she or he has been appointed as a personal accolade rather than to discharge a public service.

Humility is closely related to open-mindedness. Shientag describes these qualities well when he says:

> *The ability to receive impressions, but to keep the mind open and flexible, and emancipated from over-certainty, is one of the great judicial virtues. The characteristic of open-mindedness is true intellectual humility, free from egoism and even self-conscious modesty …* [T]*he virtue consists not only in actually keeping the mind open and receptive, but in saying or doing nothing to suggest the contrary*. (1944: 46).

He concludes by saying:

> *The judge ought to be 'wise enough to know that he is fallible and therefore ever ready to learn; great and honest enough to discard all mere pride of opinion, and follow truth wherever it may lead; and courageous enough to acknowledge his errors'*. (1944: 47–48)[46]

Shientag describes 'courtesy and patience' as belonging in 'the front rank' of the cardinal judicial virtues: 'For a judge there is a great duty of patience and high obligation of courtesy' (1944: 24). The Bangalore Principles of Judicial Conduct treat courtesy and patience towards litigants, witnesses, lawyers and others with whom she or he deals in an official capacity as integral to a judge's competence and diligence.[47] Similarly, the Guidelines for Judges of South Africa requires judges to 'act courteously and respect the dignity of all who have business there.'[48]

Those duties also arise because a judge is adjudicating disputes as a public function. In each case, there will be a loser, and while the loser may prefer a different result,

> [t]*here is no reason … why each should not leave the judgment seat convinced that the case has been fairly tried. The conduct of the Bench towards the bar, the litigants, and the witnesses is therefore a matter of great concern. They are entitled to be treated with courtesy, with patience and with consideration.* (Shientag, 1944: 27)

Underlying the duty of courtesy and patience owed to the Bar is the litigant's interest, or right, in being properly represented:

> *The demeanour of the Bench towards the bar, especially towards the Junior Bar … is of much more concern to the public than may at first sight appear, or than is generally imagined. A client is entitled to the fullest exercise of the talents of the advocate he has chosen to represent him; but this he cannot have, if the latter is not allowed to feel perfectly at ease in the pursuit of his vocation, his mental powers unchecked by unseemly interruptions, captious, ill-natured remarks, or superciliousness of manner exhibited by the judge before whom he is arguing.* (Shientag, 1944: 27–28)

On the other hand, judges are also expected to be both thorough and decisive. In

Shientag's words: 'There is nothing more distressing than the spectacle of a judge who is indecisive, particularly on matters which are mostly routine and which should be disposed of almost instinctively as intellectual reflexes' (1944: 64–65).[49] Shientag contrasts two extremes: on the one, the mind that is 'untroubled by any great legal learning' or a judge who believes that 'if he deliberates he is lost' (1944: 68) and, on the other, a mind 'tortured by the anxiety of making decisions' or paralysed by 'extreme intellectual scrupulosity', 'tormented by doubt and painful indecision'. Between the two extremes of 'the quick judge and the judge who sinks into a … bog of indecision', he describes the 'judicial mind that … proceeds with all deliberate speed, a mind in which thought is excited, rather than confused, by the invitation of doubt, a mind which at times cannot avoid, indeed does not seek to shirk, what Shelley called "the agony and bloody sweat of intellectual travail"' (1944: 69–70).

7.4.5 Commitment to constitutional values

Because the Constitution is a transformative document and is underpinned by a set of moral values, we can legitimately expect that our judges will be personally committed to those values[50] and to the journey the Constitution contemplates from 'a past based on "conflict, untold suffering and injustice" and a future which is stated to be founded on the recognition of human rights'.[51] The values underlying the Constitution are expressed in s 1.

It provides that South Africa is a democratic state founded on the following values: human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the Constitution and the rule of law, and universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. Each value has far-reaching and multi-dimensional implications and, accordingly, many issues arise when we ask what commitment to the Constitution's values and its transformative project entails. The examples chosen here are mere illustrations. Other important examples would be commitment to the realisation of social and economic rights, especially for poor people, and access to justice, but there are many.

7.4.6 Respect for diversity and pluralism

Various elementary consequences must flow from the fact that South Africa is a diverse and pluralist society,[52] that the Constitution 'not only tolerates but celebrates the diversity of our nation'[53] and that we are a society that seeks to eradicate racism and sexism.[54]

First, if judges are to dispense justice in a diverse and pluralist society, they need to have respect for difference. As Justice Sachs said in *National Coalition for*

Gay and Lesbian Equality v Minister of Justice and Others:[55] 'It is no exaggeration to say that the success of the whole constitutional endeavour in South Africa will depend in large measure on how successfully sameness and difference are reconciled.' He went on:

> *The acknowledgment and acceptance of difference is particularly important in our country where group membership has been the basis of express advantage and disadvantage. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people as they are … What the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are*.[56]

Second, there can be no place within the judiciary for discriminatory attitudes in the performance of the judicial function. South Africa's commitment to the elimination of discrimination is fundamental, perhaps most markedly racism and sexism.[57] Few, if any of us, can claim not to hold prejudices but we have embarked on a most important journey to move to a place where it is our common humanity that defines us and where each person is able to realise their full potential,[58] as individuals and as members of religious, cultural and other social groups. We should choose judges who are committed to that journey and not select those who are not. In doing so, we will protect ourselves from discrimination from the Bench.

Third, and for some controversially, the Constitution requires judges to display compassion and empathy for litigants. The constitutional value of dignity is central to the Bill of Rights: it concerns the essential worthiness of every human being and it is from our inherent dignity that our other rights derive.[59] Arguably, to appreciate the worth of every human being requires compassion and empathy.

The controversy around a call for empathy and compassion in judicial officers was evidenced recently in the United States when President Obama announced the resignation of Justice Souter from the Supreme Court. He said that in considering replacement nominees, he would 'seek someone who understands that justice isn't about some abstract legal theory or footnote in a casebook. It is also about how our laws affect the daily realities of people's lives.'[60] When he nominated Justice Sonia Sotomayor, he emphasised that he was not only looking for a rigorous intellect, mastery of the law and recognition of the judicial role, but for 'experience that can give a person a common touch, in the sense of compassion, an understanding of how the world works and how ordinary people live.'[61] These remarks ultimately set the stage for a partisan battle as for some, including a vocal Republican voice, empathy and compassion have no place in

judicial selection because this would sanction the impermissible introduction of emotion and personal or 'non-legal' considerations in judicial reasoning[62] and result in judges 'legislating personal views from the Bench'.[63]

But while the role of compassion and empathy is probably limited because adjudication requires the application of law, it does not follow that they have no place. A judge who shows empathy and compassion towards litigants does not thereby renounce adherence to legal standards. More importantly, adjudication at times *requires* consideration of a vulnerable group or person's position when applying a legal rule, notably in family law,[64] sentencing and constitutional law. For example, the test for unfair discrimination expressly requires a judge to have regard to 'the situation of the complainants in society, their history and vulnerability … and whether it ameliorates or adds to group disadvantage in real life context.'[65] Thus in *Hassam v Jacobs NO* (which concerned the application of the Intestate Succession Act 81 of 1987 to spouses in polygynous marriages concluded under Muslim personal law) Justice Nkabinde rejected assumptions made in the 1983 Appellate Division case of *Ismail v Ismail*,[66] where the remark was made that the non-recognition of polygamous unions will not cause hardship to members of Muslim communities, except perhaps in isolated cases. In *Hassam,* Justice Nkabinde held:[67] 'The assumption made in *Ismail*, with respect, displays ignorance and total disregard of the lived realities prevailing in Muslim communities and is consonant with the inimical attitude of one group in our pluralistic society imposing its views on another.' At least in cases where the experience of discrimination or vulnerability (whether in the constitutional context or not) is relevant, it would seem to be far better if a judge is open to understanding that experience than not.

But we must be cautious, as Justice Sotomayor's confirmation battle in the Senate illustrates. As it transpired, the battle was fought over a now notorious remark that Justice Sotomayor made during an extra-judicial speech in 2001 (in context of anti-discrimination law), namely that she 'would hope that a wise Latina woman with the richness of her experience would, more often than not, reach a better conclusion than a white male who hasn't lived that life.'[68] Some, adversaries and supporters alike, thought those words were ill-chosen and, during her confirmation hearings, Justice Sotomayor sought to clarify them and accepted that '[i]t was bad because it left an impression that I believe that life experience commands a result in a case.'[69] Some would argue that life experience does play a role, even if circumscribed, in how some cases are decided.

But there is another reason for caution, which is that we should not think that the qualities of compassion and empathy are the preserve of the vulnerable, the marginalised or previously disadvantaged. Indeed, Justice Sotomayor made the point in the text of her controversial speech, emphasising that it would be myopic:

> *... to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group* [and] [m]*any are so capable … However, to understand takes time and effort, something that not all people are willing to give. For others, their experiences limit their ability to understand the experience of others. Others simply do not care …*[70]

7.4.7 An appreciation of the judicial role and the extent and limits of deference owed by the judiciary

Much has been said by the Constitutional Court about the balance to be struck between the deference it owes to the other arms of government, on the one hand, and the robust approach it must adopt to the protection of rights, on the other.[71] There are many doctrines that courts invoke to preserve the separation of powers, including the doctrine of *stare decisis*:

- The principle that a dispute will, if possible, be resolved on grounds other than constitutional grounds.
- The principle that courts will generally resolve only live disputes and not abstract questions of law.[72]
- The rules of co-operative governance when intergovernmental disputes are in issue.[73]
- The doctrine of deference as applied in administrative law.[74]
- The assessment of reasonableness in social and economic rights cases[75] and when selecting an appropriate remedy in constitutional cases.[76]

7.4.8 Promoting an active citizenry

Democracy is not only about the exercise of the vote, elementary as the right to vote might be. It also entails the active participation by citizens in decisions that affect them. This was the subject of *Doctors for Life International v Speaker of the National Assembly*[77] concerning public participation in the legislative process[78] and numerous cases concerning the right to be heard when administrative action is taken that adversely affects a person's rights or legitimate expectations.[79] In his recent book, *Active Liberty: Interpreting our Democratic Constitution*, Justice Stephen Breyer advances the 'thesis that courts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts' (2005: 5) and to that end he analyses the US Supreme Court case law on issues such as speech, federalism, privacy, affirmative action and administrative law. He holds the view, which has resonance in the South African context, that the legitimacy of government action suggests 'several kinds of connection' between government and the people, including that 'the people themselves should participate in government' (2005: 15–16). It is surely

legitimate for selectors to consider whether a candidate for judicial office is committed to the type of democracy that active citizenry contemplates.

7.4.9 Commitment to the transformative goals of the Constitution[80]

South Africa did not become the society we sought when the Constitution was enacted: the Constitution merely created the framework within which the process of social change would take shape. While, at least as far as government is concerned, the executive and legislative branches are the primary architects of social change, judges are entrusted to protect rights and they have the power to halt and guide government action. It would thus seem legitimate for selectors to enquire whether candidates for judicial selection are committed to the process of social change as the Constitution mandates. That may either entail assessing whether a judge might seek to exercise judicial power with a view to preserving the status quo, on the one hand, or by assuming the role of primary architect of social change, on the other. Both are arguably inimical to the values of the Constitution.

While assessing commitment to constitutional values and the Constitution's transformative project is a legitimate exercise for selectors, selectors must be cautious not to venture beyond assessing *values* to assessing *political* commitments. It might at times, possibly often, be a difficult line to draw, but it is an important one to keep constantly in mind if we are to preserve the principle of judicial independence.

7.5 Non-discrimination, diversity and the requirement of representitivity

Considerations of race, and — although too often subordinated — gender, dominate public discourse about judicial selection and generate deep controversy. This is not surprising given that historically the Bench was composed of white men[81] and given that s 174(2) of the Constitution requires those selecting judicial officers to consider 'the need for the judiciary to reflect broadly the racial and gender composition of South Africa'.

As a matter of both principle and constitutional interpretation, the debate about how the plurality of South Africa's population should be reflected in the composition of the judiciary and the judicial selection process requires careful analysis. The analysis should take account of three notionally distinct, though overlapping, constitutional objectives or requirements: non-discrimination, diversity and the requirement of race and gender representivity.

7.5.1 Non-discrimination

The requirement of non-discrimination in judicial selection is located in s 9 of the Constitution, which prohibits unfair discrimination and which treats as

presumptively unfair, discrimination on various listed grounds: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. At its heart is the recognition that, historically, South Africans have been arbitrarily or unfairly denied equal opportunities by virtue of belonging to various groups, often those referred to in the listed grounds. The threat of discrimination is of course one that society must constantly guard against.

The issue arose pertinently in the context of Judge Satchwell's candidacy, the merits of which had reportedly been 'questioned' by an attorney who contended that god-fearing South Africans would not be able to identify with her because of her sexual orientation.[82] To its credit, the JSC, through Chief Justice Langa, made it clear during her interview that the JSC would not consider a comment of this sort to be relevant to the judicial selection process.

People from various groups might recount horrific stories of how their group membership has been held against them. An astonishing reminder of the deeply sexist attitudes towards women, until fairly recently, is reflected in the statement by Judge Davis, who became a judge of the Court of Appeals:

> [w]*e cannot but think the common law wise in excluding women from the profession of the law … the law of nature destines and qualifies the female sex for the bearing and nurture of children of our race and for the custody of the world … all lifelong callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of law, are departures from the order of nature, and when voluntary treason against it. The cruel chances of life sometimes baffle both sexes, and may leave women free from the peculiar duties of their sex … But it is public policy to provide for the sex, not for its superfluous members; and not to tempt women from the proper duties of their sex by opening to them duties peculiar to ours.* (Davis, 1914: 384)

Because the Constitution was adopted as the supreme law so as to 'heal the divisions of the past' and 'to free the potential of each person', and because South Africa is founded on the values of human dignity, the achievement of equality, non-racialism and non-sexism, the duty on the part of judicial selection officers strictly to observe the requirements of the unfair discrimination clause cannot be overemphasised.

No comprehensive quantitative or qualitative research has been undertaken to assess whether the JSC and the President, in the exercise of their selection powers, have refrained from discriminatory practices. Anecdotal observations do, however, suggest that such research may be warranted.[83] Anecdotal claims that there is no space for white men to be appointed to the judiciary have, at times, abounded but this is a claim that has been assessed and does not appear to

stand scrutiny.[84] As President of the Supreme Court of Appeal, Judge Mpati, has demonstrated, there have been a significant number of white male appointments to the Bench since 1994 (2006: 19–20).[85]

7.5.2 Diversity

The objective of creating a *diverse* Bench is distinct from the need to desist from any discriminatory practices. South Africa is a pluralist society made up of people who understand their humanity not only as human beings but also as members of religious, cultural or other social groups. Yet, save in respect of race and gender, there is no express constitutional provision referring to the need for a diverse Bench.

It does not, however, follow that it is not a permissible objective for judicial selectors to pursue. On the contrary, it is arguably sanctioned by s 9 itself, at least insofar as it is aimed at advancing persons disadvantaged by unfair discrimination.[86] Moreover, if we are clear about the purposes diversity can legitimately serve, it can validly play a role in the judicial selection process.

The danger lies in any attempt to make the judiciary broadly representative of the social or political interests represented by different social groups. Put differently,

> *the need for judges to be independent and impartial means that we should not talk about a representative judiciary in the same way as we might the legislature and executive. Judges are not there to represent the interests of any particular group but to ensure that the law is applied fairly and equally to all.* (Malleson: 216)[87]

Similarly, we should not think that 'black men cannot try white men fairly and that white men cannot try black men fairly [because] [t]he essence of the judicial office is that judges are capable of freeing themselves from the prejudices derived from their race and class background and then subjecting themselves to the law …' (Forsythe, 1991: 18).

Although the warnings of Malleson and Forsythe seem correct and clear at the level of principle, there are dangerous signs that some are thinking along these lines in the wake of two recent High Court judgments concerning the JSC investigation of Cape Judge President Hlophe for misconduct. Both decisions were split along racial lines. While we can take some comfort from the fact that in respect of the first case, which was subject to an appeal, the Supreme Court of Appeal judgment was both unanimous and represented the views of a multi-racial Bench, we may have ventured dangerously close in public debate to manifesting tolerance of the assertion that we should be tried by judges of our own race.

The Sotomayor controversy sparked related concerns. While many Democrats and Republicans alike think it a good thing for more women to be

appointed to the Supreme Court and that the appointment of a Hispanic judge may be long overdue, many were troubled by an interpretation of her 'wise Latina remark' that a judge's experience may determine the outcome of a case. Notably, it was precisely that interpretation that Judge Sotomayor disavowed during the confirmation hearings.

While we should reject the idea that diversity means representivity and that justice can be dispensed properly only by 'one of your racial kind', there are two considerations which do justify the quest for diversity on the Bench.

The first, which is the most compelling, is the need for legitimacy of the Bench as a whole.[88] Quite simply, in a country like South Africa, a Bench that is not diverse will lack legitimacy. This is especially so given that the only reason the Bench is not diverse is that under apartheid '[j]ustice had a white unwelcoming face with black victims at the receiving end of unjust laws administered by courts alien and generally hostile to them'.[89] Thus, as Malleson argues,

> *while the background of the judges should not affect their decision-making, the composition of the judiciary as a whole does affect public confidence in their work and so undermines its legitimacy. For this reason, if no other, diversity is needed*.[90]

The second reason why the quest for diversity may be legitimate does concern the impact of experience on deliberation if not determine its outcome. While one's experience surely should not dictate the outcome of a case, a diversity of experience can legitimately enhance the deliberative process in an appropriate case.

Sir Sydney Kentridge's remarks about his experience as an acting judge on the South African Constitutional Court reflect this view. He commented:

> [W]*hat I found overwhelming was the depth and variety of* [the judges'] *experiences of law and of life. This diversity illuminated our conferences especially when competing interests, individual, governmental and social, had to be weighed. I have no doubt that this diversity gave the court as a whole a maturity of judgment it would not otherwise have had. Yet no-one, black, white, male or female was representing any constituency*. (2003: 61)

Justice Ruth Bader Ginsberg made a remark to similar effect when commenting on Sotomayor's 'wise Latina remark' in an interview, held before the confirmation hearings, with Emily Bazelon of the *New York Times*:

> *I thought it was ridiculous for them to make a big deal out of that. Think of how many times you've said something that you didn't get out quite right, and you would edit your statement if you could. I'm sure she meant no more than what I mean when I say: Yes, women bring*

> *a different life experience to the table. All of our differences make the conference better. That I'm a woman, that's part of it, that I'm Jewish, that's part of it, that I grew up in Brooklyn, N.Y., and I went to summer camp in the Adirondacks, all these things are part of me.*[91]

The potential for diversity to enhance deliberation is perhaps most real on a court such as the Constitutional Court and, though to a lesser extent, the Supreme Court of Appeal because these courts sit as full Benches. It is easy to understand how a diversity of experience might enhance deliberation in such circumstances. However, when one speaks of diversity in the context of any specific High Court proceedings, the argument becomes more nuanced: a Bench composed of a single judge or two or three judges cannot be truly 'diverse', and the need to distinguish a quest for diversity from a quest to seek judges who represent the interests of social groups is particularly stark. The best one might hope for is that if the South African Bench is more diverse *at all levels*, that diversity of experience will ultimately reflect in the reasoning underlying our body of case law and thus inform the development of law over the longer term.

Thus, while seeking a diverse Bench is a legitimate objective, it remains critical to bear in mind that its pursuit serves specific objectives.

7.5.3 Race and gender representivity

Race and gender representivity in the judiciary have a distinct and special place by virtue of the provisions of s 174(2) of the Constitution, which stands on a different footing to s 9. That provision requires, in mandatory terms, that those responsible for appointing judicial officers must consider 'the need for the judiciary to reflect broadly the racial and gender composition of South Africa'. The Constitution thus ordains that there is such a need and that whenever judicial appointments are made, this need must be considered by the JSC. In public discourse there are few who would dispute that a fundamental transformation of the judiciary on race and gender lines is necessary but the meaning and implementation of s 174(2) has been highly contentious.

Some argue that s 174(2) (and its reference to the racial composition of the country) requires that each court must be *demographically* representative with reference to the racial classifications used under apartheid: black, Indian, coloured and white. Others say that it is wrong to perpetuate notions of identity that were arbitrarily imposed by the apartheid regime and that such interpretations will lead people to believe that they are entitled to be judged 'by one of one's own race'. Rather, we must reject the labels we were given and resist demographic calculations: a *broadly* representative Bench can still be achieved. While it is difficult to resist the conclusion that the section has been unhelpfully drafted, it is similarly difficult to see both as a matter of interpretation and given

our colonial and apartheid history why we should not strive for a Bench that is composed primarily of judges of African descent. That being said, we must strongly resist any interpretation that frustrates non-racialism and perpetuates apartheid's offensive racial practices.

We should also be ever mindful that although South Africa's *diversity* is not characterised crudely by race, but by many social, cultural and religious communities, as well as on class lines, s 174(2) refers specifically to the need for race and gender representivity. It may well be that the drafters of the Constitution were alive to the danger that if diversity in a broad sense were elevated to a constitutional requirement, it would be tantamount to saying that judges must be representative of social groups or interests in society, an approach that, as argued above, should be rejected. Judges, unlike politicians, are not appointed to represent social interests. If that is so, we must resist the idea that the *need* for race and gender representivity referred to in s 174(2) refers to any quest to enable us to be judged by 'one of our own race'.

We should rather focus our minds on the historical wrongs that undermine the legitimacy of the Bench that s 174(2) can address if cautiously applied. One is that in 1994, race and gender were the two fundamental distortions in group-based representivity in the judiciary, a direct result of our unjust colonial and apartheid history. Another is the damaging effect that racism and sexism, in particular, have had on individuals' advancement in the legal profession and consequently judicial aspirations. A further dimension is that for many people in South Africa 'race' remains a proxy for 'class'. If we seek to remedy these wrongs, a quest for a broadly representative Bench is in line with the Constitution's aspiration to create a just society that is based on non-racialism and non-sexism.[92] While it must mean that the Bench we seek must be made up primarily of judges of African descent, we need not resort to the crude tactics of apartheid to get there.

We also need to take a view on how being black or female ought to influence the selection process in a specific case. The easy case arises where two candidates who are similarly well qualified are being considered for appointment. Subject to any special needs of a court, the appointment of a candidate to enhance racial or gender representivity would seem appropriate. The difficult case arises where two qualified candidates are being considered but the candidate who will not enhance racial or gender representivity is appreciably better qualified in an important respect. In that case, the consideration of the need for racial and gender representivity on the Bench requires careful evaluation and cannot be the only relevant consideration. Importantly, whether the better qualified candidate should be appointed may depend on what qualities separate the two candidates and whether the qualities that stand out in the better qualified candidate are qualities that are needed to ensure a Bench that is best able to perform the

adjudicative functions entrusted to the judiciary by the Constitution. That evaluation cannot focus myopically on the relative merits of two candidates:[93] rather, selectors require an appreciation of the overall needs of the judiciary and the court in question at the relevant time.

If that evaluation is to be conducted honestly and constructively, there is a real need to remove racist and sexist discourse from our discussions and to focus squarely on the detailed criteria for judicial selection.[94] There is, similarly, a real need to be honest about mistakes we may have made in the past. The mistakes are many and include engaging in discourse that assumes that more meritorious white candidates are being overlooked in favour of less meritorious black or female candidates. But they also include appointing judges for political favour or in circumstances in which qualifications or fitness and propriety are in question. That much we know at least from our apartheid history.

In this regard, many express the view that being black or being a woman constitutes a valid *criterion* for judicial selection. This approach is misleading because the criteria for judicial selection are that a person be appropriately qualified and a fit and proper person. If a person is not appropriately qualified and is not a fit and proper person, it is irrelevant whether they are black or female. That person does not qualify for judicial office.

It is also misleading because it encourages the thinking that being black or female somehow enhances a candidate's fitness and propriety for office. Yet, in a society committed to non-racialism and non-sexism, we should be vigilant not to assume that any qualities relevant to judging flow from membership of a group. As argued earlier in the context of the Sotomayor controversy, it may be that because a candidate is black or female and has experienced discrimination, their capacity for empathy and compassion is enhanced, but that will depend on the person in question and does not flow automatically from their membership of a group. Similarly, a person's commitment to constitutional values or qualification to adjudicate questions of constitutional law does not flow from their race or gender, but from their humanity, what skills and experience they possess and how they have chosen to live their lives.

Finally, we ought not to be too quick to assume that the legitimacy of the Bench will be best enhanced if race and gender representivity is accelerated. We must obviously aim to meet the objective of racial and gender representivity with due expedition[95] and treat it with priority because the judiciary's legitimacy depends on it. But its legitimacy will ultimately depend as significantly on whether the judiciary is well equipped to perform the functions the Constitution entrusts to it.

7.6 Conclusion

This chapter has sought to explore the detailed criteria for judicial selection. The exercise has been conducted mindful of the fact that this is contested and controversial terrain but in the belief that a principled debate and discourse about the topic can deepen our democracy. Who we choose as our judges determines the quality and legitimacy of our judiciary, which, in turn, is foundational to our constitutional democracy. It is best that we make these choices with a clear understanding of what qualities we expect in our judges.

End notes

1 Section 174(8) provides: 'Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution.'
2 Section 174 of the Constitution.
3 Section 165(2) of the Constitution.
4 Section 174(2) of the Constitution.
5 The South African Judicial Education Institute Act 14 of 2008 enables the establishment of an institute to train aspirant and serving judges. See, too, Wesson & Du Plessis (2008).
6 An alternative approach would be to allow courts of general jurisdiction to develop pools of specialised judges or some pools of specialism. Judicial training might be directed to filling the gaps where necessary.
7 This has assumed particular relevance in light of the shift under the new constitutional dispensation from a formalist and literalist approach to purposive constitutional and legislative interpretation. See Wesson & Du Plessis (2008: 3–5).
8 *Bhe and Others v Magistrate, Khayelitsha, and Others* 2005 (1) SA 580 (CC) at para 43 referring to *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC).
9 However, see end note 6 above.
10 Carpenter (1987: 257). See also Corder (1984: 23).
11 See Wesson & Du Plessis (2008: 9).
12 For complex reasons that warrant separate treatment, there are still relatively few senior black and female members of the practising legal profession. Much work still needs to be done to develop a strong and diverse candidate pool.
13 Malleson makes a similar point (2006: 137).
14 It has only been a short time since attorneys who have practised continually for a minimum of three years can appear in the High Court in terms of the Right of Appearance in Courts Act 62 of 1995. While it is still uncommon for attorneys to do so, this might change and thus more attorneys will have litigation experience similar to advocates. Patterns of specialisation in legal practice are also relevant.
15 The ABA's practice of evaluating the professional qualifications of federal judicial nominees commenced in 1953, when an independent committee of the ABA started to evaluate the professional qualifications of federal judicial nominees and to submit its evaluations to the Senate. The ABA explains: 'In 1953, at the request of President Dwight D. Eisenhower, the ABA committee started to evaluate the professional

qualifications of potential nominees to assist him in resisting growing pressures to repay political debts by appointing persons who might not have the professional qualifications to exercise the important responsibilities of the Third Branch. From 1953–2000, the ABA Standing Committee evaluated the professional qualifications of potential nominees for nine administrations, Democratic and Republican alike.' Although under President George W. Bush the ABA was sidelined, it resumed its historical role under President Barack Obama. Available at: http://www.abanet.org/scfedjud/fjcfaq.pdf (accessed 17 July 2009).

16 It also evaluates judicial temperament and integrity.

17 See generally http://www.judicialappointments.gov.uk.

18 According to statute, judges must be appointed on merit.

19 This is a quality that former Australian Chief Justice Murray Gleeson emphasised. Interview with the author, Sydney, 19 June 2009.

20 Guidelines for Judges of South Africa: Judicial Ethics in South Africa, issued in 2000 by the Chief Justice, the President of the Constitutional Court, the Judges President of the High Courts and the Labour Appeal Court and President of the Land Claims Court. See, for example, item 7 (duties to enhance public understanding of judicial proceedings), item 11 (duty to dispose of court business diligently and efficiently) and item 14 (duty to give judgment without undue delay).

21 *Guidelines for the Evaluation of Judicial Performance With Commentary*. Available at: www.abanet.org/jd/lawyersconf/pdf/jpec_final.pdf.

22 See www.judicialappointments.gov.uk.

23 The JSC's questionnaire can be sourced on the website of the Constitutional Court. Available at: http:// www.constitutional court.org.za/site/Admin/judicial.htm.

24 Different considerations will apply when the dispute is to be resolved according to specialist knowledge in a field, such as standards expected in the building industry.

25 Interview, Sydney, 19 June 2009.

26 Certain training initiatives have been embarked upon and it may be that the South African Judicial Education Institute Act will create further opportunities for this.

27 Historically, women tended to be entrusted primarily with family law work and it remains the case, at least in the advocates' profession, that very talented women have practices mainly in the family law field.

28 More recently, some female advocates have started specialising in public law, which tends to be motion court work and not trial work. Relatively few women have practices in commercial law, although the numbers are growing.

29 The critical issue, of course, is when it would be unfair to do so. These are issues that require open and candid discussion so that consensus can be built.

30 Supra n 21, item 1.

31 Former Australian Chief Justice Murray Gleeson expressed the view to the author that a desire for popularity is a quality that often undermines independent-mindedness. Interview with the author, Sydney, 19 June 2009.

32 The best examples are, perhaps, the recent cases relating to the prosecution of President Zuma. There are, however, many others: much political controversy surrounded the Constitutional Court's adjudication of the state's obligation to provide antiretrovirals for purposes of preventing mother to child transmission of HIV. See *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC).

33 A classic example is the death penalty decision of the Constitutional Court: *S v Makwanyane and Another* 1995 (3) SA 391 (CC) where it was held by Justice

Chaskalson (who assumed that 'the majority of South Africans agree that the death sentence should be imposed in extreme cases of murder') as follows (at paras 88 and 89): '[P]ublic opinion may have some relevance to the enquiry, but, in itself is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication.'

34 Supra n 33 at para 89.
35 Section 165(2) of the Constitution.
36 Guidelines for Judges of South Africa, item 3.
37 Guidelines for Judges of South Africa, item 9.
38 Guidelines for Judges of South Africa, item 15.
39 Guidelines for Judges of South Africa, item 18.
40 Guidelines for Judges of South Africa, items 25 and 26.
41 Kim Askew, Chairperson of the ABA Standing Committee on the Federal Judiciary, e-mail interview, 23 April 2009.
42 Judge Wright during his confirmation hearings before the Senate Judiciary Committee. Available at: www.gpoaccess.gov/congress/senate/judiciary/index.
43 *The Free Dictionary*. Available at: www.freedictionary.com.
44 See Backgrounder sourced on the ABA website, supra n 19.
45 This term was first drawn to the author's attention by Arnold Burns (telephonic interview, 20 April 2009), a former member of the ABA Standing Committee on the Federal Judiciary, who served during the Clinton administration. The records of the Senate Judiciary Committee are replete with references to it as senators seek to establish whether nominees might, if appointed, be prone to the disease.
46 Quoting Justice Bronson in *Pierce v Delamater*, 1 N.Y. 17, 18 (1847).
47 Bangalore Principles of Judicial Conduct, article 6.6.
48 Guidelines for Judges of South Africa, item 4.
49 As pointed out by former Chief Justice Arthur Chaskalson (in discussion with the author) this is important for ensuring that litigants have speedy trials and do not encounter unnecessary delays, and highlights the importance of appropriate training and/or experience.
50 A valid distinction can be drawn between a commitment to constitutional values and skill and expertise relevant to constitutional adjudication.
51 Former Chief Justice Mohamed in *Shabalala v AG, Transvaal* 1996 (1) SA 741 at para 25.
52 On the importance of diversity, see *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC) at para 60. See, too, *Hassam v Jacobs NO and Others* 2009 (11) BCLR 1148 (CC) at para 27.
53 *Hassam v Jacobs* supra at para 33 with reference to *MEC for Education: KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) at para 65.
54 See s 1*(b)* of the Constitution.
55 *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* 1999 (1) SA 6 (CC) at para 107.
56 *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra at para 134.
57 Guidelines for Judges of South Africa deals with this (item 4) in context of judicial proceedings as follows: 'In conducting judicial proceedings judges should themselves avoid and where necessary disassociate themselves from comments or conduct by

any person subject to their control which are racist, sexist or otherwise manifest discrimination in violation of the equality guaranteed by the Constitution.'

58 See the preamble to the Constitution.

59 Justice Ackermann in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, supra at para 28.

60 Rutenberg, J. (2009). *New York Times,* 2 May.

61 Available at: www.youtube.com/watch?v=-Njr2GAFhck (accessed 17 July 2009)

62 Interview with Republican staffer, Senate Judiciary Committee, April 2009.

63 Baker, P. & Zeleney, J. (2009). *New York Times*.

64 Former Australian Chief Justice Gleeson suggests that empathy may be an important consideration in certain areas of law, such as family law, but not others, for example, commercial law (interview with the author). This is a contested view. For example, former Chief Justice Arthur Chaskalson (in discussion with the author) adopts the view that it is more widely relevant including, for example, in the evaluation of fact and the development of the common law.

65 *Minister of Finance and Another v Van Heerden* [2004] ZACC 3; 2004 (11) BCLR 1125 (CC); 2004 (6) SA 121 (CC) at para 27 (per Justice Moseneke).

66 *Ismail v Ismail* 1983 (1) SA 1006 (A).

67 *Hassam v Jacobs* supra at para 25.

68 The remarks have often been quoted in the US media out of context. For the full text of the speech, see Media still can't find context of Sotomayor's 'wise Latina' comment. Available at: http://mediamatters.org/research/200907130040.

69 Republicans press judge about bias, *New York Times*, 15 July 2009.

70 Retter, D. (2009). *New York Post*. She also made the remark that 'Personal experience affects the facts that judges choose to see …' which also formed the subject of interrogation during her confirmation hearings. She clarified the remarks by saying that she did not stand by the remark insofar as it can be understood to mean that she would 'ignore other facts or other experiences because [she hasn't] had them.'

71 See, for example, *Bato Star v Minister of Environment Affairs* 2004 (4) SA 490 (CC).

72 There is also a general principle that courts should not be approached by the legislature to exercise advisory functions on the constitutionality of proposed legislation. In limited circumstances, and with the support of at least 30% of the National Assembly, parliament may approach the court to make a declaration of unconstitutionality within 30 days of the President enacting legislation (s 79 of the Constitution.) Similar powers are vested in the provincial parliaments under s 121.

73 Section 41(3) of the Constitution. Where there is an inter-governmental dispute, organs of state involved are obliged, under the Co-operative Government provisions of the Constitution, to 'make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before approaching courts to resolve the dispute.' Legislation has now been enacted under s 42(2) of the Constitution to enable inter-governmental disputes to be resolved without approaching courts.

74 See *Bato Star* supra.

75 See *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC); *Minister of Health v Treatment Action Campaign* supra.

76 The Constitutional Court has thus held that, flowing from the principle of separation of powers, a court must keep in mind the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. That

involves 'restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature.' *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* supra at para 66.

77 *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC).

78 Section 59 of the Constitution obliges the National Assembly to facilitate public involvement in the legislative and other processes of the Assembly and its committees. See s 72 for the equivalent provision in the National Council of Provinces.

79 See ss 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000.

80 The Constitution's transformative objective was affirmed by Justice Nkabinde in the Constitutional Court decision in *Hassam v Jacobs* supra at para 28 and n 35.

81 Forsythe (1991: 1) aptly commented that '[I]t is monstrous that, in a multi-racial country, the judiciary should continue to exist of only one race [continuing in a footnote] and indeed, very largely, of only one sex.'

82 The attorney reportedly had written a complaint to this effect on behalf of his Society for the Protection of Our Constitution. His remarks were slammed by various human rights groups, including the Human Rights Commissioner Jody Kollapen, who is reported to have questioned which constitution Omar's society was claiming to protect. *Cape Times*, 28 August 2009.

83 Cowan (2006: 308–309, 313) referring to transcripts of the JSC hearings and the report by Rickard, C. (2005). *Sunday Times*, 23 October. See also Andrews (2006).

84 How race should factor into decision-making raises different questions, see later.

85 At the time he delivered his paper, and leaving aside the Supreme Court of Appeal and Constitutional Court, 51 of 134 appointments had been white judges. Only 12.5% (25 of the total of 199) of judges (including the Constitutional Court and Supreme Court of Appeal) were women (including black women).

86 Section 9(2) provides: 'To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.'

87 Malleson (2006) refers to arguments put forward by some judges and academics in the UK. The arguments are equally apposite in the South African context.

88 The helpful distinction between the need for the people of South Africa to identify with the Bench as a whole, rather than a specific judge hearing a specific case, was drawn by Tony Honore (e-mail communication with the author, 23 September 2009).

89 Chief Justice Langa quoted in Mpati (2006: 23).

90 One need not agree with Malleson's first proposition to agree with the second. The need for diversity to ensure legitimacy is made by many others, for example, Mpati (2006: 22–23); Dumisa Ntsebeza, quoted in Mpati (2006: 23); Forsythe (1991: 18); Wesson & Du Plessis (2008).

91 Bazelon, E. (2009). *New York Times*. Available at: http://www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html

92 Section 1 of the Constitution proclaims that South Africa is founded on, among others, the values of non-racialism and non-sexism.

93 It is in this context that we must be particularly astute to adopt an appropriate definition of merit.

94 During the JSC's Kliptown hearings in 2009, candidate Judge Theron was effectively asked to give herself a racial categorisation. See McKaiser, E. (2009), *Business Day.*

95 This requires far more than judicial selection aimed at meeting the objectives of

s 174(2). Importantly, it requires the legal profession and the state to take measures to enable black and female candidates to qualify themselves for judicial office.

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Chapter 8

Bending the rules: Constitutional subversion by the intelligence services

Laurie Nathan

8.1 Introduction

In 2006 South Africa was rocked by the news that the National Intelligence Agency (NIA) had spied on a prominent political figure and unlawfully intercepted the communication of several ruling party and opposition parliamentarians. At the request of the Minister of Intelligence, the Inspector-General of Intelligence investigated the matter and his findings of misconduct led President Thabo Mbeki to fire the NIA chief. The debacle was a manifestation of the intense conflict within the ruling African National Congress (ANC), which had ruptured into two camps led respectively by Mbeki and his arch-rival, Jacob Zuma. Opposition parties and civil society groups expressed fears of a return to the sinister machinations of the apartheid security forces.

The crisis highlighted both the importance and the difficulty of reforming intelligence services in countries emerging from authoritarian rule (Born, Johnson & Leigh, 2005; Bruneau & Boraz, 2007). Intelligence agencies the world over have special powers that permit them to operate with a high level of secrecy and acquire confidential information through the use of intrusive measures. Politicians and intelligence officers can abuse these powers to infringe civil liberties, favour or prejudice political parties and thereby subvert democracy. Because of their proximity to the country's rulers and their capacity to ferret out personal and party secrets, intelligence agencies have the means to wield undue influence within the state and the political arena.

In light of these dangers, established and new democracies alike are confronted by the challenge of ensuring that their intelligence services respect the democratic system and are subject to democratic control. A failure to achieve this in countries freshly unshackled from authoritarianism can retard the consolidation of democracy (Bruneau & Boraz, 2006). The obstacles to intelligence reform in these countries are formidable, however. They typically include an institutional culture steeped in the repression of dissent, the historical politicisation of the intelligence agencies, a pervasive belief that democratic controls will reduce the agencies' effectiveness, and a lack of expertise and confidence on the part of the new executive and Parliament. Above all, reform is inhibited by the extreme secrecy and political sensitivity of the intelligence

community. In Africa these problems are acute. As Eboe Hutchful (2009) observes, 'in a context of profound (and ongoing) political change that has left virtually no institution in the public domain unscathed, Intelligence continues to be excluded from both the democratisation and SSR [security sector reform] agendas'.

An exception in this respect is South Africa, whose intelligence dispensation has undergone major transformation since the end of apartheid in 1994. While the process is far from complete, the intelligence legislation and governance arrangements now compare favourably with those in established democracies (Dombroski, 2006). Whereas other accounts of this process downplay the significance of the Constitution (Dombroski, 2006; O'Brien, 2005), I argue that the Constitution lies at the heart of the transformation endeavour and has been pivotal in shaping and constraining the intelligence agencies. It is a powerful instrument whose relevance for the intelligence community is simultaneously high, complex and contested.

Constitutions are neglected in the literature on SSR. This is surprising given the literature's preoccupation with democratic governance of the security sector (for example, Organisation for Economic Co-operation and Development, 2007; Bryden & Hänggi, 2005). A democratic constitution is the foundational constraint on the exercise of state power and contains a set of higher order principles and rules that can regulate the security services and the manner in which they are governed. The story of intelligence reform in South Africa contributes to an understanding of a constitution's potential and limitations in this regard. The story also captures the remarkable core feature of a constitution as a text that is powerful enough to restrain the strongest actors in a society, but whose authority derives from the willingness of these actors to heed the text and be restrained.

The central concept here is constitutionalism, which has an ancient history and varied meanings but can be defined concisely as 'the limitation of government by law' (McIlwain, 1940: 24). It thereby restricts the majority's democratic right to govern. The concept was a crucial component of South Africa's negotiated settlement, the success of which hinged on the extent to which it met both the aspirations of the black majority and the fears of the white minority. On the one hand, the Constitution endorses universal adult franchise, regular elections and a system of democratic government and, on the other, it places substantial checks on the government's exercise of power.

For Scott Gordon (1999: 5), the essence of constitutionalism is that the coercive power of the state is constrained. This power can be exerted in many ways, blunt and subtle, but the security organisations are undoubtedly the most formidable mechanisms of state coercion. In South Africa this fact created much anxiety during the transition to democracy. In the nature of the power-

sharing arrangements of the negotiated settlement, the apartheid security forces would form the rump of the new security services and most of their officers would retain their jobs. Their loyalty to the democratic project and an ANC-led government was in doubt and their history of repression inspired fear of human rights abuses in the future. From the perspective of the ANC, it seemed prudent to bind the security services as tightly as possible in the Constitution. The ruling National Party, shortly to become an opposition party, shared this perspective because it mistrusted the ANC and was afraid that revenge would be exacted on the white community.

The architects of South Africa's democratic dispensation proved to have been far-sighted. In ways anticipated and unanticipated, the Constitution has been an immensely influential instrument with regard to the security services. In the case of the intelligence community, as discussed in this chapter, the Constitution has regulated and constrained the exercise of state power, safeguarded human rights, contributed to the management of conflict, established an agenda for transformation and promoted a process of constitutional socialisation.

This chapter proceeds by considering the relevant provisions of the Constitution and the White Paper on Intelligence; the role of the Constitution during the intelligence crisis of 2006; the perspectives of key actors on the relationship between the Constitution and the intelligence community; and the limitations of the Constitution. This chapter draws on the report of the Ministerial Review Commission on Intelligence in South Africa (2008), which quotes extensively from classified documents and thus provides an opportunity for deeper study of the intelligence sector than was possible previously.[1]

8.2 The Constitution and the White Paper on Intelligence

The 1996 Constitution is a charter for democratic governance, protecting human rights, transforming state institutions and overcoming the injustices and inequalities of apartheid. It is an inspirational and aspirational document, intended to 'heal the divisions of the past' and 'lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law'.[2] The Constitution is also, most crucially, the supreme law of the country.[3] The courts must declare 'any law or conduct that is inconsistent with the Constitution [to be] invalid to the extent of its inconsistency'.[4] The Bill of Rights is binding on the legislature, the executive, the judiciary and all organs of state.

The principle of constitutionalism and the resolve to prevent a recurrence of the abuses of the apartheid era are strongly evident in the chapter on the security services, comprising the military, the police and the intelligence agencies. The emphasis of the chapter is on the rule of law: national security must be pursued in compliance with the law, including international law; members of the services

may not obey a manifestly illegal order; and the services must act, and must teach and require their members to act, in accordance with the Constitution and the law.[5] The chapter also asserts the principle of civil supremacy, declaring that national security is subject to the authority of Parliament and the executive and that multi-party parliamentary committees must have oversight of the services. In light of the politicisation of the apartheid security apparatus, the Constitution insists that the services and their members must be strictly non-partisan with respect to political parties and may not advance or prejudice the interests of these parties.[6]

In addition to these general provisions on security, the Constitution contains separate sections on the defence force, the police and the intelligence agencies. Sections 209 and 210 on intelligence give practical effect to the tenets of legality, executive control and parliamentary oversight:

- *Any intelligence service other than an intelligence division of the defence force or police service may be established only by the President, as head of the national executive, and only in terms of national legislation.*
- *The President must appoint the head of each intelligence service and must either assume political responsibility for the control and direction of these services or designate a member of Cabinet to assume that responsibility.*
- *National legislation must regulate the objects, powers and functions of the intelligence services. It must provide for the coordination of the services and for civilian monitoring of their activities by an inspector appointed by the President with the approval of at least two-thirds of the legislature.*

The White Paper on Intelligence of 1994 provided a framework for the 'philosophy, mission and role of intelligence in a democratic South Africa' (Republic of South Africa, 1994). Its goal was 'the creation of an effective, integrated and responsive intelligence machinery that can serve the Constitution and the government of the day through the timeous provision of relevant, credible and reliable intelligence'. The document is replete with references to the Constitution: the intelligence services are 'guardians of peace, democracy and the Constitution'; intelligence officers should declare their loyalty to the state and the Constitution; the mission of NIA is to conduct security intelligence within the country's borders in order to protect the Constitution; and the control measures that regulate intelligence activities include 'allegiance to the Constitution'.

At the crucial moment of transition in 1994, the intelligence community did not regard the constraints of the Constitution as a burden. Instead, the document enjoyed an exalted status. It was the outcome of the negotiated settlement, the pact that ended the civil war and provided the basis for lasting peace and stability. It was also heralded by the ANC as the product of the liberation struggle, with the result that 'defence of the Constitution' was synonymous with 'defence of

the revolution'.[7] Equally important, the Constitution was the normative glue that united the members of the newly merged state and non-state intelligence services, which had previously been enemies.

8.3 The intelligence crisis and the Constitution

In 2005 a senior member of the ANC complained to the Minister of Intelligence, Ronnie Kasrils, that he was under surveillance by NIA operatives. Kasrils was dissatisfied with the explanation he received from Billy Masetlha, the head of NIA, and asked the Inspector-General of Intelligence to investigate the matter. The Inspector-General found that the surveillance and other eavesdropping on politicians had been unlawful (Office of the Inspector-General of Intelligence, 2006). The misconduct had its roots in Project Avani, an intelligence project set up to assess the impact of the ANC's presidential succession battle on the stability of the country. Through this project, the NIA had ostensibly intercepted emails from high-profile figures purportedly conspiring to block Zuma's bid to become the ANC president. The Inspector-General concluded that the e-mails had been fabricated and recommended disciplinary action against those responsible. On the basis of these findings, Kasrils fired two senior NIA officials and President Mbeki dismissed Masetlha. Masetlha was charged with producing the fake e-mails but the charges were later dropped. He was acquitted on the charge of failing to cooperate with the Inspector-General's investigation. The parliamentary Joint Standing Committee on Intelligence (JSCI) undertook its own inquiry behind closed doors and issued a report criticising the Inspector-General's investigative procedures.

The Constitution and its mechanisms performed a number of significant functions in relation to the crisis and its aftermath. The following discussion examines these functions by focusing on three of the key actors in the imbroglio: the Office of the Inspector-General of Intelligence (OIGI), the Constitutional Court and the Minister of Intelligence.

The Inspector-General, whose post originates in the Constitution, is appointed by the President. The governing legislation provides that the Inspector-General reports to the JSCI and must investigate complaints of misconduct, illegality, transgressions of the Constitution and abuse of power by the intelligence organisations.[8] Such complaints can be laid by the JSCI, a member of the public or a member of an intelligence organisation. The OIGI's investigation of the Masetlha affair demonstrated the potency of this mandate, exposing the wrongdoings of senior intelligence officers and leading to their dismissal. These dramatic events also highlighted the special powers of the OIGI that equip it to play an effective watchdog role. Unlike the other constitutional ombuds bodies in South Africa, the OIGI may not be denied access to any intelligence, information or premises under the control of the intelligence

services and it is a criminal offence for intelligence officers to refuse to cooperate with the Inspector-General.

In addition to investigating complaints, the Inspector-General must review the intelligence and counter-intelligence activities of the services and monitor their compliance with the Constitution, laws and policies. This enables the OIGI to scrutinise operations, controls and procedures on a regular basis, identify systemic problems and propose corrective measures as and when it sees fit. There is consequently the potential for continuous improvements in control systems and the level of compliance. However, the public is unable to gauge the extent to which this potential is realised as the results of the OIGI's monitoring and review activities are usually not disclosed.

The Constitutional Court protects rights and can provide redress if it finds that rights have been violated. Masetlha approached the Court to perform these functions, claiming that his dismissal by Mbeki was unconstitutional. The Court found against him.[9] Although the Constitution and legislation did not deal explicitly with the dismissal of the head of an intelligence service, the Court held that the President's authority to take such action derived implicitly from his constitutional power to appoint the intelligence chiefs. The constitutional pursuit of the security of the country and its people would be severely undermined if the President were unable to remove the chiefs. The Court observed that the President's exercise of power was always subject to constitutional constraints but concluded that he was entitled to fire the head of the NIA on the grounds of an irreparable breakdown in the relationship of trust between them.

After these proceedings had been concluded, a newspaper group applied to the Constitutional Court for an order to compel public disclosure of the restricted portions of the judicial record of the Masetlha case.[10] The application was based on the right to open justice. When the application was lodged, Kasrils agreed to declassify the bulk of the material but argued that the release of certain documents would compromise national security. In a majority judgment the Court rejected his argument in respect of some of the information but held that other information, regarding relations with foreign intelligence services, the NIA chain of command and the identity of NIA operatives, must remain secret. A minority judgment held that it was in the public interest to release all the information other than the names of certain operatives.

The judiciary has not been approached to consider the constitutionality of intelligence operations that infringe the right to privacy but it has issued several rulings on related matters. In cases dealing with search and seizure investigations by the police and other government bodies, the courts have consistently shown a 'jealous regard for the liberty of the subject and his or her rights to privacy and property'.[11] When called on to judge the constitutionality of legislation that permits search and seizure, the Constitutional Court has stressed the necessity

for safeguards that protect rights, arguing that 'the existence of safeguards to regulate the way in which state officials may enter the private domains of ordinary citizens is one of the features that distinguish a constitutional democracy from a police state'.[12] The Court has struck down legislative provisions that allow searches to be conducted without judicial authorisation.[13]

In the wake of the intelligence crisis Kasrils took three measures aimed at preventing further acts of illegality, all of them expressly promoting the Constitution as the primary basis for the good conduct, socialisation and reform of the intelligence services. First, he issued a statement entitled 'Five principles of intelligence service professionalism', which he ordered to be displayed prominently throughout the intelligence community. The statement covered the principles of legality, political non-partisanship and subordination to the civil authority and began as follows:

> *We must accept the fundamental principle of legality. We do not stand above the law. We are not exempt from the law. We are unequivocally and emphatically bound by the law and the Bill of Rights. All our operations must be conducted within the parameters of the Constitution and relevant legislation. The founders of our democracy took this issue so seriously that they enshrined in our Constitution the requirement that members of the security services should disobey a manifestly illegal order.*[14]

On the face of it an uncontroversial affirmation of constitutional precepts, the statement was politically charged in the circumstances. Kasrils' purpose was to press home a message to intelligence officers, many of whom were shocked and distressed over Masetlha's dismissal and claimed that his axing had given rise to uncertainty about the boundaries of acceptable behaviour. In this context Kasrils was determined to assert the executive's authority over the services, insisting that the boundaries of acceptable behaviour were fixed by the law and warning the members of the services that he would not protect them if they broke the rules.

Second, Kasrils instructed the intelligence chiefs to develop a civic education programme for the services in order to promote and entrench a culture of respect for the Constitution and the rule of law. Third, he set up the independent Ministerial Review Commission on Intelligence with a mandate to examine the civilian intelligence dispensation and recommend ways to strengthen mechanisms of control, ensure full alignment and compliance with the Constitution and minimise the potential for illegality. As discussed later, the Commission brought to light many deviations from the Constitution.

It is striking that every one of the main actors in the intelligence crisis — the President, the Minister of Intelligence, the head of the NIA, the Inspector-General, the JSCI and the Constitutional Court — had its formal origin in the

Constitution. This conferred legitimacy on the offices in question but did not confer unequivocal legitimacy on the office-bearers and their actions. Indeed, because of the political milieu in which the crisis occurred, many of the key individuals were accused of behaving in an improper and conspiratorial manner. As noted earlier, the crisis was a manifestation of the internecine conflict within the ANC and it exacerbated the conflict, with both the Mbeki and the Zuma camps convinced that their opponents were abusing their authority to further a partisan agenda.

In this volatile situation, fraught with tension and mistrust, the constitutional system of checks and balances performed a vital stabilising function. Thus a senior ANC member complained to the Minister of Intelligence that he was being harassed by the country's spies; the Minister referred the complaint to the independent office of the Inspector-General; the Inspector-General found that NIA officials had acted illegally; the JSCI criticised the Inspector-General's report; the Minister defended the report in Parliament; the President fired Masetlha; Masetlha appealed unsuccessfully to the Constitutional Court against his dismissal; criminal charges were laid against him but he was not convicted of any offence; and all of this was reported and debated in the media. Whatever the integrity of the protagonists and the veracity of their accusations, the arrangement of checks and balances transcended factional politics and played the conflict management role for which it was designed. Whereas the courts have a stabilising effect through the legal resolution of political disputes, the stabilisation function of the system as a whole occurs through the separation of powers, which constrains the ability of any single individual or body to dominate the system and ride roughshod over others.

8.4 Perspectives on intelligence and the Constitution

The Constitution's effects on the intelligence services are deeply influenced by the ways in which the services, the executive and Parliament view the relationship between the Constitution and the world of intelligence. The secrecy that shrouds the intelligence community would ordinarily preclude an adequate account of these views, but the matter was canvassed extensively in the report of the Ministerial Review Commission. In 2008 Kasrils resigned in solidarity with Mbeki, who had been asked by the ANC to step down as the President of the country, and on the eve of his departure he declassified the Commission's report. The NIA's efforts to block publication were unsuccessful (Sole, 2008). The documents reviewed by the Commission included classified operational policies, confidential memoranda prepared for the Minister of Intelligence, and submissions to the Commission from the services and government departments. This material reflected a variety of perspectives on the question of constitutional compliance, which can be grouped into five categories.

First, there were documents that provided an overall assessment of the transformation of the intelligence dispensation. One of these documents was the Inspector-General's submission to the Commission. He maintained that since 1994 the systems of intelligence accountability had improved, transparency had increased and institutional reform had taken place on the basis of the post-apartheid intelligence laws. However, 'certain transgressions and less than satisfactory transformation … have continued to shadow the intelligence community' (Ministerial Review Commission, 2008: 245). Most seriously, a culture of respect for the rule of law had not been fully entrenched and manifestly illegal instructions were issued and obeyed. In addition, there were pockets of lingering mistrust arising from the integration of the ANC and apartheid intelligence services in the mid-1990s. This led occasionally to the chain of command being bypassed and to officials being excluded from deliberations on matters for which they were responsible (Ministerial Review Commission, 2008: 245–246).

A similar assessment was contained in a confidential report prepared for Kasrils in 2006 by a task team of senior intelligence officials that was chaired by the head of the National Intelligence Coordinating Committee (NICOC). Written in the wake of the intelligence crisis, the report noted that the majority of serving officers had been active in the struggle against or in defence of apartheid during the Cold War. The experiences and training of this era had inculcated 'a culture of non-accountability of intelligence and security services, and a no-holds-barred approach to intelligence operations'; the democratic intelligence dispensation had made 'significant transformatory inroads into this culture [but] it is obviously not completely gone' and might only be eradicated when a new generation of intelligence officers had worked its way into the system (Ministerial Review Commission, 2008: 248–249).

Second, the operational policies of the services insisted on adherence to the Constitution and respect for the rights of citizens. This was not a public relations gesture since the documents were classified and it was not foreseen that they would ever be disclosed publicly. Instead, the insistence on constitutional compliance was due, in part, to the circumstances in which the Constitution had come into being. Bruce Ackerman (1997: 771–797) writes that, in some countries, a constitution is a symbol of a great transition in the political life of a nation, a marker of the moment from which the people govern themselves. In 'triumphalist scenarios' such as South Africa after apartheid, India at independence and France after World War II, 'national heroes and movements transform a moment of decisive political victory into enduring constitutional structures' (Ackerman, 1997: 780). The constitution becomes 'a powerful (though not all-powerful) symbol of national identity and democratic commitment' and political actors treat it with a certain deference (Ackerman, 1997: 783). In South

Africa many of the intelligence officials who were members of the liberation movement express pride in the Constitution as the 'product of our struggle', enshrining 'the values we fought for'.

In addition, the services regarded constitutional adherence as an operational imperative since deviation from the rules would lead to a breakdown in discipline, weaken the authority and control of the top leadership, make the services vulnerable to foreign infiltration and impair their ability to fulfil their security mandate. The intelligence services had consequently put in place a range of measures to prevent misconduct and illegality. These included mechanisms for monitoring compliance with the law and departmental directives, periodic reviews of control systems, disciplinary systems, sanctions for misconduct and a duty on members to report illegality and breaches of policy.

Third, in contradiction to the above, a number of senior officers believed that it was legitimate to 'bend the rules' — a euphemism for breaking the law — when confronted by serious security threats. In its report to Kasrils, the task team chaired by the head of the NICOC argued as follows:

> *In the hard reality of intelligence operations — when the threats and the targets are clear — it is sometimes impossible to do things by the book. When operating against terrorist threats or organised crime or other clear threats and targets, it is sometimes necessary to 'bend the rules' in order to ensure that the threat is adequately dealt with. This is an operational reality in order to ensure that the real 'nasties' do not get away with their 'nastiness'*. (Ministerial Review Commission, 2008: 249)

The task team did not consider this position to be deviant or unconstitutional. On the contrary, the motivation for 'bending the rules' was based on defence of the Constitution:

> *Prescripts are a necessary part of ensuring the democratic transformation of our intelligence services. So is the inculcation of a new culture of constitutionality and accountability. But intelligence remains intelligence. The state gives powers and mandate*[s] *to the intelligence services to employ secret means in order to protect the very Constitution that governs the conduct of intelligence itself.* (Ministerial Review Commission, 2008: 249)

Fourth, the preceding quote reflects the view that a primary function of the services is to protect the Constitution. As noted earlier, this view is promoted in the 1994 White Paper on Intelligence. It finds legislative expression in the National Strategic Intelligence Act 39 of 1994, which states that the NIA's intelligence mandate covers, among other things, 'threats or potential threats to the constitutional order of the Republic'.[15] The Act provides further that the

NIA's counter-intelligence mandate includes the use of measures and activities aimed at countering subversion, treason, sabotage and terrorism. 'Subversion' is defined as 'any activity intended to destroy or undermine the constitutionally established system of government in South Africa'.[16] Unlike the Canadian intelligence legislation, by way of comparison, this definition does not require subversive activities to be violent or in any other way illegal.[17] Similarly, the NIA's internal policies refer to 'unconstitutional activities' as a type of security threat distinct from 'criminal activities'. The implication is that subversion could include lawful acts.

The Ministerial Review Commission argued that it was entirely inappropriate for the NIA to pass judgment on whether lawful political events and actors undermined the constitutional order and to employ counter-measures that were left unspecified in the legislation. The spectre of interference in politics and violations of rights loomed large. Judged in this light, the Masetlha affair was not simply a product of mischief; the platform for the mischief was laid by the NIA's mandate, which led logically to an intelligence focus on the ANC's internal power struggle (Nathan, 2009a). As demonstrated by the report of the task team, moreover, the idea that the intelligence agencies are protectors of the Constitution can elide into the hubristic belief that they stand above and not beneath the Constitution.

Fifth, there was a widespread conviction that the intelligence services are an exceptional case in terms of compliance with the Constitution. Because of the nature and importance of intelligence efforts to uncover and counter threats to national security, it was felt that the services are not bound by constitutional provisions to the same extent as other state departments. Whereas the 'bending the rules' position was held confidentially within the services and was meant to apply to extreme security threats, the broader notion of 'intelligence exceptionalism' appears openly in many places, applies to several issues and is held not only by intelligence officers but also by the executive and Parliament.

For example, the Minister of Intelligence has issued secret regulations that are known only to the intelligence community. The intelligence legislation permits him to do this despite the Constitution's clear statement that regulations must be accessible to the public.[18] Similarly, the Constitution provides that the Auditor-General's reports must be made public and must be submitted to the relevant legislature,[19] but the audit reports on the intelligence services are presented only to the JSCI and are classified. Although the Constitution states that national budgets and budgetary processes must promote transparency and accountability,[20] the annual intelligence budgets are secret; they are reviewed by the JSCI but are not tabled in Parliament. In addition, the executive's exclusion of intelligence officers from the labour rights in the Bill of Rights is unconstitutional because the exclusion was not enacted through legislation.

Another major deviation from the Constitution arises in respect of intelligence methods that infringe the right to privacy. The Constitution states that the rights in the Bill of Rights may be limited only by law of general application.[21] The relevant legislation permits the intelligence services to intercept communication and enter and search premises with prior judicial authorisation.[22] Other intrusive intelligence methods — such as infiltration of an organisation, physical and electronic surveillance and recruitment of an informant — are not covered by any law. From the Constitutional Court's enumeration of the different ways in which the right to privacy might be infringed,[23] it seems clear that these methods do constitute such infringements. In the absence of governing legislation, they are unconstitutional.

The Commission denounced the notion of 'bending the rules' and maintained that the constitutional exceptionalism of the intelligence services was legally impermissible and politically dangerous. The Constitution is binding on all organs of state, it is designed to protect rights and prevent abuse of power, and the exemption of the services from constitutional provisions could spawn or reinforce a culture of illegality. The Commission's critique was shared by the National Treasury with respect to the intelligence budgets; by the Auditor-General with respect to the audit reports on the services; by the Inspector-General and the State Law Adviser with respect to labour rights; and by the Inspector-General with respect to the use of intrusive measures.

The contrasting views presented in the preceding discussion highlight the contested nature of the relationship between the Constitution and the intelligence services. Broadly speaking, there are two schools of thought, which could be referred to as 'intelligence exceptionalism' and 'strict constitutionalism'. The former emphasises intelligence effectiveness and wants to avoid overly restrictive measures that impede the services' ability to deal with security threats. As the task team warned, 'over-regulation and over-accountability of the intelligence services have the potential to render the services unable to carry out their noble duty to protect constitutional democracy' (Ministerial Review Commission, 2008: 213). The priority of the 'strict constitutionalists', on the other hand, is to ensure that the constraints are tight enough to prevent the services themselves from posing a threat to democracy and the rights of citizens. Both sides motivate their position in terms of protecting the constitutional system but their different emphases have substantially different legal, policy and political implications.

The tension between effectiveness and democratic control is one of the main themes of political debate and academic writing on intelligence in a democracy (for example, Boraz & Bruneau, 2006). It is unlikely to be resolved definitively in any country. In South Africa the contestation will continue for the foreseeable future, its trajectory and outcomes shaped by three factors in particular: the

orientation of the leadership of the NIA; the disposition of the Minister of Intelligence; and the balance struck between secrecy and openness. These factors are considered below.

8.5 The limitations of the Constitution

Notwithstanding the formal status of a constitution, its actual authority depends, to a great extent, on the willingness of the government and state departments to treat it as the supreme law, fulfil their constitutional obligations and respect the courts and other constitutional bodies. In South Africa there is no cause for complacency in this regard. In 2008 the ANC launched vitriolic attacks on the judiciary in order to halt the prosecution of Zuma on charges of fraud and corruption, and there were numerous reports of abuse of state organs by both the Mbeki and the Zuma factions.

In the realm of intelligence, the Constitution's authority is undermined by the prevalence of 'intelligence exceptionalism', the perceived legitimacy of 'bending the rules' and the apparent pattern of illegal spying and political interference by the NIA. Several reports of illegality emerged prior to the 2006 intelligence crisis (O'Brien, 2005: 216–218). Since then, it has been alleged that an intelligence agency intercepted the communication of Constitutional Court judges and that NIA officials sought to thwart the criminal prosecution of the national police commissioner (Sole et al, 2008; *Mail & Guardian*, 2009). In 2009 the National Prosecuting Authority dropped the indictment against Zuma, clearing the way for him to become President of the country, when tapes of telephone conversations tapped by the NIA revealed that the head of an elite investigating unit had had improper discussions with political figures outside of government on the sensitive issue of when to charge Zuma.

The problem of political involvement by intelligence officers seems to be intractable. The government formally regards the matter as so important that the constitutional injunction on political non-partisanship and non-interference by the security services is reiterated in the White Paper on Intelligence of 1994, the Intelligence Services Act of 2002, the Intelligence Services Regulations of 2003 and the NIA's directive on work ethics. Nevertheless, the problem persists for several reasons: the ANC and the government blur the boundary between the party and the state so that political threats to the ANC are regarded as threats to the state; there is an enduring affinity among the ANC politicians and intelligence officers, who were comrades during the liberation struggle; and the NIA's mandate, which covers non-criminal threats to stability and the constitutional order, draws it inappropriately into the arena of party politics. The available evidence suggests that intelligence officers do not have an independent political agenda but rather are enmeshed in the factional intrigues of the ruling party.

The Constitution raises the need for a process of constitutional socialisation in the security services so that their members obey the Constitution and the law. Yet there is no certainty that the civic education programme introduced by Kasrils will have the desired effect. In the closed and hierarchical environment of the intelligence services, it is possible that institutional culture and the attitudes of younger staff are shaped so strongly by the orientation of senior officers that the prevailing culture is reproduced from one generation to the next. It is also relevant that the heads of the services are appointed by the President. In the current political climate it would not be surprising if the President deemed personal loyalty rather than loyalty to the Constitution to be the paramount criterion for appointment.

Limitations on the impact of a constitution also flow from the fact that the document does not speak for itself. Even if its provisions are clear on paper, their application in different settings often requires interpretation. As Walter Murphy (1993: 14–17) points out, legislators, the executive and government officials regularly interpret constitutional texts, sometimes unknowingly, as they go about their business. As discussed earlier, in South Africa, Parliament and the executive have adopted an interpretative model of 'intelligence exceptionalism'. The model might be rejected by the Constitutional Court, in whole or in part, but this could only happen if the matter were brought before the Court.

The Ministerial Review Commission found that the officials who drafted and vetted the operational policies of the services lacked an adequate understanding of the Constitution. This was evident in policies that stressed the necessity to comply with the Constitution but mistakenly ignored or misinterpreted constitutional provisions and failed to take account of Constitutional Court judgments. For example, the NIA's directive on interception of communication underlined the need to respect the right to privacy but stated, incorrectly, that this right is confined to South African citizens. A consideration of Court decisions would lead to the conclusion that this right is, in fact, held by all persons in South Africa, including foreigners.[24] Technical errors of this kind have the far-reaching consequence of rendering certain intelligence activities unlawful.

Another major impediment to full compliance with the Constitution is the extreme secrecy that surrounds the intelligence community, stifling accountability, scrutiny and detection of unconstitutional behaviour (Nathan, 2009b). Whereas police actions tend to be visible, enabling a targeted person to challenge their constitutionality in court, intelligence operations are usually not known to the targeted person. Nor, in contrast to the police and the military, is it possible to conduct a thorough evaluation of the culture, policies and practices of intelligence agencies. Were it not for the decision by Kasrils to declassify the Commission's report, the constitutional transgressions that appeared in classified directives would, in all likelihood, have gone unnoticed. The high level

of secrecy prevents the media and non-governmental watchdogs from assessing not only the intelligence services but also the work and effectiveness of the actors that oversee them. The JSCI and the OIGI have strong powers but these bodies are not transparent and they display little sense of accountability to the citizenry (Nathan, 2009b).

8.6 Conclusion

The Constitution has been the primary frame of reference for the transformation of South Africa's intelligence dispensation since the end of apartheid. It has provided the basis for forging democratic governance arrangements, safeguarding rights and reforming the intelligence organisations that were once instruments of deadly repression. This, in turn, has contributed to the consolidation of democracy. The reform process has been uneven, however, and remains incomplete. The conviction that intelligence officers can legitimately break the law in defence of the Constitution violates the principle of the rule of law and precludes the possibility of inculcating a culture of respect for the law within the services. This conviction and the political interference and illegal spying by NIA officials pose a threat to the consolidation of democracy.

International experience suggests that the transformation of the security sector in new democracies is never smooth, continuous and inexorable. It is a process of struggle that proceeds in fits and starts because it upsets power relations, vested interests and dominant paradigms, and because it is invariably linked to larger political battles within and around the state (Nathan, 2007). In South Africa the Constitution is a site of struggle in relation to intelligence reform, both in the sense that there are conflicting opinions on its applicability to the intelligence community and in the sense that disputes over the constitutionality of intelligence conduct and laws can be taken to the Constitutional Court for adjudication.

The outcomes of struggles around SSR are shaped by many actors, including parliamentary committees, political parties, the media and civil society groups, yet there is no doubt that the key actors are those at the executive level. The President and the Cabinet ministers who are responsible for security have the authority to drive security reform. If they do not do this, whether for reasons of conservatism, fear, apathy or partisan politics, there is scant prospect of adequate transformation. Ministers who are committed to reform have to forge a delicate path between an overly assertive approach that antagonises the security forces and an overly cautious approach that lacks the decisiveness and momentum to change the status quo.

A vital task of security ministers in new democracies is to lead and oversee the process of embedding respect for non-partisanship and the rule of law in the organisational culture of the security agencies. To the greatest extent possible,

good conduct should flow from self-restraint and from the disposition of the top officers, in particular. As illustrated in this chapter, although the culture inherited from the previous regime and/or the liberation movement might be inimical to democracy, it has considerable durability, it can override the formal rules and, in the case of opaque intelligence services, it is not susceptible to public and parliamentary examination and pressure. There are no simple solutions to this problem, but it seems clear that little progress will be made if the executive is complicit in, or tolerates, misconduct and illegality by security officers.

It would be worthwhile to conduct comparative research on constitutions and security. It would be instructive, for example, to explore the dynamics of constitutional struggles around intelligence and security in different countries, ascertain the factors that determine a constitution's impact on the security organisations and evaluate the relative efficacy of different constitutional methods of control and oversight. A constitution cannot guarantee that the security services adhere to democratic norms, but it can establish an overarching vision, a set of principles and rules and a range of mechanisms for pursuing this imperative.

End notes

1 The author served on this Commission, together with Joe Matthews, the Chairperson, and Frene Ginwala.
2 Preamble to the Constitution.
3 Section 2 of the Constitution.
4 Section 172(1)*(a)* of the Constitution.
5 Sections 198 and 199 of the Constitution.
6 Section 199(7) of the Constitution.
7 This observation is based on the author's engagement as a policy adviser on security and defence to the African National Congress from 1992–1995.
8 Intelligence Services Oversight Act 40 of 1994.
9 *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC).
10 *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (and Freedom of Expression Institute as Amicus Curiae)* CCT 38/07 [2008] ZACC 6.
11 *Powell NO v Van der Merwe NO* 2005 (5) SA 62 (SCA), para 59.
12 *Mistry v Interim Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC), para 25.
13 *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); and *Park-Ross and Another v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C).
14 Minister of Intelligence. Five principles of intelligence service professionalism, September 2005.
15 Section 2(1) read with s 1 of the National Strategic Intelligence Act 39 of 1994.
16 Section 1 of the National Strategic Intelligence Act.

17 Section 2 of the Canadian Security Intelligence Service Act of 1984 defines 'threats to the security of Canada' as including 'activities directed towards undermining by *covert unlawful* acts, or directed toward or intended ultimately to lead to the destruction or overthrow by *violence* of, the constitutionally established system of government in Canada' (emphasis added).
18 Section 6(4) of the National Strategic Intelligence Act; s 37(5) of the Intelligence Services Act 65 of 2002; s 8(2) of the Intelligence Services Oversight Act 40 of 1994; and s 101(3) of the Constitution.
19 Section 188(3) of the Constitution.
20 Section 215(1) of the Constitution.
21 Section 36(1) of the Constitution.
22 Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002; and Intelligence Services Act of 2000.
23 *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC), para 69.
24 See *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC); and *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC).

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Conclusion

'Things fall apart; the centre cannot hold'

Richard Calland

South Africa changed on 16 August 2012. The centre did not hold and a dark shadow fell across the 'new' South Africa. The Marikana tragedy shocked the world and prompted a national crisis. As Sipho Pityana notes in the Foreword to this volume, Marikana is a turning point. As this book goes to print, the Farlam Commission of Inquiry is approaching the end of its critical assignment. Precisely what happened at the Lonmin mine that led to the death of over 30 workers, and why, will hopefully emerge from this inquiry. But it is already clear that Marikana incident brought together many of the factors that are discussed in this book — the desperate poverty; the extreme inequality; the culture of intolerance and violence; the precarious social compact; the underlying, unresolved class struggle; and the weakness of institutions of the democratic state (in this case, the public order management capability of a police force that has, in recent years, been 'militarised').

'Minding the gap' was the idea that originally informed the seminar series from which this volume comes — the gap, that is, between the rich promise of South Africa's Constitution and the harsh reality of life for the vast majority of people in this country. Marikana captured the essence, as well as the perils, of this gap. This chapter seeks to assimilate the analysis of the preceding chapters to pose — and attempts to address — a final, primary question: can this gap be minded and closed? It then suggests that if the gap cannot be closed, the political and social implications for the constitutional order will need to be understood and accommodated (which could be interpreted as one way of 'minding' the gap, although that is not the intention since the primary argument here is that the best — perhaps only — way to really 'mind the gap' is to close it).

The concept of minding the gap has two distinct features: that there *is* a gap and that it needs minding. Since the seminar series unfolded in 2009–2010, the soundness of this simple, conceptual rationale has been affirmed by the evidence. As the National Planning Commission's Diagnostic Report observed, South Africa's ambitions are being sorely undermined by the triple and interlocking challenges of poverty, inequality and unemployment (National Planning Commission, 2011a: 6). Moreover, the number of so-called 'service delivery protests' has increased. South Africa is being 'pushed to the limit' (to borrow the compelling phrase from the title of Hein Marais' thorough book

on South Africa's political economy: Marais, 2011). These circumstances have combined to create the space for populist political positions to emerge and gain apparent traction in the public arena, most obviously articulated by the ANC Youth League's former leader, Julius Malema, whose public rhetoric attracted significant public and media attention between 2009 and 2011, and whose criticism of the ANC's leadership led to his expulsion from the ANC in 2012. For all the internal contradictions of his politics, Malema's call for 'economic freedom' has a resonance that goes far beyond the devious superficiality of the obvious populism that informs its political motivation (Zondi, 2012).

The demand for economic freedom is inherently appealing because it makes a very simple but lucid point: that South Africa's transition delivered political freedom — most obviously in the form of the vote and institutions of representative democracy, and the Constitution itself — but not necessarily redistribution of economic power and wealth (Bhorat & Van der Westhuizen, 2005: 26). The evidence brought to bear on this issue by the Zuma administration and, specifically, the newly created Department of Economic Development, suggested that any 'redistribution' of wealth that has occurred since 1994 has been primarily in the form of welfare rather than from an equitable (re)distribution; most of the growth in the economy over these years has benefited the rich — it has not trickled down to the poor, save by fiscal redistribution through increased welfare grants.

Thipanyane (Chapter 1) draws on the research that demonstrates this and offers a usefully succinct summary of it, to make the pivotal point that appears in his chapter title: You can't eat the Constitution. This goes to the heart of the question: can the Constitution itself serve to mind the gap? The Constitution is, by virtue of South Africa's transition, an aspirational document: Chief Justice Chaskalson wrote in one of the first cases on socio-economic rights that a 'commitment … to transform our society … lies at the heart of the new constitutional order'.[1] It offers a vision of a different society, one based on substantive and procedural equality, as well as political freedom and democratic institutions such as the rule of law. But as this volume records, the gap between this vision and the reality is very substantial indeed.

The question, therefore, is can the Constitution close the gap? Attempting to answer this question involves an appreciation of the relationship between the Constitution and the idea of 'transformation', even though, as the Deputy Chief Justice has noted, 'the meaning of transformation in juridical terms is as highly contested as it is difficult to formulate' (Moseneke, 2002: 315). South Africa's second Chief Justice, Pius Langa, put the point with admirable simplicity: 'For me, this is the core idea of constitutionalism: that we must change. But how must we change? How does the society on the other side of the bridge differ from where we stand today?' (Langa, 2006: 351). Significantly, Langa proceeded

to argue that, first of all, this new society should be one based on substantive equality: 'Transformation then is a social and economic revolution' (Langa, 2006: 352).

This revolution has not taken place. As Thipanyane also records, inequality has worsened since the passage of the final Constitution in 1996; chronic poverty has softened around the edges, perhaps, but it remains the default position for the majority of people living in South Africa. Thipanyane's call for sustainable economic growth and an equitable distribution of wealth is the central debate, not only for South Africa but also for the world. As the global population continues to grow exponentially towards nine billion by 2050, so the world's economy will have to feed, clothe, house and nurse another two billion people. Clearly, economic growth is necessary. But given the second big need — to do what is necessary to avoid runaway climate change, which will harm the poor most of all — the greatest challenge is to find a way to 'grow' sustainably, that is to say, in a way that does not increase global warming through increased carbon emissions. This requires an economic revolution, specifically in energy policy. But the interconnectedness of the problems means that no one part of the economy, any more than any one part of the world, can cut itself off from the process of finding a solution.

This is the issue with which South Africa's First National Development Plan grapples assiduously:

> *South Africa needs to move away from the unsustainable use of natural resources. As water becomes scarcer, and global policy aims to price in the cost of carbon emissions, the country needs a coherent plan …* [A]*ll of this needs to be done in a way that increases the ability of the economy to employ more labour productively. The way forward is not obvious nor is it likely to be smooth. Large-scale economic transitions are disruptive and costly … Managing this transition in a way that reduces costs — especially for the poor — will require competent institutions, innovative instruments, clear and consistent policies and an educated and understanding electorate.* (National Planning Commission, 2011b: 15)

This is a daunting, as well as a complex, challenge, for even if the strategic objectives set by the first National Development Plan are met, the National Planning Commission itself suggests that South Africa's Gini coefficient will be reduced to only 0.6 and that, therefore, '[w]hile the proposed reduction would mark a significant shift, a high level of inequality would persist in 2030' (National Planning Commission, 2011b: 3). This captures what one might describe as the political economy of (constitutional) transformation and forces us to look at the primary question posed at the start of this chapter in a different way: if the 'gap' is 'minded' — in the sense that it is recognised and prioritised as a major threat

to be addressed by a key, critical mass of political opinion and by the leadership of the ruling party and government — but cannot be closed, regardless of good intentions — would it be more realistic to ask whether South Africa can accommodate the political and social consequences, and what impact will this have on the constitutional settlement of the mid-1990s?

This analytical frame of reference points to a number of precarious, as well as bleak, scenarios. But then South Africa is a precarious society. As the Arab Spring unfolded with such dramatic momentum in early 2011, so a debate was triggered among public intellectuals and other columnists in South Africa about whether our country might also face such vigorous uprising. Some, such as Moeletsi Mbeki (2011) and Jay Naidoo (2011), argued that, objectively, there was nothing to suggest that South Africa would be immune from such revolution, given the depth of inequality, the extent of hunger and the simmering sense of frustration and anger.

The desperate material conditions in which most people in South Africa live create an environment in which violence, prejudice and discrimination prosper, and where human rights are observed in the breach. As Cohen (Chapter 3) records, the xenophobic violence of 2008 was a symptom of an underlying lack of respect for human security and of intolerance towards people who are 'other'. This is in line with Afrobarometer and Idasa Democracy Index findings, which conclude that '… levels of intolerance are worryingly high' (Lefko-Everett, 2010: 164). While 80 per cent of those surveyed in the 2008 Afrobarometer survey said they trusted their relatives, only 50 per cent trusted 'other people they know' and 35 per cent, 'other South Africans' (Afrobarometer, 2008).

In South Africa, the picture is rendered more complicated by virtue of the existence of tribal authority and customary law traditions in rural areas. Since 1994, political commitment to the rural poor has been uneven, fluctuating with the passing of particular moments or changes in government. As the Mbeki decade (1999–2008) moved along, so his government appeared to accede to what it privately regarded as the inevitable: that the real action was to be found in the urban and peri-urban areas where migration had intensified and where 'economies of scale' convinced some policy-makers that greater 'bang for the buck' could be achieved. Jacob Zuma, however, promised a renewed commitment to the rural areas: this was one of the five pledges that the ANC made at the 2009 national election. Jara's account (Chapter 4) of the relationship between the Constitution and traditional authority/customary law suggests that it would be unwise to leave the rural areas to their own devices; that unresolved tensions between constitutional rights and traditional values are causing severe harm to many rural people, especially women and children, and are threatening to do untold damage to the social fabric by permitting what Jara calls a 'low intensity conflict … [taking a] more violent and tragic turn'.

This account, together with others in this volume, provides the analytical backdrop to the period of constitutional contestation that South Africa has now entered, which coincides with the rise of a populist and/or nationalist right within the ruling elite of the ANC. Attacks upon the Constitution are exemplified by the public positions adopted by senior ANC figures such as the Deputy Minister of Correctional Services, Ngoako Ramathlodi, who, in September 2011, penned a forthright op-ed article setting out a very different interpretation of the Constitution from that which underpins the approach of this volume (Ramathlodi, 2011):

> *We thus have a Constitution that reflects the great compromise, a compromise tilted heavily in favour of forces against change.*
>
> *However, there is a strong body of thought arguing the view that our Constitution is transformative.*
>
> *In this regard, a point needs to be made that a constitution can either be progressive or reactionary, depending on the balance of forces in the society it governs.*
>
> *In our case, the black majority enjoys empty political power while forces against change reign supreme in the economy, judiciary, public opinion and civil society.*
>
> *The old order has built a fortified front line in the mentioned forums. Given massive resources deriving from ownership of the economy, forces against change are able to finance their programmes and projects aimed at defending the status quo. As a result, formal political rights conferred on blacks can be exercised only within the parameters of the old apartheid economic relations.*
>
> *This imbalance is reflected across the length and breadth of the country in economic, social and even political terms to some extent.*
>
> *The objective of protecting white economic interests, having been achieved with the adoption of the new Constitution, a grand and total strategy to entrench it for all times, was rolled out. In this regard, power was systematically taken out of the legislature and the executive to curtail efforts and initiatives aimed at inducing fundamental changes. In this way, elections would be regular rituals handing empty victories to the ruling party.*
>
> *Regarding the judiciary, a two-pronged strategy is evident. The first and foremost is to frustrate the transformation agenda by downplaying requirements of gender and colour representation … .The other tactic is to challenge as many policy positions as possible in the courts, where the forces against change still hold relative hegemony. The legislature itself has not escaped the encroaching tendency of the judiciary, with debatable decisions taken by majority views, in some instances.*

Stripped to its bare essentials, this position advances the following set of propositions: black people are still very poor compared with white people; white people are using institutions such as the judiciary to frustrate change and the transfer of economic power; and the Constitution is to blame for this because it contains political compromises that are exploited now by white interests. Progressive thinkers have hit back against this approach, describing it as 'insane' and 'dangerous' (Naidoo, 2011). As Nathan (Chapter 8) amply illustrates, when there is doubt about the legitimacy of the Constitution, certain people or interest groups will exploit the weakness to further their own anti-democratic agenda.

So, we return to the question posed earlier: can the Constitution close the gap? We could also ask, in the context of this populist attack upon the Constitution, can we marshal an effective defence?

This question has tactical as well as philosophical connotations. So, when the Cabinet announced in late 2011[2] that it was going to conduct a study of the performance of the Constitutional Court in supporting transformation, there were two reactions. The first came from the mainstream liberal human rights lawyers and advocates, namely that this was an entirely inappropriate proposal because the executive arm of government had no 'right' to conduct such a study, and that to do so represented a dangerous interference with the independence of the judiciary.[3] The second, reflected in the comments of former Constitutional Court Justice, Zak Yacoob, was that the Constitutional Court had nothing to fear; its jurisprudential record was commendable and, moreover, if this 'study' encouraged a reasonable and constructive public debate about the Constitution, this would provide a good opportunity to advance the notion of 'progressive constitutionalism', which sees the Constitution as a transformative document (Yacoob, 2012).

For a more philosophical and principled defence of the Constitution, it is necessary to examine more deeply the meaning of 'transformative constitutionalism'. Karl Klare, in his groundbreaking paper, which remains a seminal work on this topic, interprets it as follows:

> *By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.* (Klare, 1998: 150)

Klare then proceeds to brand the Constitution as 'post-liberal', based on a string of six conceptual building blocks:

1. social rights and a substantive conception of equality
2. affirmative state duties (to deliver those social rights)
3. horizontality (the extension of rights into the private sphere, in recognition of the private sector's power)
4. participatory governance
5. multiculturalism, and
6. historical self-consciousness.

These remain useful parameters with which to evaluate the extent to which the law has played its part in enabling social change through non-violent political processes. But as Sandra Liebenberg has observed:

> *The Constitution does not provide a comprehensive blueprint for a transformed society nor stipulate the precise processes for achieving it. Instead it provides a set of institutions, rights and values for guiding and constraining processes of social change. Active debate and contestation concerning the nature of social change, and the political and legal reforms necessary for achieving it, should not be viewed as antithetical to transformation, but rather as integral to its achievement*.
> (Liebenberg, 2010: 29)

Liebenberg offers a robust articulation of the place and the value of the notion of deliberative democracy in South Africa's constitutional dispensation:

> *In addition to recognising and regulating representative democracy, the Constitution promotes a participatory, deliberative conception of democratic transformation. This model supports robust contestation, debate and struggle in the process of transforming society. While not prescribing a comprehensive vision of a just society, it is responsive to the inequalities and material deprivations which prevent certain groups from participating as equals in the creation of a new society.*
> (Liebenberg, 2010: 34)

This is all very well — and if her positive assessment of the pivotal role of participation and deliberation is justified it will provide succour to those who argue that it is South Africa's democracy that will spare her from a violent revolutionary uprising — but it suggests that the political process will be sufficiently strong and adept to be able to orientate the economy so as to overcome structural inequalities and injustices, when there is scant evidence that it can. In other words, the model of capitalism that is practised in South Africa (and throughout most of the world) will not bend sufficiently to the will of the Constitution, rendering the latter vulnerable to attack on the basis that it has not delivered on legitimate expectations. In short, that the Constitution does not do — and maybe cannot do — 'what the label says on the can'.

Accordingly, considerable thought needs to be given to the relationship between the Constitution — and especially the litigation of rights enshrined within it — and democratic politics. This is not to argue that constitutional litigation should be viewed as separate from, or isolated from, democratic politics. Far from it: in a *constitutional* democracy, as opposed to an 'elective' or 'representative' or 'parliamentary' democracy, constitutional litigation — and the assertion of rights — are the ultimate means of safeguarding that democracy by ensuring that all power is exercised on the basis of what Etienne Mureinik described as 'the culture of justification' (Mureinik, 1994: 32). But, as Geoff Budlender has argued in a spirited but carefully constructed defence of constitutional democracy:

> *… there is also a downside to the role of the courts. When we first debated the inclusion of social and economic rights in the Constitution, some expressed concern that this would divert political energy and activism into the depoliticised context of the courts … The concern was that the courts would become the site of struggle, and democratic energy would be demobilised. There is indeed a real danger in what has been described as the judicialisation of politics. One of the best-known dicta of Gary Bellow, a great radical lawyer, was that the worst thing a lawyer can do is to take an issue that could be won by political organization, and win it in the courts. Litigation and the courts become a new form of substitutionism.*
>
> *We have certainly seen an increasing judicialisation of our politics. This has not been limited to or even focused on the area of social and economic rights. Fifteen years after the 1996 Constitution, the amount of litigation on social and economic rights remains limited. This is probably the result of a lack of mobilisation around these issues as a matter of legal right, and of the uncertainty as to whether it is possible to obtain effective remedies from the courts for the breach of social and economic rights. However, other political issues are increasingly finding their way to the courts.* (Budlender, 2011; footnotes omitted)

We must be careful, Budlender seems to be warning, that in our litigious zeal and enthusiasm for the Bill of Rights, we do not lose sight of the need to mobilise wider support for the claims that are being made. Indeed, in so far as the Constitutional Court has been a site of successful progressive struggle in protecting vulnerable groups against executive failings, it may also reflect either a failure of politics and/or a failure of democratic institutions, what Budlender suggests might be '… the perceived inaccessibility and lack of responsiveness of the political system and of the institutions of formal democracy. When those processes and institutions do not work, people look elsewhere' (Budlender, 2011).

Certainly, it is interesting to note who brings cases to the courts because that has a very obvious impact on what gets litigated and, therefore, the trajectory of the jurisprudence that is built up. Bentley, in Chapter 2, is instructive in this regard, focusing as she does on issues of access to justice, the right to legal representation and the enforcement of socio-economic rights. Although Bentley finds some evidence of progress, limitations in the Legal Aid Board's capacity mean that public funding for socio-economic cases is rare and, as a result, most of the litigation that has reached the courts so far has been brought with the necessary support of foreign aid-funded law centres such as the Legal Resources Centre. While it may be naïve to think that turkeys might actually vote for Christmas, it can hardly be said to be persuasive for the state to question the transformative impact of the Constitution while declining to increase legal funding with sufficient speed and efficaciousness to permit more cases to be brought by litigants claiming that the state has failed in its duty to progressively realise the various socio-economic rights. Despite this, Bentley suggests that the reliance on foreign aid funding, along with the changes in the scope and availability of donor funding for more grassroots mobilisation, combined with shifts in strategy and tactics by the most effective law centres and other non-governmental organisations, mean that the government is more likely to regard the litigation brought by these civil society organisations as 'oppositional'.

It is in these circumstances that the Constitution is rendered more vulnerable to attack and, being an inanimate object, it cannot talk back (except, perhaps, through the judgments of the Constitutional Court). There is danger that it may provide a convenient scapegoat for the failure of the government to develop and execute policies that respond effectively to the constitutional requirement to progressively realise socio-economic rights, such as those to water, housing, healthcare and education.[4] These are political matters. And, as noted earlier, it is neither appropriate nor effective to seek to win political arguments through the courts alone.

Besides, the Constitutional Court does not always dispense the outcomes that are to be hoped for. In its socio-economic rights jurisprudence it has disappointed many with its cautious approach, particularly in relation to its disinclination to accept that there is a 'minimum core' to the socio-economic rights contained within the Constitution — which is to say that despite the state having a duty to progressively realise the rights of access to adequate housing and healthcare, water and social security, there is a basic 'floor' to the rights upon which the state must build.[5] In this volume, the Court's decision in *Mankayi v AngloGold Ashanti*[6] is criticised by Du Plessis for taking an overly narrow approach to the question of the employers' responsibilities to provide for the social security of their employees — in this case, miners who have contracted occupational diseases. Du Plessis argues that the Court missed an opportunity to lead — and

perhaps it did. However, it would be a grave mistake to believe that the only place in which redemption can be found is the Constitutional Court. This would place too great a burden on an institution that is under increasing political pressure. Its membership is changing and, with it, probably its jurisprudential character. In time it may become more, rather than less, cautious.

One implication of this is that the appointment of judges deserves even greater scrutiny. As Oxtoby and Sipondo show in Chapter 6, the appointment process for judges is very important and has been underestimated by human rights organisations, many of whom, for example, woke up to the importance of the process only when the record of the new Chief Justice, Justice Mogoeng Mogoeng, was scrutinised in the run up to his Judicial Service Commission interview in September 2011. As Cowen (Chapter 7) elegantly demonstrates, the various imperatives — transformation, representivity, competence, integrity, experience and jurisprudential philosophy — and their relationship to one another, present a demanding challenge, not least because, as she argues, South Africa, as a society, is very far from clear about what it regards as the 'ideal South African judge' and this uncertainty about criteria renders the selection process even more vulnerable to inconsistency and attack. Notwithstanding the argument outlined earlier, that the future of the Constitution and its progressive, transformative potential is a matter for political struggle, the jurisprudence of the courts clearly has a vital role to play. Consequently, ensuring that those on the Benches of the highest courts are people with integrity and commitment to the Constitution and the values of freedom, equality and human dignity is a necessary prerequisite for the Constitution's resilience in the face of a conservative attack.

As the chairman of the Council for the Advancement of the South African Constitution (CASAC), Sipho Pityana, asserts in the Foreword, a vibrant, meaningful public articulation of the idea of progressive constitutionalism is urgently needed — one that will 'create a popular narrative that is not self-serving of the interests of the rich and powerful, but which is truly transformational for the lives of the majority'. Without it, the gap cannot be minded and the Constitution will be vulnerable to what Pityana describes as a potentially 'lethal' assault by populist factions within the ruling party.

And, as the authors in this volume argue, the shadow of South Africa's Constitution is, as Laurie Nathan suggests in the Introduction, a place of fear and despair that requires urgent attention, lest certain interest groups exploit the shadow for their own nefarious political purpose. In this scenario, populist politicians and ideologues such as Julius Malema — or his substitutes — will prosper. There is no room for complacency. Progressive defenders of the Constitution will need to ensure that the judges appointed to the Bench are progressive and not conservative; and we must continue to litigate vigorously, to

ventilate the Bill of Rights, to create multiple narratives about its transformative purpose. But to mind the gap will require a whole lot more than the law. It is a political question — one concerned with the allocation and distribution of wealth and resources.

Indeed, it is in the realm of politics and not the law that the gap must ultimately be closed. The Constitution was always likely to be a site of contestation. In the next phase of South Africa's democracy, the contest will intensify. For a progressive vision to survive, the Constitution will have to be defended — not merely in the courts, but on the streets. It is a daunting task. In this sense, the struggle has only just begun. Without that sense of revolutionary purpose, the gap will never be closed. But the first step is to mind it by acknowledging its presence. To wander on, unwary of its consequences and blind to its most bleak ramifications, would be an act of singular negligence and short sightedness. A darker shadow will fall and things shall fall apart because the centre simply will not hold.

End notes

1 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) para 8.
2 Available at: http://www.gcis.gov.za/newsroom/releases/cabstate/2011/111124.htm.
3 See, for example, Bizos slams review of courts. Available at: http://www.iol.co.za/news/special-features/bizos-slams-review-of-courts-1.1266917 (accessed 9 November 2012).
4 Pursuant to ss 26 and 27 of the Constitution of the Republic of South Africa Act 200 of 1996.
5 See the judgment of Justice O'Regan in *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28, setting out the reasons for the court's preferred approach, namely to reject a 'minimum core' approach in favour of a 'reasonableness' test.
6 *Mankayi v AngloGold Ashanti Ltd* (CCT 40/10) [2011] ZACC 3.

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