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Cover Page Footnote
Professor of Law, University of Ulster, Northern Ireland. The author gratefully acknowledges financial assistance from the Winston Churchill Memorial Trust and the British Academy. He also wishes to thank the staff of the Registrar's Office at the Constitutional Court for facilitating his research.

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PROTECTING HUMAN RIGHTS THROUGH A CONSTITUTIONAL COURT: THE CASE OF SOUTH AFRICA

Brice Dickson*

INTRODUCTION

This article explores the South African Constitutional Court's early record in protecting human rights. After considering the origins of the Court and the jurisdiction conferred on it first by the Interim Constitution of 1994 and then by the Constitution of 1996, this article summarizes the provisions of those constitutions which protect human rights. It then analyzes the decisions of the Court which relate to those provisions; all forty-eight cases decided by the Court during its first twenty-nine months of existence are surveyed. The results of this analysis are presented under two headings: decisions on procedural points and decisions on substantive points. Finally, this article briefly identifies the most prominent features of this jurisprudence and assesses the Constitutional Court's achievements to date.

I. HOW THE CONSTITUTIONAL COURT WAS ESTABLISHED

The Constitutional Court of South Africa was first provided for by section 98 of the Interim Constitution of 1994 and has been operational since February 15, 1995. Today it exists by virtue of section 167 of the Constitution of 1996, which came into force on February 4, 1997. During the Multi-Party Negotiating Process which led to the drafting of the Interim Constitution there was little disagreement over the need for such a Court: all agreed that the country needed to be governed by a new basic document. Because the Constitution radically changed the dominant political and legal culture, it was natural to want it reviewed by a new and specialized body of judges.1 The judges who had functioned during the apartheid era were not, it was generally felt, appropriate individuals to sit in judgment over the effects of the new Constitution.2 As a result, the system used in countries such as Germany, which has a Federal Constitutional Court as well as a Federal Supreme Court, was adopted, in preference to the

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systems used in places such as Canada, the United States, and Ireland, where the Supreme Court deals with constitutional cases as well as other cases. In South Africa the highest court for non-constitutional matters is the Supreme Court of Appeal, known prior to the 1996 Constitution as the Appellate Division of the Supreme Court.

The Constitutional Court of South Africa consists of a President, a Deputy President, and nine other judges. It always sits en banc, and every case must be heard by at least eight judges. The President and the Deputy President are appointed by the President of the country, "after consulting the Judicial Service Commission and the leaders of the parties represented in the National Assembly." The Judicial Service Commission, composed of at least seventeen members, was one of the many new bodies first created by the 1994 Interim Constitution to help ease the transition to the new society heralded by the fall of the apartheid regime. Under the Interim Constitution, four of the judges on the Constitutional Court were appointed by the President of the country from among the existing judges of the Supreme Court, "in consultation with the Cabinet and with the Chief Justice," while the remaining judges were appointed, "in consultation with the Cabinet and after consultation with the President of the Constitutional Court," from among the nominees recommended by the Judicial Service Commission. Under the 1996 Constitution, all of the Court's judges apart from the President and Deputy President are appointed by the President of the country, "after consulting the President of the Constitutional Court and the leaders of parties represented in the National Assembly," from a list of nominees prepared by the Judicial Service Commission; however, four members of the Court must be currently serving as judges at the time of their appointment to the Constitutional Court.

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3. For an excellent survey see Leon Trakman, Interpreting a Bill of Rights: Canada and South Africa Compared, in Interpreting a Bill of Rights 26-49 (Johan Kruger & Brian Currin eds., 1994).
5. Republic of S. Afr. Const. ch. VIII, § 174(3). The Interim Constitution had provided only that the President of the Court was to be appointed by the President of the country "in consultation with the Cabinet and after consultation with the Chief Justice." The interim Constitution, Act No. 200 of 1993, effective on January 28, 1994 (Government Gazette, vol. 343, No. 15466) [hereinafter Republic of S. Afr. Interim Const.].
In recommending its original nominees for the Constitutional Court, the Judicial Service Commission had to "have regard to the need to constitute a court which is independent and competent and representative in respect of race and gender." In an attempt to make the initial appointing process more transparent, the Commission conducted public interviews with twenty-four candidates in October, 1994, before recommending six of them for appointment. President Nelson Mandela duly appointed all six.

Six of the eleven judges forming the initial Court were white males, one was a white female, three were non-white males and one was a non-white female. Only four of the eleven had been judges at any level before 1994. The Court's President was, and is, Arthur Chaskalson, who became well-known during the apartheid era as the Director of the Legal Resources Centre, a non-governmental organization which sought to provide legal services to indigent people throughout the country. The Court's Deputy President was Ismail Mahomed, who at the same time was a senior judge in Namibia, Lesotho, and Swaziland. In October, 1996, Mr. Mahomed was named as the next Chief Justice of South Africa, the first non-white person to hold that office. He took up this post early in 1997 and one of the existing Constitutional Court judges, Justice Langa, was named as the replacement Deputy President. As of the end of July, 1997, a new judge had not been appointed to the Constitutional Court to fill the vacancy, even though in 1995 and 1996 a replacement judge was appointed from time to time to provide cover for the absent Justice Goldstone, who had earlier been appointed as Chief Prosecutor at the War Crimes Tribunal at the Hague for both the Former Republic of Yugoslavia and Rwanda.

By the 1994 Constitution, all judges of the Constitutional Court were appointed for non-renewable seven-year terms. The 1996 Constitution extended the term of office to twelve years. This was a widely predicted reform; many felt that seven years was too short a time for a person to become proficient as a constitutional judge. Making the appointments renewable, however, could have led to accu-

11. Justice O'Regan.
12. Deputy President Mahomed, and Justices Langa and Madala.
tions of political interference with the judicial function if some appointments were renewed but others were not. The twelve-year appointment period, however, is subject to the obligation to retire at the age of seventy. Because Arthur Chaskalson was sixty-three when appointed in 1994, a new President will need to be appointed in 2001.

II. THE TYPES OF JURISDICTION VESTING IN THE COURT

When a country abandons Parliamentary sovereignty it must decide where sovereignty is to reside instead. In Ireland, for example, the Constitution of 1937 firmly locates sovereignty in the people, so that a referendum is the ultimate decision-making instrument. In the Constitution of the United States, sovereignty is more dispersed, thanks to the system of checks and balances operating among the President, the Congress, and the Supreme Court. In South Africa, although this is not made absolutely explicit in either the 1994 Interim Constitution or the 1996 Constitution, it is clear that sovereignty now rests with the Constitutional Court. Indeed, the key feature of both recent Constitutions is that the South African Parliament no longer has the ultimate say over whether a law is or is not valid. The Diceyan preference for absolute majority rule has been abandoned, and in the future no Parliament can pass laws which are contrary to the standards laid down in the Constitution, in particular to the guarantees of human rights.

South Africa has had a written Constitution since 1910, but until 1994 it coexisted with the concept of Parliamentary sovereignty—as did, for example, the Constitution of the Irish Free State from 1921 to 1937. The pre-1994 written Constitution regulated only the institutional framework of South African society, not the basic rights of its citizens; the judges, moreover, refused to rule on anything they deemed a “political” question.

The 1994 Constitution conferred an extensive jurisdiction on the new Court, which is largely maintained by the 1996 Constitution. On some issues the Court has exclusive jurisdiction and on others it has concurrent jurisdiction with other courts. Cases come to the Court in one of three ways: by virtue of an appeal, by virtue of a reference or, exceptionally, by virtue of a direct application on the part of a litigant. The Court’s exclusive jurisdiction allows it to:

(a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state; (b) decide on the

Previously, the third of these matters were not included in the Court's exclusive jurisdiction. On the other hand, the 1996 Constitution omitted from the list a previously crucial part of the Court's exclusive role: determining the constitutionality of an Act of Parliament. That issue is now part of the jurisdiction which the Constitutional Court shares with other courts: By section 167(5) of the 1996 Constitution, the Constitutional Court "makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force." This means that many of the ancien régime judges still serving in the Supreme Court and High Court will have to adapt their thinking to the new legal order; disappointed litigants can then appeal to the Constitutional Court.

If a matter falling within the Constitutional Court's exclusive jurisdiction arises during a case being heard in another court, it must be referred to the Constitutional Court for a ruling. The Interim Constitution laid down precise rules as to how and when such referrals were to occur; these were not repeated in the 1996 Constitution, but are likely to appear within an Act of Parliament. The 1994 provisions, as we shall see, gave rise to many problems of interpretation within the Constitutional Court's first two years. Matters arising in a provincial or local division of the Supreme Court had to be referred directly to the Constitutional Court; matters arising in a lower court or tribunal—or in the Supreme Court of one of the former "black homeland" territories—had to be referred first to the Supreme Court and then to the Constitutional Court. The Supreme Court had to refer a matter if it might be decisive for the case, and if the Supreme Court considered it in the interest of justice to make a referral. If the Supreme

21. Republic of S. Afr. Const. ch. VIII, § 167(5); see also Republic of S. Afr. Const. ch. VIII, § 172(2)(c) ("National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court . . . ."); Republic of S. Afr. Const. ch. VIII, § 172(2)(d) ("Any person or organ of state with a sufficient interest may appeal, or apply directly, to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court . . . .").
22. At least one commentator is optimistic that they will rise to the challenge. See Gretchen Carpenter, Constitutional Interpretation By the Existing Judiciary in South Africa - "Can New Wine Be Successfully Decanted Into Old Bottles?," 28 Comp. & Int'l L.J. of S. Afr. 322 (1995).
23. See infra Part V.
25. These territories compromised Transkei, Bophuthatswana, Venda, and Ciskei.
27. Republic of S. Afr. Interim Const., supra note 5, ch. VII, § 102(1). Before referring the case, however, the Supreme Court must hear any evidence which it is
Court decided not to refer an issue, an appeal against this decision could be brought to the Appellate Division of the Supreme Court.\(^{28}\) That Division then had to refer the matter to the Constitutional Court if a decision on the constitutional issue was necessary for the purposes of disposing of the appeal.\(^{29}\)

As well as hearing cases on appeal and by way of reference, the Constitutional Court also allows some litigants direct access. In the Interim Constitution this was provided for by section 100(2), which read: "The rules of the Constitutional Court may make provision for direct access to the Court where it is in the interest of justice to do so in respect of any matter over which it has jurisdiction."\(^{30}\) The rationale for this rather unusual provision was to create a court which is indeed open to all because the previous South African regime had, in effect, denied access to justice to vast numbers of people simply by making the courts too remote and costly. In reality, however, any reversal of this approach can only be nominal and symbolic because the floodgates would open otherwise. Rule 17 of the Constitutional Court Rules of 1995, which fleshes out section 100(2), is therefore quite conservative in its scope:

> The Court shall allow direct access in terms of section 100(2) of the Constitution in exceptional circumstances only, which will ordinarily exist only where the matter is of such urgency, or otherwise of such public importance, that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government.\(^{31}\)

Part IV(a) demonstrates that these provisions were at the heart of nearly a quarter of the cases decided by the Constitutional Court in its first two years. Direct access was allowed in five cases, but denied in a further six. The 1996 Constitution has done little to clarify matters, because section 167(6) provides only that "[n]ational legislation, or the rules of the Constitutional Court must allow a person, when it is in the interest of justice and with leave of the Constitutional Court, (a) to bring a matter directly to the Constitutional Court or (b) to appeal directly to the Constitutional Court from any other court."\(^{32}\) Part III now analyzes the fundamental guarantees of the South African Bill Of Rights.

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III. The South African Bill of Rights

The hallmark of the apartheid regime was the violation of human rights. Thus, the architects of the Interim Constitution strove to ensure that human rights would thenceforward be fully protected. Chapter 3 (sections 7 to 35) was entitled “Fundamental Rights,” and, in content, was comparable in many respects to the standard international documents on human rights, in particular the Council of Europe’s Convention on Human Rights and Fundamental Freedoms (1950) and the United Nations’ Covenant on Civil and Political Rights (1966).

Protections guaranteed include the right to equality before the law and to equal protection of the law, the right not to be discriminated against on grounds such as race, gender, sexual orientation, age or disability, the right to life, the right to freedom and security of the person, the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment, the right not to be subjected to forced labor, the right to privacy, the right to freedom of conscience, religion, thought, belief and opinion, the right to freedom of speech and expression, the right to assemble, the right to associate with others, the right to freedom of movement and to choose one’s place of residence anywhere in the country, the right to participate in political parties, to vote and to stand for election, the right when arrested to consult with a lawyer and to be given a fair trial, the right to form and join trade unions or employers’ organizations, and the right to acquire and hold property.

In some important respects, however, the 1994 Constitution went further than the standard international documents. Indeed, the persons drafting the document searched the world for more unusual models from which to borrow. While keeping in mind the particular needs of the South African situation, they were especially influenced by the German Constitution of 1949 and the Canadian Charter of Rights and Freedoms of 1982. Chapter 3 therefore also protected the right to respect for one’s dignity, the right to demonstrate and present petitions, the right to have disputes settled by a court of law, the right of access to information held by the state if such information is required for the protection of one’s other rights, the right to lawful, procedurally fair and reasoned administrative action, the right of arrested persons to be charged or released within 48 hours and to be told that they have the right to remain silent, the right freely to engage in economic activity,

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the right to fair labor practices, the right to a healthy environment, and the right to basic education and to instruction in the language of one's choice where this is reasonably practicable. Special mention is also made of children's rights.

Nevertheless, Chapter 3 did not confer all rights in absolute terms. But rather than follow the format of the European Convention, which allows the rights conferred to be taken away if factors such as public order, morality or the economy so dictate, Chapter 3 relied upon a general limitation clause. The clause provided that the rights entrenched could be limited provided such limitation was (a) reasonable, (b) justifiable in an open and democratic society based on freedom and equality, and (c) not contrary to the essential content of the right. In many instances the limitation also had to be necessary. In theory, no right, not even the right not to be tortured, was made immune from limitations, but it is difficult to conceive of circumstances where the breach of truly basic rights would not be viewed as negating the essential content of those rights.

Perhaps surprisingly, the 1994 Constitution also allowed for the suspension of some of the rights in Chapter 3 in times of emergency. However, such an emergency first had to be proclaimed by Act of Parliament and was permitted only "where the security of the Republic is threatened by war, invasion, general insurrection or disorder or at a time of national disaster." Courts of law were permitted to adjudicate upon the validity of a declaration of emergency, and a declaration could not remain valid for longer than twenty-one days unless it was extended through a resolution passed by a two-thirds majority in the National Assembly. No action taken as a result of a state of emergency could create retrospective crimes or indemnify any representative of the state for unlawful behavior, nor could the emergency be allowed to interfere with the right not to be discriminated against, the right to life and dignity, the right to be free from torture or forced labor, the right to freedom of belief, and the right to fair labor practices. Basic children's rights were also inviolable. Persons detained during a state of emergency were entitled at all times to have access to a legal representative and a medical practitioner of their choice and had to be given written reasons for their continued detention. During a state of emergency the Constitution even permitted detainees to be held for up to ten days before needing to be brought before a court.

To help ensure that Chapter 3 was really effective, however, further constitutional provisions encouraged South African society to adopt a human rights culture. For a start, the Constitution specifically directed all courts when interpreting Chapter 3 to "promote the values which underlie an open and democratic society based on freedom and

equality. The courts also had to regard relevant international human rights law and could, if they desired, look to comparable foreign case law. Courts which have been dealing with constitutional cases have already referred on many occasions to similar cases decided in Canada, the United States, Europe, and elsewhere.

The 1994 Constitution also provided several non-judicial mechanisms for implementing the rights guaranteed by Chapter 3. The Public Protector was the new name given to the ombudsman in South Africa. The person appointed must be nominated by a joint committee of the Houses of Parliament and approved by seventy-five percent of those present at a joint meeting of the Houses. He or she can investigate any maladministration, abuse of power or improper conduct allegedly committed by a person performing a public function. Additionally, all organs of state are required to accord such assistance as may be reasonably required to protect the independence, impartiality, dignity, and effectiveness of the Public Protector.

The Human Rights Commission, also created by the 1994 Constitution, is an eleven-member body operational since early 1996 and tasked with promoting the observance of fundamental rights, developing a public awareness of those rights, and recommending new measures to protect them. It can also investigate any alleged violation of fundamental rights and assist a victim to secure redress. If it believes that any proposed legislation might breach Chapter 3 or international human rights law, the Commission must immediately report this to the legislature concerned. The Constitution of 1994 also created the Commission on Gender Equality which is supposed to promote gender equality and advise and make recommendations to Parliament regarding any laws or proposed legislation affecting such equality. In addition, the Commission on Restitution of Land Rights was created principally to investigate the merits of claims, settle disputes and provide evidence to courts. Finally, the Truth and Reconciliation Commission was established to hear evidence and grant amnesties.

concerning human rights abuses and other crimes committed prior to President Mandela's inauguration on May 10, 1994.44

All of the decisions made by the Constitutional Court in its first twenty-nine months of existence were based on the provisions of the 1994 Interim Constitution. Of the forty-eight decisions in question,45 twenty-six required a decision regarding whether an existing law violated the human rights provisions in Chapter 3. In analyzing how the Court dealt with those cases, it is therefore not necessary to consider what changes to the human rights provisions were made by the 1996 Constitution, but it is of interest to note them here as these issues will become the focus of the Court's attention in the years to come.

On September 6, 1996, the Constitutional Court refused to certify that the new draft Constitution drawn up by the Constitutional Assembly and issued in May, 1996, fully complied with the Constitutional Principles set out in Schedule 4 to the 1994 Interim Constitution.46 Amongst the defects indicated were that the fundamental rights, freedoms, and civil liberties in the new text were not “entrenched” as required by Constitutional Principle 2 and that the right of individual employers to engage in collective bargaining was not protected as required by Constitutional Principle 27.47 The Assembly had to take back the text and rework it before submitting it for further scrutiny by the Court. Eventually, on December 4, 1996, the Court felt satisfied enough to issue a certification order.48 There had been four challenges to the provisions on fundamental rights, but the Court rejected all of them. First, the Court did not accept that section 22 was defective in giving only citizens the right to choose a trade, occupation or profession. Second, it did not accept that the new Constitution failed sufficiently to protect collective rights of self-determination. Third, the exclusion of certain rights from those made non-derogable during a state of emergency was not a fatal flaw. Fourth, the Court found there was nothing in the new Constitution to suggest that declarations of martial law could be issued in the future.

Chapter 2 in the 1996 Constitution, entitled “Bill of Rights,” has four more sections than Chapter 3 of the 1994 Constitution.49 One of these is section 7, which boldly asserts in subsection (1) that “[t]his

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44. The original cut-off date was December 6, 1993, the date when the Interim Constitution was adopted, but President Mandela extended it on December 13, 1996.
45. This article is based on all decisions taken up to and including July 15, 1997.
46. 1996 (4) SALR 744 (CC) (ruling by a unanimous judgment, but in the absence of Justice Ackermann who was ill); see also Vera Sacks, Due Process in Making a Constitution, 146 New L.J. 1237, 1238 n.ed. (1996) (noting that the 1996 Constitution cannot come into force until certified by the Constitutional Court).
47. In all, nine defects were noted, including a failure to allocate sufficient powers to provincial legislatures and an attempt to make the Promotion of National Unity and Reconciliation Act of 1995 immune from constitutional review.
48. It was signed by the President on December 10, 1996, International Human Rights Day.
Bill of Rights is a cornerstone of democracy in South Africa. [It] enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom." Subsection (2) goes on to say that the state must not only respect, protect and fulfill the rights in the Bill of Rights, but also promote them. The other new sections deal with the right of access to adequate housing, the right of access to health care, food, water, and social security, and the rights of cultural, religious and linguistic communities.

There are also important changes to some of the sections that were included in the 1994 Constitution. For example, the new section 12, on freedom and security of the person, expressly includes the right to make decisions concerning reproduction, the right to control over one's body, and the right not to be subjected to scientific experiments without informed consent. The new section 21, on freedom of movement and residence, confers on every citizen the right to a passport. The new section 35, on the rights of arrested, detained, and accused persons, confers the right to remain silent, while the right to a fair trial, enshrined in the new section 35(3) describes fifteen species of that right in place of the former ten.

The new limitation clause in the 1996 Bill of Rights, section 36, is both more and less demanding than its 1994 counterpart. It is more demanding in that it requires any limitation to have regard for human dignity and not just for equality and freedom. This is more than outweighed, however, by the elimination of the requirements that the limitation must not negate the essential content of the right in question and that, for some rights, the limitation must be necessary. The provision on states of emergency—the new section 37—has also changed. It now stipulates that any legislation enacted in consequence of a declared state of emergency may derogate from the Bill of Rights only if it is consistent with South Africa's obligations under international law applicable to states of emergency. Likewise, the Table of Non-Derogable Rights differs in some respects from the list included in section 34(5) of the 1994 Interim Constitution. It is interesting, moreover, that section 8 now expressly requires a court, when applying the Bill of Rights, to apply, or where necessary, develop, the common law to the extent that legislation does not give effect to the right. A court may also, conversely, develop rules of the common law to limit the right provided the limitation accords with section 36.

54. This seems to endorse the Constitutional Court's decision in Shabalala v. Attorney-General Transvaal, 1996 (1) SALR 725 (CC); see infra Part V.
55. The Constitution reads:
   (1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of state. (2) A provision of the Bill of
IV. The Constitutional Court's Procedural Decisions Affecting Human Rights

A. When is a Litigant Granted Direct Access To the Court?

A great deal of time and effort during the Constitutional Court's first two years was devoted to clarifying the methods by which an issue can be brought before it. The complicated jurisdictional provisions in sections 98 and 100-103 of the Interim Constitution caused no end of problems, particularly regarding direct access to the Court. These issues had to be analyzed in the very first case decided by the Court, S v. Zuma. The substantive issue was whether section 217(1)(b)(ii) of the Criminal Procedure Act of 1977, which dealt with the admissibility of confession evidence, was consistent with the Interim Constitution. The Court held that the issue should not have been referred to it, given that the parties in the case had exercised their power under section 101(6) of the Constitution to ask the Supreme Court to decide the issue—a request the Supreme Court had wrongly rejected. But rather than send the case back to that Court, with all the consequential delay that would have entailed, the Constitutional Court decided to consider the issue itself. Under section 100(2) of the Interim Constitution, the Court, following a request from the Attorney-General for Natal, granted direct access because it was in the interest of justice that a binding decision on the validity of section 217(1)(b)(ii) be given as soon as possible.

In S v. Mhlungu argued before the Court on the same day as Zuma, the issue was whether the invalidity of section 217(1)(b)(ii) should apply even in cases that were pending when the Constitution came into force. The Court again held that the reference to it was improper, because the effect of the Interim Constitution on pending cases was one of interpretation of the Constitution and not, therefore, within the exclusive competence of the Constitutional Court: The judge in the Natal Provincial Division should himself have decided the issue. Once more, though, the Court remedied the faulty reference by

Rights binds natural and juristic persons if, and to the extent that, it is applicable, taking into account the nature of the right and of any duty imposed by the right. (3) In applying the provisions of the Bill of Rights to natural and juristic persons in terms of subsection (2), a court - (a) in order to give effect to a right in the Bill, must apply or, where necessary, develop the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).


56. 1995 (2) SALR 642 (CC); see Gerhard Erasmus & Hennie Strydom, Judgments on the Constitution and Fundamental Rights, 1995 Stellenbosch L. Rev. 264, 264-69 (discussing Zuma in detail).

57. The Court then proceeded to strike down the sub-paragraph as inconsistent with the Interim Constitution. See infra Part V.

58. 1995 (3) SALR 867 (CC).
dealing with the case as if it were a direct access application under section 100(2), even though there was no specific request from any official for that to be done.\textsuperscript{59} The rationale for so acting is not clear from the judgment in the case. Justice Kentridge did, however, say that before a provincial or local division of the Supreme Court refers an issue to the Constitutional Court,\textsuperscript{60} it should be of the opinion not only that the issue "might be decisive of the case" and that a referral is "in the interest of justice," but also that there is a reasonable prospect that the law or provision in question will be held invalid by the Constitutional Court.\textsuperscript{61} Given how careful the Constitutional Court has otherwise been not to imply additional words into the Constitution, this is a rather remarkable judicial ruling, no doubt prompted, although not expressly so, by a worry that the Constitutional Court might otherwise be inundated with referrals.

Likewise, in \textit{S v. Mbatha},\textsuperscript{62} the first decision issued in 1996, the Court overlooked a faulty reference and acceded to an unopposed oral request from counsel for the applicant that the matter in question should be dealt with as if it were a direct access application. The Court stressed the need for certainty in the area of law involved, which was the extent of the presumption of innocence in cases where persons are charged with possession of firearms.\textsuperscript{63} However, in a case where two matters were combined for simultaneous adjudication, \textit{S v. Vermaas} and \textit{S v. Du Plessis},\textsuperscript{64} the Court refused to rectify a faulty reference regarding the right of an accused to legal representation—guaranteed by section 25(3)(e) of the Interim Constitution. Justice Didcott said that direct access should be permitted only in truly exceptional settings. There was no such setting here because the Constitutional Court was "ill equipped for the factual findings and assessments which the enquiry entails."\textsuperscript{65} While this conclusion might at first glance seem odd, it must be remembered that section 25(3)(e) gives a right to legal representation at state expense only "where substantive injustice would otherwise result."\textsuperscript{66} Nevertheless, the Court has been criticized for not taking a more proactive stand in this case.\textsuperscript{67}

\begin{footnotes}
\footnote{59. \textit{Id.} at 889-90.}
\footnote{60. Republic of S. Afr. Interim Const., \textit{supra} note 5, ch. VII, § 102(1).}
\footnote{61. \textit{Mhlungu}, 1995 (3) SALR at 892-93 (Kentridge, J., concurring). This is a requirement imported from Republic of S. Afr. Interim Const., \textit{supra} note 5, ch. VII, § 103(4), which deals with referrals of issues originating in courts other than the Supreme Court.}
\footnote{62. 1996 (2) SALR 464 (CC).}
\footnote{63. \textit{Id.} at 475. It went on to strike down the legislative provision in question. \textit{See infra} Part V.}
\footnote{64. 1995 (3) SALR 292 (CC).}
\footnote{65. \textit{Id.} at 299.}
\footnote{66. Republic of S. Afr. Interim Const., \textit{supra} note 5, ch. III, § 25(3).}
\end{footnotes}
involved a claim by a former undercover employee of the Ministry of Defence for money which he said was owed to him under a contract with the Ministry. Part of the Ministry's defense was that the claim was time-barred. The Constitutional Court struck the referral off the roll because the referring judge had not properly considered whether the issue was "decisive for the case," or whether a referral was "in the interest of justice." The judge had suggested that sections 26 and 27 of the Interim Constitution were in question—protecting the rights to engage freely in economic activity and to benefit from fair labor practices—but had given no explanation as to how. Direct access to the Court was refused because there was no pressing need for a definite and final decision on a controversial point springing up frequently throughout the country. The Court even held that the respondents in the case should bear their own costs because they had done nothing to oppose the referral to the Constitutional Court.

The decision in *Luitingh* was distinguished in *Brink v. Kitshoff NO*, where the Court did allow direct access even though the referral was yet again defective. The issue in *Brink* was whether section 44 of the Insurance Act of 1943 was in conflict with the Constitution insofar as it discriminated against married women by depriving them, in certain circumstances, of some or all of the benefits of life insurance policies ceded to them or made in their favor by their husbands before they became insolvent, while no similar limitation affected a life insurance policy ceded in favor of a husband by a wife. President Chaskalson pointed out that the Constitutional Court had been prematurely given the case because no decision had yet been made by a court as to whether the estate in question had become entitled to Mr. Brink's life insurance policy before or after the Interim Constitution came into force. He nevertheless dealt with the case under the direct access procedure because the application to the Constitutional Court had been made in March, 1995, before practitioners and other courts had been given any guidance as to the jurisdiction of the Constitutional Court (in *Luitingh* the application was made one month after judgment had been given in *Zuma*). Direct access was also permitted in

68. 1996 (2) SALR 909 (CC).
70. This view had already been adopted in cases decided within the previous two weeks or so. *See* Ferreira v. Levin, 1996 (2) SALR 621 (CC); Bernstein v. Bester, 1996 (2) SALR 751 (CC). On the latter case, see *infra* Parts IV(c) and V.
71. 1996 (4) SALR 197 (CC).
72. *Id.* at 208-09.
73. *Id.* at 209. The Court in *Brink* went on to hold, with little difficulty, that section 44 of the 1943 Act did breach the equality provision in section 8 of the Interim Constitution and that the breach could not be upheld as an acceptable limitation within the terms of section 33(1).
Besserglik v. Minister of Trade, Industry and Tourism,\(^7\) where Justice O'Regan said that

the applicant’s failure to follow the correct procedures may have been influenced by the novelty of the Constitution and its procedures. At this stage, the applicant has almost no further recourse available to him. Should we refuse to hear his application for direct access, it is unlikely that he will obtain relief elsewhere.\(^7\)

In Gardener v. Whitaker,\(^7\) the Court reverted to its stance in Luitingh and refused to deal with the substantive issue involved, which was whether the Interim Constitution’s provisions on fundamental rights affected the common law action of defamation. Justice Kengtridge, for the Court, held that the action in the Provincial Division of the Eastern Cape raised issues other than constitutional ones, and that therefore the application for leave to appeal should go to the Appellate Division of the Supreme Court and not to the Constitutional Court.\(^7\)

Likewise, in Tsotetsi v. Mutual and Federal Insurance Co.,\(^7\) the Constitutional Court remitted a case to the Transvaal Provincial Division on the basis that the issue was not decisive for the current case because the accident in which the applicant had been injured had occurred before the Interim Constitution came into force.\(^7\)

In Transvaal Agricultural Union v. Minister of Land Affairs,\(^7\) an application for direct access concerning the validity of provisions in the Restitution of Land Rights Act of 1994 was dismissed because there was not yet any “case” in which the question was decisive.\(^7\) This last decision was followed in Motsepe v. Commissioner for Inland Revenue,\(^7\) where the Court rejected a reference from the Transvaal Provincial Division seeking a ruling on the constitutionality of certain provisions in the Income Tax Act of 1962.\(^7\) The Court stated that whatever ruling it would give on this matter would not affect the legitimacy of the sequestration proceedings being brought against the applicant by the Commissioner. The Court further held that direct access be not

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74. 1996 (4) SALR 331 (CC) (concerning the constitutionality of section 20(4)(b) of the Supreme Court Act 59 of 1959, which requires leave for any civil appeal to the Appellate Division).
75. Id. at 334.
76. 1996 (4) SALR 337 (CC).
77. Id. at 346.
78. 1997 (1) SALR 585 (CC).
79. The issue raised focused on whether provisions in the Multilateral Vehicle Accidents Act of 1989 were in breach of § 8 of the Interim Constitution (the equality clause), because they limited the damages payable to certain classes of persons injured in motor vehicle accidents.
80. Tsotetsi, 1997 (1) SALR at 590.
81. 1997 (2) SALR 621 (CC).
82. Id. at 630.
83. 1997 (2) SALR 898 (CC).
84. Id. at 912.
granted because the applicant could have followed the objection and appeal procedures provided for in the Act itself.\textsuperscript{85}

The Court again ruled on the availability of direct access in \textit{S v. Bequinot},\textsuperscript{86} a case which also contains very significant remarks on when a reference to the Court is justifiable in a criminal case. In \textit{Bequinot}, the appellant had been convicted in a magistrate's court of receiving stolen property under section 37 of the General Law Amendment Act 62 of 1955. That section provides that a person accused of this offense has the onus of proving that he or she had reasonable grounds for believing that the goods were not stolen. The appellant appealed to the Witwatersrand Local Division of the Supreme Court, but did not raise the constitutionality of section 37; it was the judges themselves who, of their own motion, decided to refer the constitutionality issue to the Constitutional Court. Obviously wishing to avoid a flood of references, the Court stressed that issues should be referred to it only if they were vital to the determination of the case: it was not in the interest of justice for the Court to consider cases \textit{in abstracto}. In the words of Justice Kriegler:

\begin{quote}
There are sound policy reasons why constitutional questions should not be anticipated . . . . A referral at the appropriate juncture, where the constitutional issue is vital to the determination of the case and has been thoroughly canvassed in one or more of the courts, serves to define the constitutional issues and focus the development of our constitutional jurisprudence. But a case such as this, where the parties did not raise the issues themselves and the constitutional point may well prove peripheral, is inappropriate for grappling with the difficult legal and policy issues involved in invalidating a long-standing weapon in society's war against crime.\textsuperscript{87}
\end{quote}

Many decisions to date on direct access are confusing and difficult to reconcile. Of the eleven cases in point, the Court permitted direct access in five and disallowed it in the other six. It must have been very difficult for the lawyers involved in these cases to predict how each would go, and even now the applicable criteria are none too definite. What is required in this area is a reformed set of Court Rules which set out clearly and rationally the criteria that will be applied by the Constitutional Court when deciding whether or not to accede to a request for direct access. Accession should, it is submitted, remain wholly exceptional. At present, the Court risks bringing itself into disrepute if, on the one hand, it chastises applicants for misconstruing the Constitution's provisions on the Court's appellate and referral juris-

\textsuperscript{85} \textit{Id.} The Court added that in any event the applicant's counsel had made no formal application for direct access as required by Constitutional Court Rule 17. \textit{Id.} at 909.

\textsuperscript{86} 1997 (2) SALR 887 (CC).

\textsuperscript{87} \textit{Id.} at 896.
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diction and yet, on the other, proceeds to hear applications under the direct access provisions.

B. When Does the Bill of Rights Operate Retrospectively?

One of the most divisive issues, procedural or substantive, to have confronted the Constitutional Court so far has been whether the fundamental rights guaranteed in the Bill of Rights are to be enjoyed by persons involved in court proceedings that were pending when the Interim Constitution came into effect on April 27, 1994. In Mhlungu, \(^{88}\) seven justices decided that the individuals involved in proceedings pre-dating the implementation of the Constitution are still guaranteed these fundamental rights; however, four justices claimed that these individuals were not entitled to these protections. Although it is not possible to detect racial or sexual fault-lines in the reasoning of the judgments rendered, it is worth noting that the four dissenters were all white males. They adopted a traditionally literal approach to the interpretation of the Constitution, justifying this by saying that sometimes the wording of a law is just too plain to allow for any meaning other than the obvious. \(^{89}\) The majority, nevertheless, adopted a more imaginative approach. In Justice Sachs’ words, the challenge was “to seek out the essential purposes and interest to be served by the two competing sets of provisions, and then, using a species of proportionality, balance them against each other.” \(^{90}\) He added: “Practical problems can always be dealt with in a practical way. Rights are of a different order, and it is our duty to uphold them wherever possible.” \(^{91}\)

In four subsequent decisions, however, the Constitution has been held not to have a retrospective effect. \(^{92}\) In Du Plessis v. De Klerk, \(^{93}\) the Court held that a newspaper could not rely upon section 15 of the Constitution—conferring the right to freedom of expression—as a defense against a defamation action launched by plaintiffs prior to April, 1994. \(^{94}\) The majority of the Court did, however, leave open the possibility that in some circumstances of gross injustice the human rights

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89. Id. at 901-02 (Kenridge, J., dissenting): see Republic of S. Afr. Interim Const., supra note 5, ch. XV, § 241(8).
90. Mhlungu, 1995 (3) SALR at 914-15 (Sachs, J., concurring).
91. Id. at 920.
92. See also Zantsi v. Council of State, Ciskei, 1995 (4) SALR 615 (CC). There the issue was whether local and provincial divisions of the Supreme Court could inquire into the constitutionality of Acts passed prior to April 1994. The Constitutional Court did not think that that was an issue of sufficiently compelling interest to justify a reference to itself under section 102(8), but it concluded in any event that the lower courts did not have the power in question.
93. 1996 (3) SALR 850 (CC).
94. Id. at 884-85.
provisions might apply retrospectively. Likewise, in Key v. Attorney-General, Cape Provincial Division, where Mr. Key complained that the search and seizure of documents at his home, conducted under the Investigation of Serious Economic Offences Act of 1991, breached the Constitution, the Court held that no use could be made of the Constitution in relation to events occurring wholly before April 27, 1994. Again, though, the Court, through Justice Kriegler, was unwilling to lay down a blanket rule; instead, it found that the way in which evidence had been obtained could affect the fairness of a trial, guaranteed by section 25(3) of the Constitution.

It seems, therefore, that the Constitutional Court is generally reluctant to give the human rights provisions of the South African Constitution any retrospective effect. Only in exceptional circumstances will a departure from that rule be contemplated. Of course, as time elapses, the likelihood of a case arising out of facts occurring prior to April, 1994, when the first set of human rights provisions came into force, will gradually diminish.

C. Can the Bill of Rights Have Any Horizontal Effects?

When drafts of the Interim Constitution were being discussed, and even after it came into force, one of the issues most fervently disputed was whether Chapter 3 should operate not just vertically, so as to allow private companies and individuals to claim rights against organs of the state, but also horizontally, so as to allow private companies and individuals to claim rights against one another. Most of the wording of Chapter 3 tends to favor the view that it operates only vertically, but some of the provisions are open to the opposite interpretation. For instance, section 7(4) says that when a person alleges that a Chapter 3 right has been infringed, he or she is entitled to apply to a court for relief, and nothing expressly limits this entitlement to situations where the infringement is by an organ of the state.

95. Id. at 887. The case also raised the question of the Constitution's horizontal effects. For a discussion of the Constitution's horizontal effects, see infra Part IV(C).
96. 1996 (4) SALR 187 (CC).
97. Id. at 192; see also Rudolph v. Commissioner of Inland Revenue, 1996 (4) SALR 552 (CC) (reaching the same conclusion under comparable facts, where a search had been conducted under the Income Tax Act of 1962).
98. Key, 1996 (4) SALR at 195. In Ynuico Ltd. v. Minister of Trade and Industry, 1996 (3) SALR 989 (CC), a case that did not deal with any of the human rights provisions as such, the applicant alleged that the Minister's refusal in 1988 to grant him an import license for tea breached section 37 of the Constitution, which vests the legislative authority of the Republic in Parliament, not a Minister. Justice Didcott, for the Court, brushed aside this argument by saying that section 37 had no bearing on the matter since it dealt with legislative power only from the time the Constitution began to operate.
99. This is particularly true of section 7(1) which provides: "This Chapter shall bind all legislative and executive organs of state at all levels of government." Republic of S. Afr. Interim Const., supra note 5, ch. III, § 7(1).
Section 35(3) says that when a court is interpreting any law, it must have "due regard to the spirit, purport and objects of this Chapter." Moreover section 33(3) makes it clear that other rights or freedoms are to be recognized in South African law only if they are consistent with the rights described in Chapter 3.

The Constitutional Court had occasion to rule on this issue in two cases decided in May, 1996, both concerned with defamation: Du Plessis v. De Klerk and Gardener v. Whitaker. In principle, the Court declared, Chapter 3 does not have a horizontal effect on the common law applying between private individuals or companies, and section 15, which confers the right to freedom of expression, certainly does not. But the Court refused to rule out the applicability of all provisions of Chapter 3 in all situations arising between private individuals or companies. Likewise, in Bernstein v. Bester, Justice Ackermann refused to be drawn into the debate about whether the Interim Constitution imported rights horizontally, but he strongly suggested that the Interim Constitution had deliberately not constitutionalized civil procedure. It is likely that this matter will come before the Court on future occasions, if only because the 1996 Constitution is much more explicit in its extension of fundamental rights to the private sphere. This is in line with developments elsewhere, though it runs counter to the approach preferred by the Canadian Supreme Court.

V. THE COURT'S SUBSTANTIVE DECISIONS AFFECTING HUMAN RIGHTS

As shown earlier, under the Interim Constitution, but not under the 1996 Constitution, the Constitutional Court obtained exclusive power to strike down "any law" on the grounds that it violated constitutional provisions, including provisions concerning fundamental rights contained in the Bill of Rights. Of the first forty-eight cases decided

103. 1996 (3) SALR 850 (CC).
104. 1996 (4) SALR 337 (CC).
105. This follows the restrictive approach adopted by the Supreme Court of Canada in relation to the Charter of Rights and Freedoms. See Retail, Wholesale & Dep't Store Union, Local 580 v. Dolphin Delivery Ltd. [1986] D.L.R. 174.
106. 1996 (2) SALR 751 (CC). See infra Part V.
108. See supra Part III.
by the Court and surveyed for this article,²¹two-six required a
decision on whether existing law violated any of the human rights pro-
visions.²²In sixteen of these twenty-six cases a law was invali-
dated.²³Usually the invalidity was ordered to apply from the date
the Interim Constitution came into force (April 27, 1994), but on one
or two occasions it was extended to cover actions performed before
that date²⁴or, in contrast, postponed until a stipulated date in the
future.²⁵

To facilitate matters, the Court has devised a straightforward two-
stage test for determining whether a law should be declared invalid.
The first stage involves asking whether a violated right is a right pro-
tected by the Constitution. The Court has made it clear that, when it
interprets rights protected by the Constitution, it will take a broad
view, as in both Canadian constitutional jurisprudence and the juris-
prudence of the European Court of Human Rights. The second stage,
which applies only if the violated right is protected, involves asking
whether the alleged violation constitutes a permissible limitation of
the right in question. The Court has said that the onus of showing
whether this type of alleged violation is a permissible limitation rests
upon the party relying on the violating legislation. Again, this second
stage test is reminiscent of the approach adopted in Canada and in the
European Court of Human Rights. Because the United States Consti-
tution does not contain a limitation clause comparable to those in the
South African Constitution, the Canadian Charter, or the European
Convention, American courts must instead fine-tune the law by giving
ever more particular definitions of the rights in question.

Probably the best known of the substantive decisions of the South
African Constitutional Court affecting human rights are S  v.

¹¹². A chronological list of all cases (and much other useful information) is avail-
able from the website of the Faculty of Law at the University of Witwatersrand, Wits
Law School: Decisions of the Constitutional Court of South Africa (visited Sept. 27,

¹¹³. The other 22 cases concerned procedural issues only—as defined in Part IV of
this article—or were challenges against drafts of proposed legislation or proposed na-
tional or provincial constitutions; one case dealt only with the allocation of costs.

¹¹⁴. In brief those sixteen cases, in chronological order, are: S v. Zuma, 1995 (2)
SALR 642 (CC), S v. Makwanyane, 1995 (3) SALR 391 (CC), S v. Mhlungu, 1995 (3)
SALR 867 (CC), S v. Williams, 1995 (3) SALR 632 (CC), Coetzee v. Government of
the Republic of S. Afr., 1995 (4) SALR 631 (CC), S v. Bhulwana, 1996 (1) SALR 388
(CC), Shabalala v. Attorney-General, Transvaal, 1996 (1) SALR 725 (CC), Ferreira v.
Levin, 1996 (1) SALR 984 (CC), S v. Ntuli, 1996 (1) SALR 1207 (CC), Curtis v. Minis-
ter of Safety & Sec., 1996 (3) SALR 617 (CC), Brink v. Kitshoff NO, 1996 (4) SALR
197 (CC), S v. Julies, 1996 (4) SALR 313 (CC), Scagell v. Attorney-General, Western
Cape, 1996 (11) BCLR 1446 (SA), Mohlomi v. Minister of Defence, 1997 (1) SALR
124 (CC), Fraser v. Children’s Court, Pretoria N., 1997 (2) SALR 261 (CC), and S v.
Coetzee, 1997 (4) BCLR 437 (SA). Only Shabalala involved the invalidity of a com-
mon law rather than a legislative rule.

¹¹⁵. Mohlomi, 1997 (1) SALR 124; Mhlungu, 1995 (3) SALR 867.

¹¹⁶. Fraser, 1997 (2) SALR 261; Ntuli, 1996 (1) SALR 1207.
Makwanyane,\textsuperscript{117} where the death penalty was declared unconstitutional, and \textit{S v. Williams},\textsuperscript{118} where whipping of juveniles was likewise condemned as unconstitutional.\textsuperscript{119} The death penalty case was the first to be given an oral hearing by the Court, and the decision was keenly awaited throughout the country. There had been no hangings since November, 1989, but during much of the preceding apartheid era there had been more than one-hundred every year. When the Constitutional Court’s decision was finally announced more than three months after the hearing, no one was really surprised that the judges were unanimously opposed to the death penalty, but the result was still roundly criticized in many quarters as being out of touch with the wishes of the majority of the population. The fact that 459 prisoners on death row were to be reprieved did not go down well with the media, and perhaps in anticipation of this reaction, the Court stressed in its final order that all such prisoners were to remain in custody until the death sentences imposed on them had been set aside in accordance with the law and alternative punishments substituted.

Uniquely, all eleven judges issued a judgment in this case. They unanimously held that the death penalty, provided for by section 277(1)(a) of the Criminal Procedure Act of 1977, was inconsistent with the right to life under section 9 of the Interim Constitution,\textsuperscript{120} the right to dignity under section 10,\textsuperscript{121} and the right not to be subjected to cruel, inhuman or degrading punishment under section 11(2).\textsuperscript{122} It was not justifiable in terms of the limitation provision—section 33(1)—because no study proved it to be a deterrent, and retribution \textit{per se} could not outweigh the right to life. President Chaskalson was particularly eloquent in explaining the process the Court must go through when applying section 33(1). After stating that section 33(1) requires the weighing of competing values and ultimately an assessment based on proportionality—a test which he said was used in some form in Canada, Germany, the United States and by the European Court of Human Rights, and which calls for a balancing of interests—he continued:

\begin{quote}
In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary [as required in certain
\end{quote}

\begin{footnotes}
117. 1995 (3) SALR 391 (CC).
118. 1995 (3) SALR 632 (CC).
120. \textit{Makwanyane}, 1995 (3) SALR at 429.
121. \textit{Id.} at 422.
122. \textit{Id.} at 433.
\end{footnotes}
instances by section 33(1)], whether the desired ends could reason-
ably be achieved through other means less damaging to the right in
question.123

The judges in Makwanyane were happy to consult the reports of the
technical committees which had advised the Multi-Party Negotiating
Process while the Interim Constitution was being drafted, but in fact
those travaux préparatoires revealed that the negotiators had not re-
solved the issue of whether the death penalty should be permitted or
not. Interestingly, four of the justices supported their conclusion by
citing the need to promote “ubuntu,”124 one of the values mentioned
in the Interim Constitution under the provisions following section 251
titled “National Unity and Reconciliation.” There was also exten-
sive reference made to foreign case law, it being noted, for example,
that the Supreme Court of India, the Supreme Court of Zimbabwe,
and the Privy Council in relation to Jamaica, had all held the death
penalty constitutional, but that the European Court of Human Rights
had held that extraditing someone to the United States, where there
would be a long wait on death-row, was inhuman and degrading treat-
ment.125 Less attention was given to United States Supreme Court
decisions, which grant considerable leeway to the individual states to
impose a death penalty if they so prefer.126 It may be that the Constitu-
tional Court will have occasion to revisit this issue in the not too
distant future, because the ANC is now reviewing its opposition to the
death penalty in light of rising murder rates in South Africa.127

In Williams, where only one judgment was issued, the Court found
that provisions in the Criminal Procedure Act of 1977, authorizing the
whipping of juveniles—in practice persons aged between nine and
twenty—were inconsistent with sections 10 and 11(2) of the Constitu-
tion—the sections guaranteeing respect for and protection of a per-
son’s dignity and freedom from torture or cruel, inhuman, or
degrading treatment or punishment.128 In so holding, the Court cited
similar findings from courts around the world, including Strasbourg,129
the United States, Canada, Namibia, and Zimbabwe, though it recog-
nized that the neighboring jurisdictions of Lesotho and Botswana still
tolerated the practice. Justice Langa stressed that the Court had al-

123. Id. at 436.
124. “Ubuntu” is apparently a Zulu word connoting reconciliation.
punishment enacted by a democratically elected legislature, constitutionality is pre-
sumed valid).
127. Indigo Gilmore, ANC Forced to Consider Return of the Gallows, London
dealing with the mistreatment of terrorist suspects in Northern Ireland); Tyrer v.
ready held\textsuperscript{130} that when Chapter 3 of the Interim Constitution was interpreted a purposive approach should be adopted.\textsuperscript{131} Given that the political negotiations resulting in the drafting of the Interim Constitution had been based on a rejection of violence, there could be no doubt that institutionalized violence by the state against juvenile offenders would run counter to the values underlying the Constitution.

Coupled with its two stage approach to Chapter 3, and consistent with its strictures on the legitimacy of references and of requests for direct access,\textsuperscript{132} the Constitutional Court has adopted a restrictive attitude to the framing of questions referred to it. In \textit{Shabalala v. Attorney-General, Transvaal},\textsuperscript{133} Deputy President Mahomed for the Court chose to rephrase the three questions posed in the reference. He said that the first question—whether a court interpreting the Constitution was bound by the principles of \textit{stare decisis} to follow the decision of a superior court—should not have been referred at all because that concerned an issue of interpretation of the common law, not of the Constitution. The second and third questions, he added, were too widely framed. The Court would consider whether the privilege attaching under South African common law to the contents of police files (known as "dockets" in South Africa) was consistent with the Constitution, but not the precise circumstances in which access to those dockets would be allowed. Similarly, the Court would consider whether the common law's prohibition on accused persons or their legal representatives consulting with prosecution witnesses without the consent of the prosecuting authority was consistent with the Constitution, but not the precise circumstances in which such consultations should be allowed.\textsuperscript{134}

On both these questions, the Constitutional Court held that the common law rules were inconsistent with the Constitution, in particular with section 25(3), which gives to every accused person the right to a fair trial.\textsuperscript{135} This was principally because the common law rules were too all-embracing, and hence they were impossible to uphold in terms of section 33(1) of the Constitution as necessary, reasonable, and justifiable in an open and democratic society based on freedom and equality. The Court was not prepared to substitute one blanket rule for another, but in its order it carefully outlined some guidelines as to how requests for access to police dockets or consultations with prosecution witnesses should be dealt with by the courts in each case. The courts, said Deputy President Mahomed, retain discretion in these

\textsuperscript{130} The Court had held in \textit{S v. Zuma}, 1995 (2) SALR 642 (CC), and \textit{S v. Makwanyane}, 1995 (3) SALR 391 (CC), that Chapter 3 was intended to have significant meaning.

\textsuperscript{131} \textit{Williams}, 1995 (3) SALR at 649.

\textsuperscript{132} \textit{See supra} Part IV(A).

\textsuperscript{133} 1996 (1) SALR 725 (CC).

\textsuperscript{134} \textit{Id.} at 755-56.

\textsuperscript{135} \textit{Id.} at 756-57.
matters. Shabalala is thus an important case: It illustrates the impact of the constitutional human rights provisions on the common law, and it demonstrates how the Constitutional Court can provide guidance to legislators charged with correcting that law, even if the details must always be left to Parliament.

An understandable reluctance to be categorical was also evident in Coetzee v. Government of Republic of South Africa, a decision on the constitutionality of imprisonment for debt (provided for by the Magistrate's Courts Act of 1944). The applicants challenged their imprisonment as being contrary to section 11(1) of the Interim Constitution, the right not to be detained without trial, and section 25(3), the right to a fair trial. Holding in their favor, the Court listed as many as eight reasons why the provisions in question were not justifiable under section 33 of the Constitution—e.g., the person imprisoned may not even know that he or she is a debtor—but no judge was prepared to rule out imprisonment for debt in every conceivable case. Justice Sachs came nearest to doing so, but even he shied away. He did, though, provide eloquent guidance on how the phrase “open and democratic society” in section 33 should be interpreted. He said that it was “not merely aspirational or decorative” but “normative, furnishing the matrix of ideals within which we work.” He also said, “[W]e should not engage in purely formal or academic analysis, not simply restrict ourselves to ad hoc technicism, but rather focus on what has been called the synergetic relation between the values underlying the guarantees of fundamental rights and the circumstances of the particular case.”

Criminal procedure was again at issue in S v. Bhulwana and S v. Gwadiso, two cases concerned with the constitutionality of a statutory provision which provided that a defendant found in possession of more than 115 grams of cannabis, sometimes called “dagga” in South Africa, was presumed, until the contrary was proved, to be dealing the drug. The cases were therefore comparable to Zuma in that they involved the constitutionality of a statutory presumption of guilt.

Applying its two-stage approach, the Court held in its threshold inquiry that the provision was contrary to the presumption of innocence guaranteed to accused persons by section 25(3)(c) of the Interim Constitution. Secondly, the presumption could not be upheld under section 33(1). Justice O'Regan, for the Court, dismissed the possibility of “reading down” the provision so as to give it a more restricted, and

136. Id. at 756.
137. 1995 (4) SALR 631 (CC).
138. Id. at 643-45.
139. Id. at 659-61 (Sachs, J., concurring).
140. Id. at 656.
141. Id.
142. 1996 (1) SALR 388 (CC).
constitutionally valid, interpretation. She said this would entail reading “until the contrary is proved” as “unless the evidence raises a reasonable doubt,” thereby substituting an evidential burden of proof for the legal burden. She continued that the words were not reasonably capable of bearing such an interpretation, given both their lack of ambiguity and the previously consistent judicial interpretation of the phrase. The same reasoning was employed by Justice Kriegler, for the Court, in a case with very similar facts that arose under a comparable paragraph in the same Act, S v. Julies, and by Justice O’Regan again, for the Court, in Scagell v. Attorney-General, Western Cape, where the presumptions raised by sections 6(3) and (4) of the Gambling Act of 1965 were declared unconstitutional.

In another case involving a statutory presumption of guilt, the Court expressed itself more fully on the right to silence: S v. Mbatha, where the provision under scrutiny was section 40(1) of the Arms and Ammunition Act of 1969. According to this provision, if a person was being prosecuted for possession of arms or ammunition, and it was proved that the item was at any time on or in any premises or vehicle, then any person who at that time was on or in charge of such premises or vehicle was presumed to have been in possession of the item unless the contrary was proved. The state’s chief argument in favor of retaining this presumption was that it assisted in combating the escalating levels of crime, thereby helping the government to fulfill its duty to protect society generally. Moreover, the state argued that detection of people in possession of illegal arms and ammunition was often extremely difficult, and that without the presumption, the prosecution would have great difficulty in proving both the mental and physical elements of possession. Justice Langa, again for the Court, said that he sympathized with the law enforcers’ problem, but that the measure taken was not “fashioned in accordance with the specifications permitted by the Constitution.” He concluded that the presumption was couched in terms that were too wide, that its application did not depend on a logical or rational connection between the assumed fact and the basic facts proved, and that it gave immense discretionary power to the police and the prosecuting authorities as to whether or not to proceed with arrest and indictment.

Surprisingly, Justice Langa went on to suggest that an acceptable alternative to section 40(1) might be a provision casting an evidential burden on the defense. He continued:

143. Id. at 397-98.
144. Id. at 398.
145. Id.
147. 1996 (11) BCLR (SA) 1446.
148. 1996 (2) SALR 464 (CC); see supra Part IV.
149. Mbatha, 1996 (2) SALR at 475.
That it might impact on the right of an accused person to remain silent is true; but on the assumption that the rampant criminal abuse of lethal weapons in many parts of our country would justify some measured re-thinking about time-honoured rules and procedures, some limitation on the right to silence might be more defensible than the present one on the presumption of innocence.\textsuperscript{150}

In support of his view, Justice Langa did not cite recent reforms to Northern Irish\textsuperscript{151} or English law\textsuperscript{152} on the right to silence, but he might well have done so. The framers of the 1996 Constitution do not seem to have heeded Langa's views, however, for section 35(3) now explicitly states that every accused person has both the right to silence\textsuperscript{153} and the right not to be compelled to give self-incriminating evidence.\textsuperscript{154}

In fact, the constitutionality of the right to silence had already come before the Court in \textit{Ferreira v. Levin},\textsuperscript{155} decided two months before \textit{Mbatha}. It was in the context of a challenge to section 417(2A)(b) of the Companies Act of 1973, as amended, which refers to persons summoned to provide evidence in winding-up proceedings, and says that such persons may be required to answer questions put to them, notwithstanding that the answer might tend to incriminate them. Eight of the ten judges in the case held that a right against self-incrimination, while not expressly mentioned in the Interim Constitution, is implicit in the fair trial provisions of section 25(3).\textsuperscript{156} This means that the South African Constitutional Court has now recognized "unenumerated" rights in the Constitution, just like the Supreme Courts of the United States and Ireland before it. The other two judges, Justices Ackermann and Sachs, preferred to strike down the provision in question because of its inconsistency with section 11(1) of the Interim Constitution, which guaranteed the freedom and security of the person.\textsuperscript{157} It is interesting that the European Court of Human Rights has recently held against the United Kingdom in a case with similar facts.\textsuperscript{158}

There are two further decisions of the Constitutional Court relating to the right to silence. In \textit{Bernstein v. Bester},\textsuperscript{159} the challenge was to the whole scheme of sections 417 and 418 of the Companies Act of 1973, which deal with winding-up examinations. The applicants al-

\textsuperscript{150} \textit{Id.} at 479.
\textsuperscript{151} Criminal Evidence (Northern Ireland) Order 1988.
\textsuperscript{152} Criminal Justice and Public Order Act, 1994, §§ 34-39 (Eng.).
\textsuperscript{155} 1996 (1) SALR 984 (CC).
\textsuperscript{156} \textit{Id.} at 1090-92.
\textsuperscript{157} \textit{Id.} at 1020-22 (Ackermann, J., dissenting).
\textsuperscript{159} 1996 (2) SALR 751 (CC).
 alleged a breach of section 8 of the Interim Constitution (the guarantee of equality), section 11(1) (the right to freedom and security of the person), section 13 (the right to personal privacy), section 24 (the right to procedurally fair administrative action), and section 25(3) (the right to a fair trial). On all grounds, except the last, which had already been considered in Ferreira v. Levin, they failed. Justice Ackermann gave the main, extremely learned judgment, where he supported his conclusions by referring to decisions reached in several other jurisdictions, including the United Kingdom, Australia, Canada, the United States, and Germany. He also cited the jurisprudence of the European Court of Human Rights. Regarding the challenge based on section 11(1), he was prepared to accept the majority view of that subsection expressed in Ferreira with which he and Justice Sachs previously disagreed, and about which Justice O'Regan had stated no opinion, though he did say he would have reached the same conclusion had he maintained his own view propounded in the earlier case. He also made the important point that care must be taken when attempting to project common law principles onto the interpretation of fundamental rights and their limitation, or indeed principles derived from the United States or Germany, because South African constitutional law, like that of Canada, now requires a two-stage approach when deciding the constitutionality of a provision. In Ferreira, the Court had left open the question of whether it was constitutional to use an examinee’s answers in civil proceedings against the examinee; in Bester, the Court held that it was.

A related issue arose in Nel v. Le Roux, where the Court had to rule on the constitutionality of section 205 of the Criminal Procedure Act, the section which, when read together with section 189 of the same Act, permitted the imprisonment of a person who, having been called to give evidence in criminal proceedings, refused to answer any question put to him or her. The applicant was complaining that if he answered the questions foreshadowed in the subpoena requiring him to appear in connection with charges being brought against another individual for fraud, he risked exposing himself to the civil forfeitures provided for in the Exchange Control Regulations. The allegation was that this breached sections 8(1), 11(1), 11(2), 13, 15(1), 23, 24 and 25(3)(a), (c) and (d) of the Interim Constitution.

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160. 1996 (1) SALR 984 (CC).
162. Id. at 791.
163. Id. at 792.
164. Id. at 802.
165. 1996 (3) SALR 562 (CC).
166. The Court lamented the fact that the referral from the Witwatersrand Local Division of the Supreme Court had, somewhat carelessly, not mentioned section 189. This could have led to real difficulties if the Constitutional Court had decided that section 205 was unconstitutional, for what status would section 189 then have had?
Justice Ackermann, on behalf of the Court, rejected this argument. As in Bester, he was able to show that the law already allows someone such as the applicant a "just excuse" for refusing to answer questions. He added, though, that any compulsion to answer is permissible only if it was justifiable under section 33(1) of the Constitution. Such compulsion was conceivable on the facts of particular cases, as was acknowledged in other legal systems, including the United States and Germany.

The presumption of innocence was again at issue in S v. Coetzee. The applicant first challenged section 245 of the Criminal Procedure Act of 1977, which provides that where an accused person is charged with an offense of which a false representation is an element, and it is proved that the false representation was made by the accused, he or she must be deemed to have made the representation knowing it to be false unless the contrary is proved. The Court unanimously struck down this provision, holding that it could not be "saved" by the limitation clause in the Interim Constitution merely on the basis that the prosecution would otherwise find it difficult to prove an essential element of the offense. The applicant's challenge to another provision in the same Act, section 332(5), was much more controversial. Seven of the judges upheld it and four dissented. The subsection provides that a servant or director of a company that has committed an offense is deemed guilty of that offense unless he or she can show on a balance of probabilities that he or she had no personal involvement in the offense and could not have prevented it. The majority focused on the unacceptable breadth of the provision and felt that there were other means, consistent with the Bill of Rights, by which the law could ensure that the affairs of companies are conducted properly. The minority thought that the provision was a justifiable limitation of the right to be presumed innocent enshrined in section 25(3)(c) of the Interim Constitution. On this occasion, the Court certainly did not split on racial grounds, but both female judges were among the dissenting voices.

The most recent decision on the presumption of innocence is Prinsloo v. Van der Linde, where the issue arose in a civil rather than a criminal context. Section 84 of the Forest Act of 1984 presumes negli-
gence on the part of a landowner if a fire starts on his or her land and spreads to neighboring land. The Court unanimously rejected the applicant's challenge to section 84. It failed the first stage of the two stage test because the right in question was not one recognized by the Interim Constitution, section 25(3)(c) being confined to criminal cases. The Court also rejected a further ground of alleged invalidity of section 84, namely the "discrimination" against defendants in fire cases, as opposed to those in other cases of delict, and against landowners living outside fire control areas, as opposed to those living within them. Unsurprisingly, the Court had little difficulty in holding that any inequality of treatment or discrimination in this case was justifiable within the terms of sections 8(1) and 8(2) of the Interim Constitution, primarily because the core of those provisions, the protection of a person's dignity, was not in question here.

In S v. Ntuli, the matter at issue was the constitutionality of section 309(4)(a) of the Criminal Procedure Act of 1977. That paragraph provides, in effect, that a person who has been convicted in a magistrate's court and who is in prison for that offense, shall not be entitled to proceed with an appeal in person—i.e., without a lawyer—unless a judge of the provincial or local division certifies that there are reasonable grounds for the appeal. Mr. Ntuli, having been convicted by a magistrate of rape, attempted murder, and assault with intent to do grievous bodily harm, applied to a judge of the Witwatersrand Local Division for such a certificate. The acting judge on that case suspended the application while he referred the constitutionality of section 309(4)(a) to the Constitutional Court under section 102(1) of the Constitution. Justice Didcott, for the Court, branded section 309(4)(a) unconstitutional, because it violated section 25(3)(h) and section 8(1).

The former guarantees to accused persons who have been tried the right "to have recourse by way of appeal or review to a higher court than the court of first instance," while the latter dictates that "[e]very person shall have the right to equality before the

176. 1996 (1) SALR 1207 (CC).
177. The Court was informed that during the three year period between 1992 and 1994 more than 8,000 applications for judge's certificates were received and almost 7,000 were rejected. Id. at 1216.
178. Id. at 1210. Perhaps strangely, the Constitutional Court found no fault with Justice Cloete's course of action, even though he did not, as counselled by Justice Kentridge's preferred "general principle" enunciated in S v. Mhlungu, 1995 (3) SALR 867 (CC), fully resolve the issue in front of him before referring it.
Having analyzed exactly what is involved in the certificate procedure of the judge under section 309(4)(a), and finding that decisions sometimes are made without reading the full record of the magistrate's hearing, Didcott refused to characterise it as "recourse by way of appeal or review." Section 8(1) was violated because the certificate procedure does not apply to prisoners who are legally represented in their appeals or to convicted persons who are not in prison. Nor could section 309(4)(a) be saved under section 33(1), because the violation in question was neither reasonable nor justifiable in a society based on equality.

What is remarkable about Ntuli, however, is that the Court did not strike down section 309(4)(a). Instead, persuaded that abolition of the judge's certificate procedure would result in a substantial swelling of the number of appeals, the Court exercised its discretion under the proviso in section 98(5) of the Interim Constitution to suspend the order of invalidity so that Parliament would have time to devise a means for dealing with the increased number of appeals. The declaration of invalidity was suspended until April 30, 1997—some sixteen months later—or until the defect was remedied if that was earlier. In fact, the Minister of Justice later discovered that he was not able to meet this deadline and therefore applied for an extension of the period until the end of 1998. In a subsequent judgment, the Court gave the Minister no quarter: President Chaskalson found that the Minister's officials had failed to act promptly and diligently and that the order of invalidity must therefore stand.183

A few weeks after its decision in Ntuli, the Constitutional Court issued its decision in the comparable case of S v. Rens.184 There, the question was whether the requirement in section 316 of the Criminal Procedure Act of 1977, whereby persons convicted of an offense before a superior court have to apply for leave to appeal against the conviction or sentence, was unconstitutional. In Ntuli, Justice Didcott had already outlined the similarities and differences between the judge's certificate procedure with which he was there concerned and the leave to appeal procedure under section 316. It came as no surprise, then, when Justice Madala, on behalf of the Court, found section 316 not to be inconsistent with section 25(3)(h) of the Interim

182. Ntuli, 1996 (1) SALR at 1214 ("That phrase sounds rather vague. But the minimum that it envisages and implies, I believe, is the opportunity for an adequate reappraisal of every case and an informed decision on it. The statute makes no provision for that opportunity.").
183. The case in reference is Minister of Justice v. Ntuli. The decision in this case was rendered on June 5, 1997, and, as of the time of this article, was unreported. It is available on the Internet. Faculty of Law at the University of Witwatersrand, Wits Law School: Decisions of the Constitutional Court of South Africa (visited Sept. 27, 1997) <http://www.law.wits.ac.za/judgements/ntuli97.html>.
184. 1996 (1) SALR 1218 (CC).
Constitution. As he did not discuss section 33(1), he presumably felt that the challenge failed in line
ine, i.e., that the need to seek leave for an appeal from a superior court was not itself a violation of the
right "to have recourse by way of appeal" or review to a higher court or otherwise unfair. He said that the judge's certificate procedure
dealt with in Ntuli was "materially different" and that "the underlying purpose of the leave to appeal procedure—to protect the higher court
from the burden of having to deal with appeals in which there is no prospect of success—is a legitimate and rational purpose." He felt strengthened in his conclusion by similar findings made with reference to the European Convention on Human Rights.

In Besserglik v. Minister of Trade, Industry and Tourism, the applicant impugned section 20(4)(b) of the Supreme Court Act of 1959, which sets as a precondition for the prosecution of a civil appeal the leave of the provincial or local division against whose judgment an appeal is sought or, if such leave should not be granted, the leave of the Appellate Division of the Supreme Court. Justice O'Regan, for the Constitutional Court, had little difficulty in rejecting the application. She held that "it cannot be said that a screening procedure which excludes unmeritorious appeals is a denial of a right of access to a court."

Turning to the right to freedom of expression, there have been two notable decisions. In Case and Curtis v. Minister of Safety and Security, the applicants had been charged with contravening section 2 of the Indecent or Obscene Photographic Matter Act of 1967 for possession of sexually explicit video cassettes. The Court declared section 2 to be unconstitutional, although there was a difference in the reasoning employed to reach this end. Justice Mokgoro based her judgment on section 15 of the Interim Constitution, the right to freedom of expression, referring in the process to numerous authorities from Canada and the United States, whereas Justices Didcott and Langa, with whom seven other judges concurred, preferred to rely only on

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185. Id. at 1225-27.
186. Id. at 1224-25.
187. Id. at 1226.
188. Id. at 1225; see, e.g., Monnell and Morris v. United Kingdom, App. Nos. 9562/81 and 9818/82 10 Eur. H.R. Rep. 205, 222 (1987) (Commission report) (holding that an appeal will not be granted unless there are legitimate grounds for appeal in law which merit further consideration).
189. 1996 (4) SALR 331 (CC).
190. Id. at 335.
192. 1996 (3) SALR 617 (CC).
193. Id. at 626-34 (Mokgoro, J., concurring).
section 13, the right to privacy. Justice Sachs relied on both provisions. In *J.T. Publishing v. Minister of Safety and Security*, the Court declined to consider the constitutionality of the Publications Act of 1974, because in the interim it had been repealed and replaced.

The right to equality was under consideration in *Brink v. Kitshoff NO*, where the issue was whether section 44 of the Insurance Act of 1943 was in conflict with the Constitution in so far as it discriminated against married women. Justice O'Regan, dealing with the substance of the matter, ruled that section 44 did unjustifiably breach the equality provision in section 8 of the Constitution. As to the appropriate court order, O'Regan declared section 44 to be invalid from April 27, 1994, except to the extent that its operation had already resulted in the transfer to a creditor or beneficiary of any money or asset which would not otherwise have formed part of the deceased’s estate since that date. In *Fraser v. Children’s Court, Pretoria North*, section 8 was again invoked to undermine section 18(4)(d) of the Child Care Act of 1983, which requires a Children's Court to obtain the consent of both parents before it can issue an order for the adoption of a legitimate child, but dispenses with the need to obtain a father's consent for the adoption of his illegitimate child. The Constitutional Court, through Deputy President Mahomed, did think that section 18 breached section 8, but it held that Parliament should be given two years to decide how to change it; in the meantime section 18 is to remain in force.

The rights of fathers were again under consideration in *President of the Republic of South Africa and Minister of Correctional Services v. Hugo*, where a male prisoner was complaining that the President's grant of early release from prison to mothers with children under the age of twelve discriminated against him, a single father with a child under twelve. The President’s power in this context derived from section 82(1)(k) of the Interim Constitution, not from an Act, so lower
courts were entitled to measure the constitutionality of the exercise of this power. The Durban and Coastal Local Division accordingly struck down the grant of release, and the President and Minister appealed to the Constitutional Court. Nine judges upheld the grant of release and two dissented. As in *Prinsloo v. Van der Linde*,

decided by the Court on the same day, the majority focused on whether the differentiation between mothers and fathers in the grant of release fundamentally impaired the dignity and sense of equal worth of fathers. They held that it did not, partly because early release is a privilege, not a right, and partly because fathers could still apply separately to the President for early release in their particular case. The general test to be applied when determining whether discrimination is unfair, said the Court, is whether the impact of it has been unfair, and that means looking at the group which has been disadvantaged, the nature of the power used, and the nature of the interest affected. Judges will doubtless find the application of this test in future cases somewhat problematic, but it is hard to see what more precise criteria could have been laid down at this early stage in the Constitutional Court’s development.

The right of access to justice was at issue in *AZAPO v. President of the Republic of South Africa*, where a complaint was lodged by relatives of Steven Biko and other victims of security force brutality that section 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 was unconstitutional because, in permitting a Committee on Amnesty to grant amnesty to the perpetrator of an unlawful act, it was depriving persons of their right under section 22 of the Interim Constitution to have disputes settled by a court of law or another independent forum. In a politically charged decision, the Court agreed that section 22 had been breached, but held that the breach was justifiable under section 33(1) because the Afterword to the Constitution—“National Unity and Reconciliation”—sanctioned the limitation and the disputed amnesty was a crucial component of the negotiated settlement itself, without which the Constitution would not have come into being. Also, the amnesty provisions were not inconsistent with international norms.

Two months later, however, in *Mohlomi v. Minister of Defence*, the Court did strike down a provision under section 22, and made the declaration of invalidity applicable to all actions instituted before or

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204. The dissenters were Justice Didcott and Justice Kriegler.
205. The decision in this case was rendered on April 18, 1997, and, as of the time of this article, was unreported. It is available on the Internet. Faculty of Law at the University of Witwatersrand, Wits Law School: Decisions of the Constitutional Court of South Africa (visited Sept. 27, 1997) <http://www.law.wits.ac.za/judgements/prinsloo.html>.
206. 1996 (4) SALR 671 (CC).
207. Id. at 698.
208. 1997 (1) SALR 124 (CC).
after April 27, 1994—unless by then they were time-barred or fully determined. The provision in question was section 113(1) of the Defence Act of 1957, which requires all civil actions against the Minister of Defence to be instituted within six months from the date on which the cause of action arose. Justice Didcott, for the Court, said that such a short time limit, given the degree of illiteracy and inaccessibility of legal assistance in parts of South Africa, did not afford claimants an adequate and fair opportunity to seek judicial redress for wrongs allegedly done to them. The breach was not justifiable under section 33, because the state’s legitimate objectives could be satisfied through other, less stringent, means.

A related matter came before the Court in the most recent of all its decisions to date, Fose v. Minister of Safety and Security. The appellant contested a decision of the Witwatersrand Local Division of the Supreme Court that a claim for constitutional damages was not good in law. He had alleged that he had been injured in a series of assaults by members of the South African Police Services, and that these assaults formed part of a pattern of widespread and persistent abuses by the police. The provision invoked was section 7(4)(a) of the Interim Constitution, which allows the victim of an alleged human rights abuse to apply to court for appropriate relief. While not ruling out the granting of constitutional damages in some future case, the Constitutional Court unanimously held that they should not be awarded in this case because substantial compensatory damages would be adequate. Further, the Constitutional Court refused to award punitive damages, since these would amount to the imposition of punishment without the person being punished having a chance to assert his or her own constitutional rights. Punitive damages, the court held, also represent a drain on scarce public resources, a bold but realistic criterion for the Court to apply.

VI. KEY FEATURES OF THE COURT’S JURISPRUDENCE TO DATE

There has been a remarkable degree of unanimity in the forty-eight decisions announced by the Court so far. The great majority have contained no dissents at all, and in only two have there been a substantial disagreement. The norm is a single judgment in which the

209. Id. at 131.

210. The decision in this case was rendered on June 5, 1997, and, as of the time of this article, was unreported. It is available on the Internet. Faculty of Law at the University of Witwatersrand, Wits Law School: Decisions of the Constitutional Court of South Africa (visited Sept. 27, 1997) <http://www.law.wits.ac.za/judgements/fose.html>.

211. Section 38 of the 1996 Constitution similarly provides that a court “may grant appropriate relief.” Republic of S. Afr. Const. ch. II, § 38.

212. See S v. Coetzee. The decision in Coetzee was rendered on March 6, 1997, and, as of the time of this article, was unreported. It is available on the Internet. Faculty of Law at the University of Witwatersrand, Wits Law School: Decisions of the Constitu-
other judges simply concur, although one or two of the judges, notably Justice Didcott, seem increasingly keen to formulate their own reasons in separate judgments. In addition, there has been a fair degree of rotation between the judges as far as issuing the main judgment is concerned.

All of the judgments have, on the whole, been marked by a legalism which was probably somewhat unexpected. Even those justices with no previous judicial experience have been careful to couch their reasoning in traditional legal language. Only Justice Sachs can be said to have departed from this conservative approach at all frequently, though this is not meant to imply that the other judges have failed to adopt a purposive and rights-oriented attitude to their interpretative function. No doubt this stance has been deliberately adopted in order to prevent the Court being overtly embroiled in political controversies. At the time its first members were appointed, fears were expressed that it would be a blatantly pro-ANC Court. If this is the predominant slant, it has not become apparent so far.213

Such evaluations as have appeared in print seem to conclude that the Court has done well during its first two years. In the words of the Human Rights Committee, a non-governmental organization working in the field, “even its critics allow that its performance has at least been adequate,” though that Committee itself goes on to claim that “so far the judges have been quite unventuresome in applying the Constitution.”214 Professor Gretchen Carpenter is more specific: “[o]ne can only commend the members of the court for their contextual approach to constitution interpretation, their willingness to examine minutely every possible interpretive option and their sedulous attention to detail.”215 There has been an openness to considering decisions on human rights in other jurisdictions, including in no small measure the decisions of the European Court of Human Rights216 and even the Human Rights Committee of the United Nations. The judges have also constantly referred to the Court’s own previous decisions to back up their conclusions. Reference has been made repeatedly to the “spirit” of the Constitution and genuine attempts seem to have been made to apply it in a way that its framers intended—or supposedly would have intended.217 A pragmatic stance has been

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213. Of course this paper has not analyzed the Court’s decisions to date on issues other than those concerning human rights.


adopted concerning the starting dates for declarations of invalidity and care has been taken not to rule out completely the availability of constitutional damages as a form of relief.

**Conclusion**

In general, the Court has so far steered a delicate path between radicalism and conservatism. In human rights cases it has invalidated pre-1994 legislation on no fewer than sixteen occasions but it has made it clear to Parliament that, for the sake of a greater good, such as a reduction in the crime rate, limitations on rights can be tolerated so long as certain safeguards are maintained. The Court has been cautious in its application of the equality and non-discrimination provisions, and has referred to the country's scarce resources as one factor it must take into account when deciding upon the extent of a constitutional right—while not allowing officials to plead pressure of work for not having rectified a breach of constitutional rights in the time specified by the Court. Undoubtedly the greatest impact of the Court has been felt in the realm of criminal procedure, with sections of the Criminal Procedure Act of 1977 struck down by the Court no fewer than five times.

The Constitutional Court is the most powerful institution in South Africa, the repository of the nation's sovereignty. In its exercise of that responsibility, it has already earned much respect both at home and abroad. If it continues to perform in the way that it has to date, it is likely to gain even more admirers.