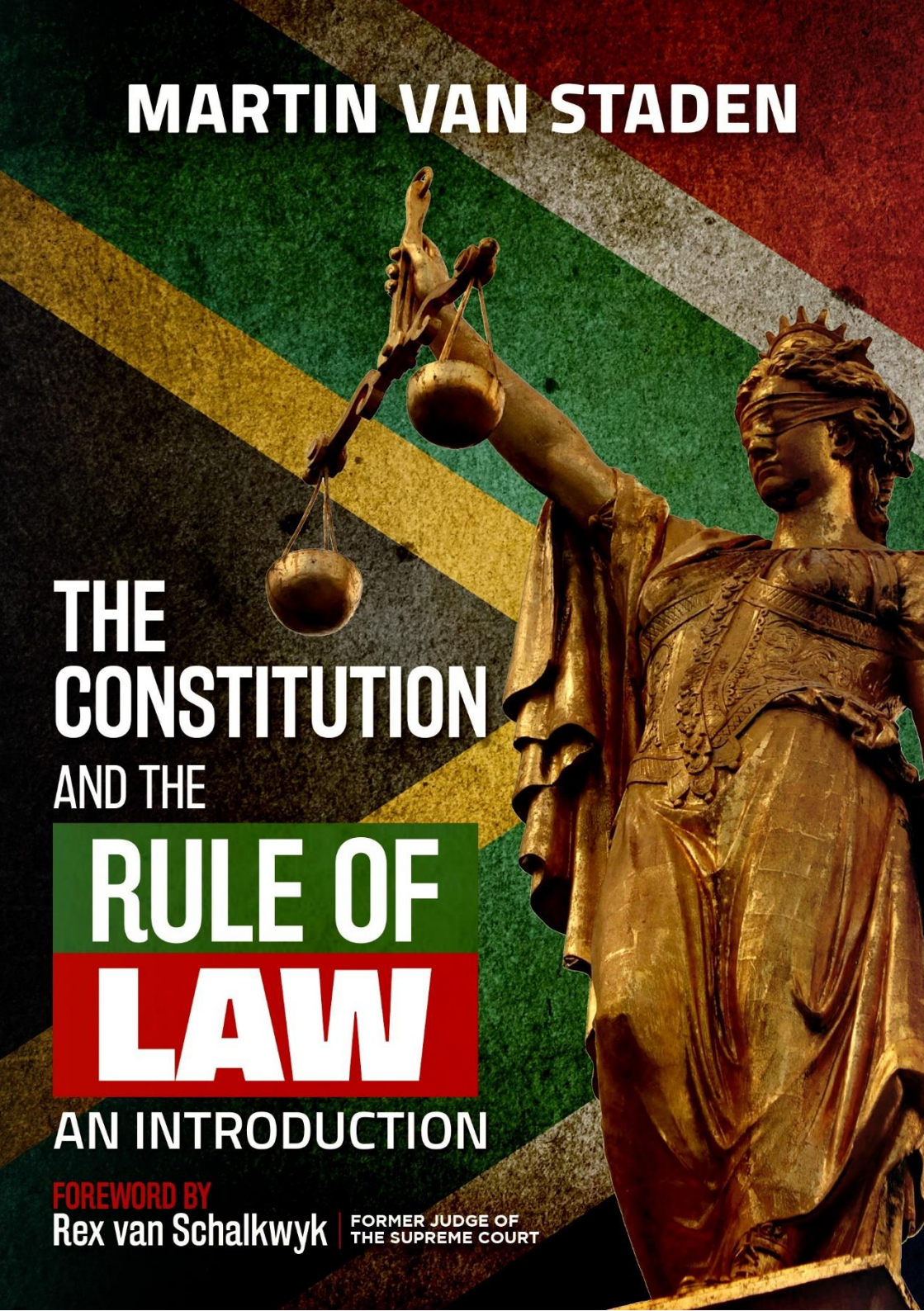
MARTIN VAN STADEN



THE CONSTITUTION AND THE RULE OF LAW

AN INTRODUCTION

FOREWORD BY
Rex van Schalkwyk | FORMER JUDGE OF THE SUPREME COURT

THE CONSTITUTION
AND
THE RULE OF LAW

AN INTRODUCTION

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THE CONSTITUTION AND THE RULE OF LAW

AN INTRODUCTION

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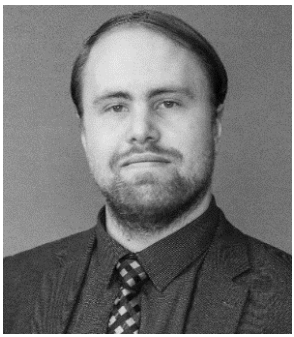
ABOUT THE AUTHOR



Martin van Staden is an author, jurist, and policy analyst who has worked for the Free Market Foundation as a Legal Researcher since January 2017.

He has presented oral evidence to the Parliament of South Africa, written books and multiple articles, and appeared on television and radio on topics of public and economic policy and jurisprudence.

At the time of writing, Martin was pursuing a Master of Laws (LL.M.) degree from the University of Pretoria.

A passionate writer, Martin is the Editor in Chief of the Being Libertarian LLC group of publications, which includes *Being Libertarian*, *Rational Standard*, and *Think Liberty*. He is a co-author and editor of *Fallism* (2017) and *Igniting Liberty* (2019), and principal co-author of *The Real Digital Divide* (2017).

Martin has been featured in *Al Jazeera*, *Business Day*, *City Press*, *CNBC Africa*, *Daily Maverick*, *De Rebus*, *eNCA*,

Huffington Post, *kykNET*, *Netwerk24*, *Radio 702*, *Rapport*, *SABC News*, *SAfm*, *The Star*, and at the Foundation for Economic Education, among many others.

Martin was on the African Executive Board of Students For Liberty from 2015 to 2018, and was a Young Voices Advocate between May 2017 and March 2018.

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This book is the product of two years' work during which time I have engaged with both the proponents of the idea of the Rule of Law and those who believe it is largely a 'feel good' term devoid of practical significance. These engagements have helped improve the content that will follow.

Eustace Davie, a director of the Free Market Foundation, must be acknowledged for the long discussions he had with me on the Rule of Law and the implications one might expect if the Rule of Law were adhered to. Without these discussions, my thoughts concerning much of the content in this book would not have been organised enough to be put in the written form.

I must also thank Rex van Schalkwyk for agreeing to and writing the foreword to this book. The value that his name lends to this work is unquantifiable.

Both Eustace Davie and Rex van Schalkwyk were kind enough to read through the two initial drafts of this book and provided constructive comments and critiques that enriched the final product.

Joan Evans proofread the final draft of the book and made the necessary fixes to the grammatical and other linguistic errors scattered throughout.

Gail Day, the former Executive Manager of the FMF, has had much experience in the publishing of books, and gave me a lot of useful advice about the logistics and timelines associated with a project of this nature. Nicholas Woode-Smith has also provided valuable information in this regard.

It is impossible to acknowledge all those who played some indirect role in the development and eventual publication of a book of this kind. I must therefore give a general acknowledgment to everyone with whom I have discussed matters of the Rule of Law and the logistics of publishing, for they have provided invaluable information that, in one way or another, has assisted in the production of this work.

Finally, I must thank the Free Market Foundation and the Rule of Law Project for the opportunity to write this book.

Martin van Staden
1 February 2019

FOREWORD BY REX VAN SCHALKWYK

Martin van Staden is a most enterprising young man. In addition to all his other writings and academic commitments, he has now written this book on the Rule of Law. In having done so he has performed a valuable service for both the academic and the practising legal fraternities. The book is however written is such accessible style that it will also serve the interested layman as a useful source of information upon an issue that, especially within the context of present-day South African discourse, requires an informed opinion.

The Rule of Law is widely misunderstood, even within the legal-academic environment. The origin of the problem lies, probably, with the misleading English-language descriptor. 'Rule of law' means, to many, 'rule by', or 'according to' law. It is then readily understood why an error is made in the assumption that rule of law is the sanction for the enacted law. The better descriptor is the German one: *rechtsstaat* – the state *under law*. This means that the state itself is subject to law, with the corollary that the state acts illegitimately when it exercises powers that the Law does not confer.

Martin's closely reasoned, and well selected series of "essays", each dealing with a distinct issue of concern to students of the Rule of Law, will do much to dispel the misunderstanding to which I have alluded. However, the true value of the work is that it demonstrates how the unconstrained exercise of political authority is corrupted and how, in the process, society loses its cherished freedoms.

The work is also a salutary warning to aspirant law-makers, and those who would assist in repairing a system, broken but not yet destroyed.

The Rule of Law is a self-sustaining construct. The principles enunciated thereby are not dependent upon constitutional or any other authority. Since the advent of the constitutional era in South Africa however, the emphasis has been almost exclusively upon the Constitution, with scant attention paid to the Rule of Law. This is a grievous error because the Constitution and the Rule of Law are both, and each in their own right, foundational systems within the South African legal order.

This book should be required reading for all lawyers, whether in practice or within the academe. It is especially

required for those who presume to make laws by which the citizens are required to conduct their lives.

It is always useful to recall that, within a system of representative democracy, those who are elected to make laws *do so on behalf and for the benefit of* the electorate. There is no "vertical" authority in public affairs: all authority is passed "horizontally" from the electorate to those who are, temporarily, their representatives.

Rex van Schalkwyk is the Chairman of the FMF's Rule of Law Board of Advisors and a former judge of the Transvaal Provincial Division of the Supreme Court of South Africa. He authored three books, *Enigma's Diary* (Minerva Press, 1998), *One Miracle is Not Enough* (Bellwether, 1998), and *Panic for Democracy* (Eloquent Books, 2009).

CHAPTER 1
INTRODUCTION

In April 2016, in the runup to the 2016 municipal elections in South Africa, former President Jacob Zuma told a crowd of African National Congress (ANC) supporters that they should vote for the ANC because "the rule of law […] is drafted in Parliament" and in order for the Rule of Law to be changed, "Parliament needs a majority".[1]

To most people, this is a relatively innocuous thing to say. Indeed, in ordinary parlance when we speak of the Rule of Law, we essentially mean that the law, as passed by Parliament, must be enforced and adhered to.[2]

According to the President, thus, one can go to Parliament to have the Rule of Law changed by simply introducing a new law or changing existing law.

The story of the Rule of Law, however, is not quite that simple. The Rule of Law is a rich doctrine that goes far

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1 Hans B. "Zuma calls on black voters to 'counteract' whites". (2016). *The Mercury*. http://www.iol.co.za/news/politics/zuma-calls-on-black-voters-to-counteract-whites-2004577. Accessed: 21 July 2017.

2 This phenomenon, however, is known as "law and order", rather than the Rule of Law.

beyond those pieces of legislation enacted by politicians. In fact, the Rule of Law is a dangerous concept for ambitious politicians and bureaucrats who seek to expand their own networks of power, because the essence of it is to *constrain* and to *limit*. The Rule of Law is more than mere legal rules that the legislature can chop and change on a whim – it is, as Professor Friedrich von Hayek argued, a "meta-legal doctrine" which exists above and throughout the law.

This doctrine is an under-appreciated part of South Africa's constitutional order.

This under-appreciation is unfortunate, for South Africans are one of the very few peoples in the developing world who have the rare privilege of having the Rule of Law as an *explicit*, rather than an *implied*, part of their constitutional dispensation.

Section 1(c) of the Constitution of the Republic of South Africa, 1996, thus, in addition to providing the title of this book, provides as follows:

> 1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> […]

(c) Supremacy of **the constitution and the rule of law**.[3]

The implications of having section 1(c) in the Constitution are not widely known or understood in South Africa. This is especially true for government, as it has often disregarded crucial tenets of the Rule of Law despite this concept sharing the same level of authority as the codified Constitution itself.

To the Constitution's credit, however, it has, to greater and lesser extents, been successful in restraining tyrannical government behaviour, mostly by way of the courts. As a consequence, unfortunately, government has become increasingly hostile toward our constitutional order and, as we will see, some in civil society have even questioned whether the negotiated settlement that ended Apartheid and gave us our constitutional dispensation, was just. Talk of amending the Constitution to do away with the right to compensation when private property is expropriated, is the most brazen manifestation of this.

In this book, I explore the concept of the Rule of Law as a constitutional principle, and the dangers that South

[3] My emphasis.

Africa will have to face should it be abandoned. I also consider how the Rule of Law might be applied to some of the contemporary issues facing South African society.

I set out, briefly, the constitutional history of South Africa in CHAPTER 2, which is essential to understanding both the positioning and importance of the Rule of Law in our constitutional law.

CHAPTER 3 is an introduction to the Rule of Law generally, outlining its core concepts.

In CHAPTER 4 I discuss what I consider to be the most important characteristic of the Rule of Law: an aversion to unconstrained discretionary power and delegated law-making.

CHAPTER 5 concerns the question of whether the Constitution itself can be inconsistent with the Rule of Law.

The relevance of public participation in the creation of law and policy to the Rule of Law is considered in CHAPTER 6.

The role of the judiciary in the conceptualisation and maintenance of the Rule of Law, especially as regards deference, is considered in CHAPTER 7.

In CHAPTER 8 I provide a brief and cursory introduction to the theory of private property, which, I argue, is an engrained component of the Rule of Law.

Affirmative action has been a controversial issue in South African political discourse since the early 1990s. In CHAPTER 9 I set out whether affirmative action is compatible with the Constitution and the Rule of Law.

In CHAPTER 10, how the Rule of Law might contribute to solving South Africa's education crisis, is considered.

Finally, in CHAPTER 11, I conclude the book by emphasising the importance of *institutions,* such as the Rule of Law, over the dangerous reliance South Africans have placed in the *personalities* of individual politicians or 'leaders'.

This book is not a treatise on my conception of ideal law, but an interpretation of the Constitution within generally mainstream parameters. My intention in this book is to offer a practical solution to some of the most pressing problems facing South African society today.

While I am a libertarian and espouse free market fundamentalism and the unlimited freedom of the individual, which is often construed as idealistic and

radical, this book does not call for a free market or unconstrained liberty *per se*. I take what is already in our Constitution and offer an interpretation of it which I believe to be legally correct, and which has not been offered, to any notable extent, elsewhere.

This book does also not contain all my thoughts on the topic of the Rule of Law. Indeed, it is intended to be an introduction to some core principles, ideas and trends surrounding the concept. No discussion found in this book is thus exhaustive.

I also did not strain myself in trying to accord with the judgments and interpretations of the Constitution by the South African judiciary – especially those of the Constitutional Court. A notion that Americans have long embraced but which South Africans still struggle with, is that the courts – especially the highest court – can be and often are incorrect in their interpretations of the law. Their judgments, like Acts of Parliament, *are the law*, but are also susceptible to scrutiny and criticism, which is exactly what I do at various junctures throughout this book. Where I consider the courts to be wrong, I point it out and say *why* I think they are wrong. This, however, does not negate my respect for the authority of the courts.

Similarly, my tone throughout the book may create the false impression that government officials deserve scorn and disrespect. This is not my intention and is certainly not what the Rule of Law is about. Most government officials are individuals of impeccable moral character and go about their work in what they believe to be the best interests of ordinary South Africans.

This does not negate, however, the problems that I identify, which are systemic and for which no single official or entity is to blame. Arbitrariness is something all human beings exhibit in various circumstances; thus, when I talk of arbitrary whims or powers, I am not accusing individual officials of being capricious or malevolent. In fact, I hope officials who read this book find it useful and not offensive. They are not the targets this book's sights are set on, but, like ordinary South Africans, are victims of a most unfortunate system.

There are those who will deem the interpretation of the Constitution found in this book to be 'anti-transformative' because it will stand to constrain government action, indeed, in every conceivable way. In pre-emption of this inevitable argument, I must say that I disagree. South African society has transformed in leaps and bounds since Apartheid ended, as black people were

finally allowed to participate in a property rights-respecting market economy.

Not only is it estimated that the black middle class is larger than the totality of the white population in South Africa, black people are now represented in every dimension of society, an opportunity denied to them during the Apartheid era.

While complete racial parity with regards to ownership, wealth, and demographic 'representivity' can never be achieved – due to vast differences in interests, cultures, and everyday choices – engaging in transformation denialism is deeply condescending toward the millions of black South Africans who have made use of the opportunities provided by a Rule of Law-respecting free society to lift themselves out of destitution. To say that there has been no substantive transformation is to say that even in spite of racist Apartheid legislation being repealed, black South Africans have been unable to help themselves, and this is simply not true.

Respecting the Constitution and the Rule of Law will, if anything, finalise South Africa's transformation from an authoritarian statocentric society into a free and open people-centric society where politicians, judges,

bureaucrats, and 'experts' do not presume to tell ordinary people how to live their lives.

Black South Africans suffered incredible hardships under the thumbs of ideologised, petty government officials who were granted the discretionary power to rule the lives of their subjects. The opinion of an official in a Labour Bureau was all that stood between a black South African and destitution. The opinion of an official in the security police was all that stood between any South African and detention without trial on a charge of 'professing communism'.[4]

The Rule of Law is the necessary ingredient to ensure South Africans remain liberated from the arbitrary whims of strangers.

[4] For an in-depth discussion on how the Suppression of Communism Act (44 of 1950) and South Africa's Apartheid security laws more broadly failed to comply with the Rule of Law, see Mathews (footnote 49 below).

CHAPTER 2
CONSTITUTIONAL HISTORY OF SOUTH AFRICA

HISTORY OF GOVERNANCE IN SOUTH AFRICA

Although there was a prior permanent, albeit nomadic, population settled in the area today known as South Africa, the region's modern political history is widely considered to have started on 6 April 1652, when the Dutch East India Company employee, Jan van Riebeeck, arrived at what is today Cape Town. The purpose of the company at the Cape was to establish a replenishment station for ships passing the southern tip of Africa; however, it soon grew into a fully-fledged settlement and eventually a colony of the Dutch.

With company rule came *Roman-Dutch law*, being Roman law as it was received into the Germanic law that applied in the general area of what is today the Netherlands. The type that came to South Africa with Van Riebeeck was principally from the Dutch provinces of Holland and Zeeland.[5]

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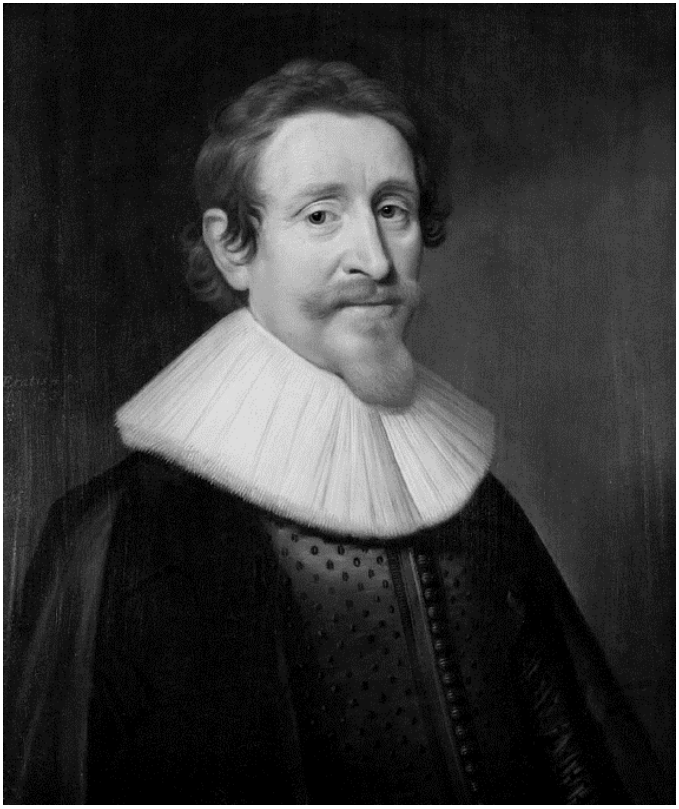
[5] Mellet HF (ed) *et al.* "Introduction" in *Our Legal Heritage*. (1982). Durban: Butterworths.



Hugo Grotius (1583-1645), or Hugo de Groot, was a leading Dutch jurist known primarily for his pioneering work on international law. Grotius also wrote *Inleydinge tot de Hollantsche Rechtgeleertheid* (*Introduction to Dutch Jurisprudence*, 1613) which is one of the key texts of Roman-Dutch law. Painting by Michiel van Mierevelt, 1631. Public domain.

In 1794, France invaded the Dutch Republic and established a puppet state known as the Batavian Republic, of which the Cape Colony thus became a part. The French were also engaged in a war with Great Britain at this time. Because of the Cape's strategic location for ships travelling from Europe to the East and back, Britain invaded and occupied the colony in 1795. The British, having little other practical interest in the Cape, allowed for the continued use of Roman-Dutch law.

The British gave the Cape back to Batavia in 1803 under the Treaty of Amiens to improve relations with France. This peace was short-lived, however, and in 1806, the Cape was, for the last time, returned to British control when Cape Town was again invaded. In 1819, the administration introduced a code of criminal procedure that had something of a British character,[6] starting the earnest legal reform that came with increasing numbers of British subjects settling in the Cape.[7]

In 1823 and 1832, the British administration introduced charters of justice which significantly changed how justice was administered, while Roman-Dutch law in general

6 Mellet (footnote 5 above) 53.

7 Mellet (footnote 5 above) 52.

form was still retained.[8] These interventions largely imposed British-inspired institutions[9] on the body of Roman-Dutch law, the consequence of which was the infiltration of British law mostly by way of legislation.[10]

Resentment of British institutions and interference led the Boers[11] living on the periphery of the Cape Colony to embark on the Great Trek. This exodus of mostly-Dutch descendants lasted from 1835 to 1848, and, eventually, led to the establishment of the two significant Boer Republics – the South African Republic[12] and the Orange Free State – within the interior of Southern Africa.[13] Roman-Dutch law was declared to be official State law in these republics.

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8 Mellet (footnote 5 above) 53.

9 Such as the new Cape Supreme Court, whose justices would be appointed from the advocates' profession only; and a dual legal profession, divided between "advocates" and "attorneys". Crucially, the separation between 'legal' and 'equitable' jurisdiction which then prevailed in Britain was not introduced in the Cape. Today, still, equity is not a separate part of South African law. It has been said that the Roman-Dutch common law is inherently equitable.

10 Mellet (footnote 5 above) 55.

11 Also known as *Voortrekkers* ("pioneers"). These people are today commonly known as *Afrikaners*.

12 More commonly known as the Transvaal.

13 There were various smaller Boer Republics, such as Natalia, which quickly fell to the British and became the Natal Colony.

For a host of reasons, mostly surrounding the discovery of precious mineral resources in the interior, the British annexed the Transvaal in 1877, apparently in violation of their earlier recognition of its independence. The Boers declared independence in 1880 and sparked the First Boer War. The Transvaal and the Orange Free State were victorious, once more securing formal recognition of their independence at the Pretoria Convention. However, in 1899, hostilities again broke out in the form of the South African War.[14] The British won in 1901.

In 1910, the various colonies of South Africa[15] were united into the centralised Union of South Africa, which itself became legislatively independent of the United Kingdom in 1931 by way of the Statute of Westminster. During the two British occupations and prior to the Statute of Westminster, English influences on South Africa's Roman-Dutch law were amplified. The Union of South Africa, and later the Republic, was based on the British political system of parliamentary sovereignty.

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14 Also known as the Second Boer War.

15 The Cape Colony, Natal Colony, Transvaal Colony, and Orange River Colony.

By 1931, governance was already heavily racialised, with laws like the Natives Land Act[16] already robbing vast swathes of the population of property rights. Apartheid officially came into being around 1948, when the National Party won the general election. In 1961, South Africa became the completely independent Republic of South Africa, but broadly retained the constitutional makeup of 1910. Only the white population had national franchise.[17]

In 1993, Apartheid can be said to have officially ended with the enactment of the Republic of South Africa Constitution Act (the interim Constitution),[18] which commenced on 27 April 1994, the day of the first multi-racial democratic election in South African history.

In 1996, the current, sometimes called "final", Constitution was enacted.

16 Natives Land Act (27 of 1913).

17 This changed superficially in 1983 when Indian and coloured South Africans gained parliamentary representation. The political supremacy of the white electorate was however retained.

18 Republic of South Africa Constitution Act (200 of 1993).

SOUTH AFRICAN LAW

South Africa has a rich and interesting legal tradition made up, broadly, of three distinct influences.

The first, and arguably greatest influence, is Roman-Dutch civil law, which South Africa inherited by way of its status as a Dutch colony and recipient for many Dutch settlers at the Cape. The arrival of French Huguenots further reinforced this, as the French legal system at the time was also part of the broad continental European civil law family.

The second influence is British common law, which was received into South Africa when it was, too, a British colony at the Cape and Natal, and later the Transvaal and Free State. The British common law family is the most relevant for purposes of this book, as it was the primary influence on South African public law.

The third influence, which has only begun to find expression in the last few decades, is African customary law. This is not a uniform system, as the various traditions and communities which existed in South Africa before European colonisation had various differing value systems and understandings of law. How this will be

infused into South African law in the future will be interesting to witness.

In general, Roman-Dutch law has influenced the content, or substance, of South Africa's common law, whereas British law has influenced the law of procedure and public law. There are exceptions to this rule, but that is beyond the scope of this book.

With these three legal traditions all influencing South Africa's legal composition, it can be said that we have a *mixed*, *pluralistic*, or *tri-juridical* system. Most of the rest of the world, with various exceptions, are either British common law- or European civil law-inspired legal systems.

South African law is broadly divided into two branches, each of which has sub-branches.

The first branch is *private law*. Private law regulates the relationships, disputes, and engagement between people. In other words, it regulates how people and organisations must conduct themselves with one another in their daily lives. Some of the sub-branches of private law are *contract law*, *law of obligations*, *insolvency law*, and *property law*.

The second branch is *public law*. Public law regulates the relationship, disputes, and engagement between people and the State, and the relationships, disputes, and engagement between the various parts of the State. Some of the sub-branches of public law are *criminal law* (because a crime is not only considered a violation of the rights of another person, but also an affront to society, as represented by the State), *administrative law*, and *constitutional law*.

This book is principally concerned with constitutional law.

Constitutional law, broadly, relates to the powers, functions, and composition of the State in society. It is most often, but not always, laid out in a constitutional document, but also includes a host of unwritten principles and canons, of which the Rule of Law is one.

PARLIAMENTARY SOVEREIGNTY (1910 – 1993)

South Africa's current constitutional dispensation is young. Before 1993, South Africa only knew *parliamentary sovereignty*, which meant that Parliament could make whatever laws it pleased.

In the 1934 case of *Sachs v Minister of Justice*,[19] the then-Appellate Division of the Supreme Court said, per the acting Chief Justice James Stratford, that "Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and [...] it is the function of courts of law to enforce [Parliament's] will". Section 59(1) of the 1961 Constitution[20] provided for this explicitly, saying "Parliament shall be the sovereign legislative authority in and over the Republic, and shall have full power to make laws for the peace, order and good government of the Republic". This was echoed in section 30 of the 1983 Constitution.[21] South Africa's first constitution, the 1910 South Africa Act,[22] was an Act of the British Parliament and provided for the sovereignty of the British monarch; however, in practice, section 59 of the Act effectively made the South African Parliament sovereign within South African territory.

The Appellate Division judge, HWW de Villiers, in a speech to the Second National Law Conference in Port Elizabeth in 1962, defined the Rule of Law, correctly, as "the absolute supremacy and predominance of the law so

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19 *Sachs v Minister of Justice; Diamond v Minister of Justice* 1934 AD 11.
20 Republic of South Africa Constitution Act (32 of 1961).
21 Republic of South Africa Constitution Act (110 of 1983).
22 South Africa Act, 1909 (9 Edw. VII c. 9).

that the exercise of the powers of Government shall be conditioned by law, and that the subject shall not be exposed to the arbitrary will of its ruler". Immediately after giving this appropriate definition, however, Judge De Villiers said that there was an exception to the rule in that, "Parliament as the law maker is the Supreme body politic and Parliament can make rules curtailing the rights and liberties of the individual or class of individuals".

He summed up the concept of parliamentary sovereignty well, saying, "It is said that Parliament can do everything except make a man of a woman or a woman of a man". According to De Villiers, and indeed, with few exceptions, the legal community during the previous dispensation, Parliament was *not* bound by the Rule of Law.[23]

Parliamentary sovereignty was the bedrock upon which the South African government was able to construct Apartheid. While the common law did, and today still does, recognise the inherent individual rights of all people regardless of race, the government was able to simply set rights aside by enacting legislation. Because of parliamentary sovereignty, thus, no court of law or civil

[23] De Villiers HHW. "Second National Law Conference 1962." (1962). 7 *De Rebus* 11. 268-271.

rights association could challenge the rightfulness or legality of Apartheid rules. They could only truly oppose Apartheid morally. Thus, unlike in the United States where the superior courts progressively came to interpret the US Constitution as precluding segregation in the American South, the courts in South Africa were mostly hamstrung.

The courts did, however, win "an enviable reputation for integrity and impartiality", according to the Liberal Party senator, Edgar Brookes, and the tax court judge, JB MacAulay QC, who wrote *Civil Liberty in South Africa* in 1958.[24]

According to Brookes and MacAulay, even black South Africans respected the courts, but the courts were unable to deviate from the wording imposed on them by Acts of Parliament and could not come to the assistance of property- and liberty-deprived blacks. The courts could not, as some contemporary critics errantly assume, defy the legislation; and, therefore, played an unfortunate part in the social engineering legitimised by the Apartheid system.

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[24] Brookes EH and MacAulay JB. *Civil Liberty in South Africa.* (1958). Cape Town: Oxford University Press.

The courts did try to defy Parliament. In the early 1950s, shortly after the National Party government enacted the Separate Representative of Voters Act,[25] a series of cases came before the Appellate Division. The 1910 Constitution guaranteed to coloureds a qualified franchise in the Cape Province, which the Separate Representation of Voters Act sought to do away with. This guarantee in the 1910 Constitution could only be amended with two-thirds of Parliament sitting unicamerally.[26] However, the National Party and most lawyers at the time believed the principle of parliamentary sovereignty superseded this procedure and argued that Parliament can amend any law with a simple majority in each house. The Separate Representation of Voters Act was thus passed, contrary to the provisions in the 1910 Constitution, by a mere simple majority in each house, and the constitutionality of this was challenged. The Appellate Division struck down the Act as inconsistent with the Constitution.[27] In response to this defiance of parliamentary sovereignty,

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25 Separate Representation of Voters Act (46 of 1951).

26 In other words, two-thirds of *all* the members of both the Senate and the House of Assembly, taken together, must have voted in favour of an amendment.

27 *Harris and Others v Minister of the Interior and Another* 1952 (2) SA 428 (A).

Parliament simply enacted legislation that enlarged the bench of the Appellate Division from five to eleven, and appointed judges sympathetic to the National Party government, and enacted further legislation enlarging the upper house of Parliament, the Senate, which gave it the two-thirds majority required to make the change it sought.[28]

Judicial defiance during the Apartheid era was thus not an easy enterprise to undertake.

Indeed, in the case of *Minister of the Interior v Lockhat*, Judge George Neville Holmes characterised Apartheid as a "colossal social experiment", and that it was for Parliament, *not the courts*, to decide whether this system was "for the common wealth of all the inhabitants".[29]

South Africa, however, was not alone in the world as having a sovereign parliament.

That system was inherited from the United Kingdom, which today still has a sovereign parliament. The key difference between South Africa and the UK, however,

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[28] For a comprehensive discussion of the 1950s constitutional crisis, see Marshall G. "South Africa: The courts and the Constitution" in *Parliamentary Sovereignty and the Commonwealth*. (1957). Oxford: Oxford University Press.

[29] *Minister of the Interior v Lockhat* 1961 (2) SA 587 (A).

was that whereas the UK had a rich tradition of uncodified constitutionalism and common law protection against the excesses of State power, South Africa did not. By 1910, when the Union of South Africa was formed, both the Boer Republics and the two British colonies had racially-discriminatory laws on the books, and it was deemed acceptable for the State to engage in social engineering to 'protect' the white population.

Even where constitutional supremacy was flirted with, as in the Orange Free State, it was not the kind of constitutionalism which respected the Rule of Law or individual rights for all.

Professor Ben Roux described the South African state in 1971 as a type of "democratic constitutionalism".[30] He defined *constitutionalism* as "some form of top-level structural and functional differentiation in government aimed at limiting the possibility on the whole spectrum of government powers and functions being organically centralized in such a way that reciprocal controls cannot be maintained in the process of rule-making, rule-application, and rule-adjudication".[31] This formalistic

[30] Roux B. "Parliament and the executive" in Worrall D (ed). *South Africa: Government and Politics*. (1971). Pretoria: JL Van Schaik Ltd.

[31] Roux (footnote 30 above) 31.

definition of constitutionalism, while technically accurate, did not accord with a Rule of Law conception of constitutionalism, which can be summed up in the saying, *that which is not forbidden, is allowed* for the people, and *that which is not allowed, is forbidden*, for the government. This conception of constitutionalism means that a set of rules constrains government from infringing upon the natural rights of the individuals within its jurisdiction, such as the right to life, liberty, and property.

Timothy Sandefur, Vice President for Litigation at the Goldwater Institute, aptly describes constitutionalism thus:

> "Constitutionalism is the effort to impose a higher level order on the actions of government so that officials are not the judges of the limits of their own authority. Just as law is a limitation on action, a constitution limits the government's actions and is therefore a 'law for laws.' In the absence of a constitution, a state's ruling power is ultimately arbitrary, and its decisions are matters of decree rather than of well-settled and generally understood principles. Such a society can provide little protection for individual rights, economic prosperity, or the rule of law."[32]

[32] Sandefur T. "Constitutionalism" in Rockville RH (ed). *The Encyclopedia of Libertarianism*. (2008). Washington DC: Cato Institute. https://www.libertarianism.org/encyclopedia/constitutionalism/. Accessed: 30 November 2017.

Upon this construction, South Africa was not a constitutional state, given that Parliament, as the court noted in *Sachs*, could encroach upon life, liberty, and property if and whenever it deemed appropriate.

As Professor John Dugard noted, "Civil liberty and the Rule of Law were sacrificed on the altar of parliamentary supremacy to the idol of apartheid".[33]

CONSTITUTIONAL SUPREMACY (1993 – PRESENT)

The interim Constitution, which came into effect in 1993, and the current Constitution, which was adopted in 1996, brought an end to parliamentary sovereignty as well as the tyrannical denial of property and other rights to black South Africans.

This was the beginning of *constitutional supremacy*, meaning all law and legal conduct must be in line with the text, spirit, and goals of the Constitution and the Rule of Law, and, especially, the Bill of Rights.

As mentioned above, South Africa had three constitutions prior to the 1993 interim Constitution.

[33] Dugard J. *Human Rights and the South African Legal Order.* (1978). Princeton: Princeton University Press. 28.

These constitutions, however, must be distinguished from constitutions as they are properly understood today.

The 1910, 1961, and 1983 constitutions were all pieces of ordinary legislation which set out the structure of South Africa's government as well as the powers of the different levels and branches of government. Indeed, all three 'constitutions' were Acts of Parliament, and were referred to as 'the Act' in the text of each. These constitutions, with the exception of the 1910 Constitution, were not enacted by some special procedure, as the United States Constitution[34] and both the interim and current Constitutions were. They were, for most intents and purposes, amendable by a simple majority of Parliament and thus could change on a whim. The exceptions to this were the so-called 'entrenched' language clauses which provided for equality between English and Afrikaans and the provision for the qualified franchise of coloured voters in the Cape Province, which required a two-thirds majority of Parliament to be amended.[35] As South Africa

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[34] Constitution of the United States of America, 1788.

[35] Section 152. The 1952 constitutional crisis came about because government attempted to disenfranchise the coloureds in a manner that was procedurally inconsistent with the Act. Whether these limitations in

saw during the 1950s constitutional crisis, however, Parliament could practically *give* itself a two-thirds majority by gerrymandering the legislature.

The interim Constitution was a fundamentally different creature.

It was, like the previous constitutions, enacted by Parliament as an 'Act', but it enjoyed special status. Indeed, it was the product of extensive multi-racial constitutional negotiations at the Convention for a Democratic South Africa, with its adoption by the last Apartheid Parliament being merely a formality. The interim Constitution did, however, lack democratic legitimacy, and thus provided for its own expiration.

Chapter 5 of the interim Constitution provided that the new democratic Parliament, which was practically constituted after South Africa's first democratic election in April 1994, must adopt a democratic constitution. Section 68(1) provided that Parliament, in adopting the new democratic Constitution, shall be known as the 'Constitutional Assembly'.

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the Act were *enforceable* on Parliament by the courts, as discussed above, has been a debated question.

Various principles were embodied in the interim Constitution which the Assembly was required to enact into the new Constitution, and the Constitutional Court was obliged to ensure that that occurred.[36] These principles included freedoms and civil liberties, legal equality, a separation of powers, and universal franchise.

Two 'certification' cases came before the Constitutional Court, wherein the Constitutional Assembly failed in the first case to properly embody the principles in the new Constitution.[37] In the second certification judgment, however, the Constitutional Court certified the text and subsequently the current Constitution of 1996 was formally adopted.[38]

Section 4(1) of the interim Constitution provided that the "Constitution shall be the supreme law of the Republic" and that law or conduct inconsistent with it shall be invalid. This was the beginning of constitutional supremacy.

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36 Schedule 4 of the interim Constitution.

37 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC).

38 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC).

Section 1(c) and section 2 of the current Constitution reaffirmed constitutional supremacy, but, as the reader will come to learn in the ensuing pages, also affirmed the supremacy of the Rule of Law.

CHAPTER 3
WHAT IS THE RULE OF LAW?

RULE ACCORDING TO HIGHER LAW

In 1832 Britain, one of the fathers of legal positivism, Professor John Austin, wrote in his *magnum opus*, *The Province of Jurisprudence Determined*,[39] that "government is *free* from legal restraints: or (what is the same proposition dressed in a different phrase) every supreme government is legally *despotic*".[40] The law, according to Austin, consists of commands given by government. Sovereign governments owe no obedience to any external constraints (save, perhaps, for religious constraints) in their law-making, or command-giving, authority.

This legal positivist mindset was engrained in Apartheid parliamentary sovereignty. Judge De Villiers made this point by stating that the sovereign government – Parliament – was exempt from the tenets of the Rule of Law (as an external constraint) and that it could in

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39 Austin J. *The Province of Jurisprudence Determined.* (1832). London: John Murray.

40 Austin (footnote 39 above) 291.

essence do as it pleased. The Rule of Law, according to this mindset, is, in fact, the rule of Parliament.

But things have changed.

Chapter 1 of the Constitution is known as the 'Founding Provisions' and sets out the jurisprudential basis upon which South Africa is founded.[41] Indeed, section 1 is entitled 'Republic of South Africa', and what follows in that section is what the Constitution envisages will characterise the South African state.

This chapter of the Constitution can, in a certain respect, be regarded as *the Constitution of the Constitution*, for the Founding Provisions inform everything else that follows and everything in our highest law must be read in accordance with the Founding Provisions. It also takes a 75% majority, and not a two-thirds majority, in the National Assembly to amend the most important provision of the Founding Provisions – section 1 – unlike the rest of the Constitution.

[41] The full chapter is annexed at the end of this book.

Section 1 of Chapter 1 reads as follows:

> Republic of South Africa
>
> 1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
>   (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
>   (b) Non-racialism and non-sexism.
>
>   (c) Supremacy of the constitution and the rule of law.
>
>   (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

In addition to section 1, the Founding Provisions consist of a further five sections, which provide for constitutional supremacy, citizenship, the national anthem and flag, and the official languages of South Africa.

The Founding Provisions should not be confused with the Preamble to the Constitution, which comes before the Founding Provisions. In essence, the Preamble is a poetic statement of intent, and exists outside of the Constitution, looking inward. It is unenforceable, but not

unimportant. The Founding Provisions, however, have legal content and cannot be disregarded.

According to the full bench of the Constitutional Court in the second 2002 case of *United Democratic Movement v President of the Republic of South Africa*, political rule in South Africa is subject to higher law, with Parliament and government no longer being able to legislate according to their whim:

> "These founding values have an important place in our Constitution. They inform the interpretation of the Constitution and other law, and set **positive standards with which all law must comply** in order to be valid."[42]

Section 1 provides that South Africa is by virtue of its very existence, by default, founded on the values that are listed. Unlike other provisions that are found in the Bill of Rights, which obligate the State to 'progressively realise' the content of those rights, the State has no choice or discretion where these foundational values are concerned. And because section 1 is not found in the Bill of Rights – Chapter 2 of the Constitution – the application

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[42] *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* (No 2) 2003 (1) SA 495 (CC) at para 19. My emphasis.

of section 1 cannot be 'limited' by section 36, which provides for the limitation of the rights in the Bill of Rights.[43]

Section 1(a) says that the State is founded on "the advancement of human rights and freedoms"; section 1(b) says that South Africa is non-racial and non-sexist; section 1(c) says the State is founded on the supremacy of the Constitution and the Rule of Law; and section 1(d) says the State is founded on "a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

This book focuses on section 1(c).

It would, however, be wrong to overlook section 2 of the Constitution, entitled 'Supremacy of Constitution', and which reads as follows:

> 2. This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

On the face of it, this might appear to be a redundant provision, because it essentially repeats what has already been stated in section 1(c) above.

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[43] Section 36 is discussed in more detail in CHAPTER 8 below.

In light of the fact that this repetition *does*, in fact, appear in the constitutional text, it, however, stands to reason that the constitutional drafters considered this to be a provision of paramount importance.

This section has the effect of strengthening not only section 1 above, but the Constitution as a whole. Laws which are passed by any level of government that are inconsistent with the constitutional text are invalid. Any law which thus violates the Rule of Law is also invalid, because of the Rule of Law's stated supremacy in section 1(c).

It would appear from section 1(c) and section 2 that, unlike Austin's command theory of law, the South African government is subject to an external constraint on the exercise of its power. That constraint, besides the Constitution itself, is also the Rule of Law.

VENTURING A DEFINITION

In light of this, it is pertinent to ask what the 'Rule of Law' means.

As of yet, there is no widespread consensus within the legal community on what exactly the term comprehends.

Instead, the Rule of Law is most often understood *descriptively* rather than *definitionally*. In other words, rather than defining the term, the legal community most often describes what they mean when they speak of the Rule of Law, and there has been a surprising consistency and agreement between the various political camps – be they liberals or socialists – on what the Rule of Law means.

This has found expression, most pronouncedly, in the saying that *"the Rule of Law is the opposite of the rule of man"*. Perhaps its most notable contemporary appearance was in Article 30 of the Constitution of Massachusetts, 1780, which described the ideal of "a government of laws, and not of men".[44] In other words, the law, and not the whims of the enforcers of the law, is sovereign in decision-making.

Aside from that negative description, the Rule of Law is also very often described with reference to a set of principles, tenets, or rules. Among these are usually included that officials must be constrained by objective

[44] Constitution of Massachusetts, 1780. http://www.nhinet.org/ccs/docs/ma-1780.htm. Accessed: 20 December 2018.

legal criteria in their decision-making, and that the law must apply equally to all who are bound by law.

The law is a set of binding rules applied through the force of the State. But 'law' is not only used in the political sense – Acts of Parliament or judgments of courts – but also used when referring to other fields of study. Think of the so-called 'law of gravity' or more generally the 'laws of physics', or the 'laws of economics', etc.

What these different 'laws' have in common with law in the political sense is *regularity*; in other words, these are *rules* which are *fixed* and *certain*. This does not necessarily mean that these other laws are always *known*, given the endless process of discovery which takes place in these scientific or economic fields. However, be it discovered or not, the inherent nature of physics remains unchanged, and the nature of economics will similarly remain unchanged in the absence of a fundamental change in human nature. The famous English legal scholar, William Blackstone, wrote therefore that a law "signifies a rule of action, and is applied indiscriminately to all kinds of

action, whether animate or inanimate, rational or irrational".[45]

The law, then, can perhaps be thought to be rules of a fixed and certain nature, which do not change at the whim of those with authority. The Rule of Law, not the rule of man, means thus that society is governed by fixed and certain principles.

The former judge of the Transvaal Provincial Division of the Supreme Court of South Africa and Chairman of the Free Market Foundation Rule of Law Board of Advisors, Rex van Schalkwyk, defines the Rule of Law as *"the barrier that the law sets against tyranny"*. "The many rules that are said to constitute the rule of law all have one central purpose," writes Van Schalkwyk, "to protect the individual from the excesses of a predatory government".[46]

Professor Albert Venn Dicey, another renowned English jurist known for his *Introduction to the Study of the Law of the Constitution*, and considered a pioneer of the concept of the Rule of Law, wrote that the Rule of Law is "the

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45 Blackstone W. *Commentaries on the Law of England*. (1876 edition). London: John Murray.

46 Van Schalkwyk R. "Op-Ed: Babylonian gods, the rule of law & the threat to personal liberty." (2017). *CNBC Africa*. https://www.cnbcafrica.com/news/special-report/2017/06/08/ruleoflaw/. Accessed: 17 July 2017.

absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government".[47]

Sir Ivor Jennings, one of Dicey's contemporaries, criticised Dicey for ostensibly engaging not in law, but in political advocacy of free market positions.[48] The distinction between politics and law is, however, of semantic relevance, for the two have always been entwined. Law has become the practical expression of politics, and this is indeed sanctioned by the Constitution.

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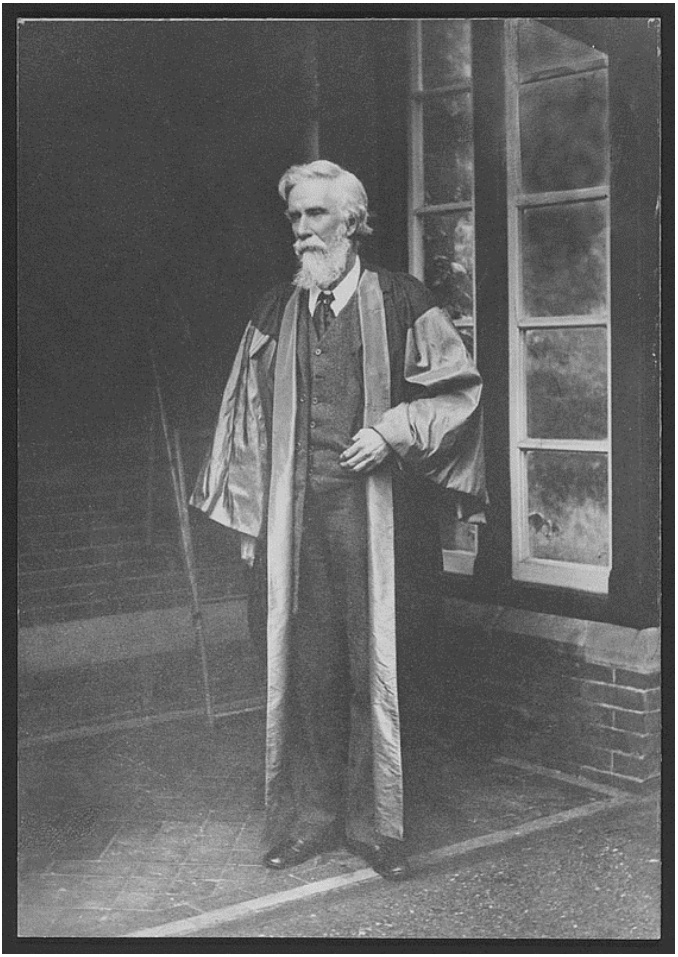
47 Dicey AV. *Introduction to the Study of the Law of the Constitution.* (1885, 8th edition). London: Macmillan. 120.

48 Jennings I. *The Law and the Constitution*. (1976, 5th edition). London: Hodder and Stoughton. 54.
Jennings uses the term "*laissez-faire*".



Albert Venn Dicey (1835-1922) was a leading British jurist whose name is most closely associated with the phrase "Rule of Law". While recognising parliamentary sovereignty as a part and parcel of British constitutionalism, Dicey's work, *Introduction to the Study of the Law of the Constitution* (1885), is today still considered a pioneering text expounding the principles of the Rule of Law. Picture author unknown. Public domain.

These criticisms often assume – not dissimilarly from President Zuma's assumption highlighted in the INTRODUCTION – that the Rule of Law 'changes'. For instance, Professor AS Mathews wrote that "[i]n the age of the planned economy considerable modification of Dicey's [emphasis on the institution of private property and his rejection of any system of administrative law] is obviously necessary".[49] It may well be that the Rule of Law can develop conceptually, but Dicey's critics have not made a convincing argument in this regard. Indeed, the mere changing of circumstances cannot necessitate changing the principles of the Rule of Law, as indeed the nature of a principle is that it overrides circumstance as a general rule. Mathews assumes without further ado that by the mere fact that central economic planning was the order of the day, that circumstance should modify the Rule of Law.

Instead, a more appropriate response would have been to ask, "How do we bring our present circumstances in line with the dictates of the Rule of Law?" The Rule of Law

[49] Mathews AS. *Law, Order and Liberty in South Africa*. (1971). Johannesburg: Juta. 2.

is a useless notion indeed if it is to be surrendered to circumstance.[50]

This should not be taken to mean Dicey's work is without its faults. One glaring error is his endorsement of parliamentary sovereignty, to the extent that the apparent will of a sovereign parliament is exempt from the other, substantive imperatives of the Rule of Law. These values – of a near-absolute conception of the power of the legislature, and of a system of rules that exist to constrain State power – are irreconcilable. This is why the work of contemporary authors such as Professor Trevor RS Allan, who reconceptualise parliamentary sovereignty (in those few systems where it still exists, chiefly the United Kingdom), should be read alongside that of Dicey.[51]

The Austrian polymath Professor Von Hayek, rather than criticising the 'confusion' of law and politics as it relates to the Rule of Law, wrote frankly of the Rule of Law:

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[50] As indeed it did, with the crumbling of the centrally planned economies in the early 1990s. Were we to 'reimagine' the Rule of Law again in light of this circumstance? Do we change it again if central planning becomes popular in the future again?

[51] See the discussion of deference in CHAPTER 7 below for Allan's conceptualisation of parliamentary sovereignty and judicial review.

> "**The** rule of law is therefore not **a** rule of **the** law, but a rule concerning what the law ought to be, a **meta-legal doctrine** or a **political ideal**."[52]

What is profound in Von Hayek's quote is that he points out that *the* Rule of Law is not the same as *a* rule of *the* law. Indeed, any new Act of Parliament or municipal by-law creates and repeals multiple 'rules of law' on a regular basis. The Rule of Law, as we shall see, exists outside of 'laws' and is more relevant to the notion of 'the law'.[53] It is a doctrine, which, as Judge Madala implied in *Van der Walt*,[54] permeates *all law*, including the Constitution itself. And Von Hayek specifically points out that the Rule of Law is an ideal. It is a standard to be upheld and to serve as a tool to measure whether current legal reality is correct or appropriate. It is the end-point, a magnet that pulls laws toward legitimacy.

Professor AJGM Sanders agrees, broadly, with Von Hayek's conception of the Rule of Law:

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52 Von Hayek, FA. *The Constitution of Liberty*. (1960). Chicago: The University of Chicago Press. 206. My emphasis.

53 Mathews acknowledges this fact. See Mathews (footnote 49 above) 11.

54 *Van der Walt v Metcash Trading Limited* 2002 (4) SA 317 (CC).

> "The Rule of Law, just like the principle of African legality, is a politico-legal concept by which positive law can be judged and guided in the light of a certain ideal."[55]

Sanders ventures a definition of the Rule of Law, writing that it is the "politico-legal code for governmental conduct which is best suited to securing to the individual the highest possible enjoyment of those of his public claims which a particular political society regard as fundamental," bearing in mind considerations of "competing individual interests", the availability of resources, and "the necessities of government".[56]

Both Von Hayek and Sanders' conceptions of the Rule of Law, in my view, place the Rule of Law firmly within the *natural law* tradition. According to this tradition, to take a line from Sir Ernest Barker's *Traditions of Civility*, there is a "notion of an eternal and immutable justice; a justice which human authority expresses, or ought to express – but does not make; a justice which human authority may fail to express – and must pay the penalty for failing to

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55 Sanders AJGM. "On African socialism and the Rule of Law." (1982). 15 *Comparative and International Law Journal of Southern Africa*.

56 Sanders (footnote 55 above) 302.

express by the diminution, or even the forfeiture, of its power to command".[57]

The opposite of natural law is *positive law*.

Whereas natural law consists of eternal principles of justice which exist outside of conscious human creation, positive law is the law as created by humans. Acts of Parliament, court judgments, regulations, international treaties, etc., are all examples of positive law. Relying on Barker's definition of natural law, it means that all man-made law must comply with the principles of justice which nature – itself or through a God-like entity – has bestowed on humanity, and that any man-made law which does not comply with those principles, lacks authority, and is indeed not truly a law.

Since the Rule of Law is said to be a doctrine which binds all positive law and is not a creation of any legislature or court, it appears to be part of natural law.

To say that the Rule of Law is the opposite of the *rule of man* means that under such a doctrine all people are to

[57] Barker E. *Traditions of Civility*. (2012 edition). Cambridge: Cambridge University Press. 312.

be held to the same standards, regardless of their status, or relationship with those in power.

Von Hayek wrote that civilised living is only possible when individuals act in accordance with certain rules – the law. These rules developed unconsciously over centuries, indeed millennia, as human beings realised that their interests often conflicted. If these rules were deliberately or consciously created, it would "rank among the greatest of human inventions". Like language and money, the law came about spontaneously without being invented.[58]

The mere existence of an Act of Parliament based on political considerations, thus, cannot be said to automatically accord with the Rule of Law. If the Act is merely a manifestation of the arbitrary rule of man and does not fulfil the requirements of the Rule of Law, it would be incompatible with that doctrine.

Professor Todd Zywicki writes that Dicey articulated "three fundamental characteristics of the rule of law". These were:

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[58] Von Hayek (footnote 52 above) 216.

- The supremacy of law and not arbitrary power (Rule of Law, not man).
- Equality before the law between all people as well as politicians and officials.
- The "incorporation of constitutional law as a binding part of the ordinary law of the land".[59]

Despite the elapse of time and the fact that Dicey's writing was primarily directed toward the concept of the Rule of Law within the context of the United Kingdom, his articulation of the principle remains relevant today.[60]

Zywicki identifies three basic concepts that today make up the Rule of Law:

- **Constitutionalism**: Government authority is both substantively and procedurally limited by the law.
- **Rule-based decision-making**: Decisions are informed by clearly-articulated and previously-announced rules which enable the courts to control the invasive conduct of political actors.

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[59] Zywicki TJ. "The rule of law, freedom, and prosperity." (2002). *George Mason Law & Economics Research Paper No. 02-20.* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=323720. Accessed: 17 July 2017.

[60] Zywicki (footnote 59 above) 2.

- **Commitment to neutral principles**: Decisions must be accompanied by reasons, which are themselves informed by principles of law.[61]

The Rule of Law, in other words, comprehends a society governed according to legal principles, rather than arbitrary political considerations, and excludes law which is ambiguous, arbitrary, retrospective, unpredictable, value-subjective, applies unequally, violates the separation of powers, or violates core human rights.

The Rule of Law can, clearly, be conceptualised and articulated in various ways, which essentially mean the same thing. Its essence, in my view, can be summed up as an *aversion to arbitrariness*. It is concerned, however, with only a particular type of arbitrariness: that which emanates from the State. As Mathews wrote, "the Rule of Law is a doctrine of constitutional law [...] that is concerned with the *power* aspect of the relationship between the State and the subject".[62] In other words, for instance, the arbitrariness that a parent shows their child, that a spouse displays toward the other, or arbitrariness

61 Zywicki (footnote 59 above) 3.
62 Mathews (footnote 49 above) 29.

that is expressly or implicitly sanctioned by a contract, are not influenced by the Rule of Law.

From this, all the various principles associated with the concept follow.

THE IMPERATIVES OF THE RULE OF LAW

The Free Market Foundation's Rule of Law Board of Advisors formulated a list of ten Imperatives of the Rule of Law which summarise the content of the concept and provide a roadmap for policy- and law-makers to follow in order to adhere to this constitutional imperative. The Imperatives are:

1. All law must be clear, predictable, accessible, not contradictory, and shall not have retrospective effect.
2. All legislation that makes provision for discretionary powers, must also incorporate the objective criteria by which those powers are to be exercised. The enabling legislation must, in addition, stipulate the purpose or purposes for which the powers may be exercised.

3. All law must apply the principle of equality before the law.

4. All law must be applied fairly, impartially, and without fear, favour or prejudice.

5. The sole legitimate authority for making substantive law rests with the legislature, which authority shall not be delegated to any other entity.

6. No law shall have the aim or the effect of circumventing the final authority of the courts.

7. No one may be deprived of or have their property expropriated, except if done with due process for the public interest, and in exchange for market-related, fair and just compensation.

8. The law shall afford adequate protection of classical individual rights.

9. All law must comply with the overriding principle of reasonableness, which comprehends rationality, proportionality, and effectiveness.

10. The legislature and organs of state shall observe due process in the rational exercise of their authority.[63]

THE CONSTITUTIONAL COURT

Since 1994, the Constitutional Court has been South Africa's highest court, and its judgments on constitutional law principles and its interpretation of the Constitution are considered to be as authoritative as law passed by Parliament. It is no surprise, then, that this court has also interrogated the concept of the Rule of Law.

Unless explicitly stated otherwise, all the court cases hereafter referred to in this book will be from the Constitutional Court.

In the above-mentioned case of *Van der Walt v Metcash*, Judge Tholakele Madala said:

> "The doctrine of the rule of law is a fundamental postulate of our constitutional structure. This is not only explicitly stated in section 1 of the Constitution but it **permeates the entire Constitution.**"[64]

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63 For more information on the Imperatives, see www.ruleoflaw.org.za.

64 At para 65. My emphasis.

This sentiment was mirrored by the then-Chief Justice, Arthur Chaskalson, in the 2004 case of *Minister of Home Affairs v NIRCO*,[65] where he said that the Founding Provisions "inform and give substance to all the provisions of the Constitution".[66] In the 2002 *UDM* case, as we saw above, the full bench of the Constitutional Court also said that the Founding Provisions set standards with which all South African law must comply. This constitutional *permeation* of the Rule of Law will be relevant throughout this book.

Madala highlighted several of the Rule of Law's basic principles. These are:

- The "**absence of arbitrary power**", meaning "no person in authority enjoys wide unlimited discretionary or arbitrary powers".
- The principle of "**equality before the law**", meaning "that every person, whatever his/her station in life is subject to the ordinary law and jurisdiction of the ordinary courts".

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65 *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC).

66 At para 21.

- And "the **legal protection of certain basic human rights**".

Madala also quoted former Chief Justice Prafullachandra Natwarlal Bhagwati of the Supreme Court of India with approval. Bhagwati said that the Rule of Law also excludes "**unreasonableness**".[67] Reasonableness, of which rationality is a subset, is the opposite of arbitrariness.

In the 2017 case of *AMCU v Chamber of Mines*, Judge Edward Cameron, in quoting previous judgments, said that the "rule of law is enshrined as a foundational value in the Constitution". He continued, saying that "it flows as 'axiomatic' that the exercise of public power must comply with the doctrine of legality, which stems from the rule of law. This foundational principle binds Parliament. Its legislation must show 'a rational relationship between the scheme which [Parliament] adopts and the achievement of a legitimate governmental purpose', since 'Parliament cannot act capriciously or arbitrarily'."[68]

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67 At para 66.

68 *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 (3) SA 242 (CC) at para 65. Citations omitted.

Judge Laurie Ackermann said in the 1997 case of *Prinsloo v Van der Linde* that government must "act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate government purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state".[69] Legitimate government purposes stem from the State's constitutional obligations.

Rationality, in other words, means that the purpose for which a particular intervention (a law, regulation, or conduct) is being enacted or used for, must be a legitimate government purpose, and must be reasonably capable of achieving said purpose.

That there is an endorsement of the Rule of Law by South Africa's highest court is clear, however, that endorsement is often limited to the confines of administrative law. In other words, the Rule of Law is rarely applied to 'political' decisions or 'executive action', wherein the judiciary usually prefers to 'defer' to the relevant other branch of government.[70] Instead, it is applied to administrative

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69 *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) at para 25.

70 Deference will be covered in detail in CHAPTER 7 below.

action, which is a narrowly-defined kind of government conduct, usually exercised by officials.

The Rule of Law principle, however, must be applied across the whole length and breadth of South African governance, in the same way the Constitution is applied. And, because the Constitution can be applied holistically without violating the separation of powers, the same would be true for applying the Rule of Law.

THE PRINCIPLE OF LEGALITY

In South Africa, the Rule of Law finds expression more often than not in terms of the so-called principle of legality. This was especially true during the Apartheid years, but the tradition remains relatively strong.

According to Professor JD van der Vyver in 1975, agreeing with a formulation of the Rule of Law by Professor Marinus Wiechers, the Rule of Law "simply means legality". This, according to Wiechers, means that government action "must be formed in accordance with the law". This encompasses the notion that "both the

rulers and the subjects" are bound by the law, but, writes Van der Vyver, the Rule of Law "means nothing more".[71]

This conception of legality accords more or less with the "minimalist" conception of the Rule of Law. Gift Kudzanai Manyika describes it as such:

> "As its name suggests, the minimalist version simply provides that the state must act in accordance with a valid law regardless of its procedural and substantive qualities. In other words, the state may only exercise those powers that have been conferred upon it by law. […] Provided that government is acting in terms of a valid law it is complying with the rule of law, even if those laws are unfair and unjust. This version was promoted by the apartheid government."[72]

In the case of *Fedsure Life Assurance v Johannesburg*, Judge Chaskalson said that for the majority of the court legality means government may not exercise any power or perform any function not conferred on it by law. Chaskalson continued, saying that the court in that case was not called upon to determine whether the Rule of

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71 Van der Vyver JD. "The unruly horse: Reflections on the Rule of Law". (1975). 40 *Koers* 4-6. 371.

72 Manyika GK. "The Rule of Law, the Principle of Legality and the Right to Procedural Fairness: A Critical Analysis of the Jurisprudence of the Constitutional Court of South Africa". (2016). LL.M. thesis. University of KwaZulu-Natal. 3.

Law "has greater content than the principle of legality", but clearly left the door open that it indeed *may have*.[73]

Mathews wrote that the conception of the legality principle as expressed by the Committee on Administrative Tribunals and Enquiries in its 1957 report is the most apt.[74] It read as follows:

> "The Rule of Law stands for the view that decisions should be made by the application of known principles or laws. In general such decisions will be predictable, and the citizen will know where he is. On the other hand there is what is arbitrary. A decision may be made without principle, without any rules. It is therefore unpredictable, the antithesis of a decision taken in accordance with the rule of law."[75]

While the Committee did use the term "Rule of Law", Mathews regarded this as an expression "of the constitutional doctrine of legality". It is narrower than "Dicey's wider theory which associates the Rule of Law with the protection of basic individual rights", and narrower than the International Commission of Jurists'

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73 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 58.

74 Mathews (footnote 49 above) 12

75 Franks O. "Report of the Committee on Administrative Tribunals and Enquiries". (1957). Command Paper 218. 29.

conception elaborated below.[76] The Committee on Administrative Tribunals and Enquiries' notion, however, is clearly wider than the minimalist conception outlined above, which Mathews called the "formal" notion.[77]

It is quite debatable whether the so-called minimalist conception of the Rule of Law – that duly enacted laws comply with the principle of legality – has any validity. An Act of Parliament that, for instance, divests Parliament itself of the power to oversee the executive, and empowers the President to rule by decree, would clearly not be a legal Act. Regardless of the fact that it would be incompatible with the Constitution, such legislation would contravene most of the assumptions and tenets embedded in the notion of legality, that it cannot hope to survive.

HUMAN RIGHTS AND THE RULE OF LAW

Among the above Imperatives of the Rule of Law is included that the "law shall afford adequate protection of classical individual rights", which Madala also highlighted

[76] Mathews (footnote 49 above) 4
[77] Mathews (footnote 49 above) 3

as a feature of the Rule of Law in *Van der Walt*. In other words, the Rule of Law requires that *basic* human rights (individual rights conceived of in the classical sense) be protected by law – and the use of this particular phraseology was intentional.[78]

In 2002, Professor Ziyad Motala and the now-President of South Africa, Cyril Ramaphosa, wrote *Constitutional Law*,[79] wherein they presented their view of South African post-Apartheid constitutionalism and the Rule of Law.

According to the authors, the Rule of Law is essentially a relative concept with no real fixed meaning. It means different things at different times to different people from different contexts.

In South Africa's post-Apartheid context, they argue that it is inappropriate to approach the Rule of Law according to "the old nineteenth-century" conception that obtains

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78 The European Commission for Democracy Through Law (known as the "Venice Commission") regards those human rights which the Rule of Law protects as the right to be heard, to access to justice, a competent judge, an effective remedy for claims, innocence until guilt is proven, a fair trial, a prohibition on double jeopardy, and non-retroactivity. See Venice Commission. "Report on the Rule of Law". (2011). 12. http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e.

79 Motala Z and Ramaphosa C. *Constitutional Law: Analysis and Cases*. (2002). Cape Town: Oxford University Press Southern Africa.

in "the Anglo-American tradition". This conception, write the authors, holds the Rule of Law up as a mere restraint on arbitrary government. A "dynamic" approach to the Rule of Law should instead be favoured. So-called "social and economic rights" should be considered part of this "expansive" notion of the Rule of Law. They argue that under South Africa's "dynamic concept of the constitutional welfare state, the classical notion of the passive state is no longer tenable".[80]

Constitutional Law will be revisited again below within the context of the role of the judiciary in South Africa. The authors' theory of the Rule of Law, however, must be problematised within the present context of defining and conceptualising the Rule of Law.

The International Commission of Jurists resolved in 1959 that the Rule of Law, similarly to what Motala and Ramaphosa asserted years later, in addition to its aversion to arbitrariness, *also* meant "the establishment of the social, economic, educational, and cultural

[80] Motala and Ramaphosa (footnote 79 above) 395-396, 408.

conditions" which uphold dignity.[81] The Commission also considered the Rule of Law a "dynamic" concept.[82]

Unfortunately, these errant understandings of the concept have muddied the water as to what the Rule of Law means as a legal-political doctrine. They imply, in essence, that so-called 'positive', 'welfare', or 'socio-economic' rights – entitlements promised by government, such as education, housing, healthcare, etc. – are part of the Rule of Law.

As Mathews wrote, however, the goal of achieving material welfare (conceived of as substantive freedom) for bearers of formal freedom is admirable, but "indefensible" for this goal to be pursued "under the banner of the Rule of Law".[83] This interpretation of the Rule of Law is borne out of one of the most commonly-held misconceptions in political discourse, i.e. that all the *good*, or at least the *important*, things in life, are 'human rights'.

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81 Raz J. "The Rule of Law and its virtue" in Cunningham RL (ed). *Liberty and the Rule of Law*. (1979). College Station and London: Texas A&M University Press.

82 Schreiner OB. *The Contribution of English Law to South African Law; and the Rule of Law in South Africa.* (1967). London: Stevens & Sons. 77.

83 Mathews (footnote 49 above) 29.

This lack of clarity over what human rights truly are, according to Dr Nigel Ashford, leads to human rights not being respected.[84]

This is because claiming that 'good things' are human rights "reduces the moral force of the claim". The importance of human rights is undermined when there is a host of new items routinely added to its purview – such as the 'right to Internet access'. For human rights to be a consequential standard of measuring the treatment of individuals and communities by government, it needs to be a strict notion which does not change on a whim.

The South African Constitution, of course, includes *constitutional* rights to some of these welfare entitlements, but one should *not* assume that these are part of the concept of the Rule of Law, or the concept of human rights, for it should be evident that neither of these things simply mean *'all that is good in the world'*.

As Ashford points out, the 'human' in human rights "means that these rights belong to all human beings, regardless of nationality, religion, gender, ethnic group,

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[84] Ashford N. "Human rights: What they are and what they are not". (1995). *Libertarian Alliance.* http://www.libertarian.co.uk/sites/default/lanotepdf/polin100.pdf. Accessed: 30 November 2017.

or sexual preference. This means not only that they apply to every person throughout the world, but that they belonged to every human being that has ever existed".

Thus, for a right to be a human right, it must satisfy the following criteria:

- **Universality**: They belong "to everyone throughout time".
- **Absoluteness**: They "cannot be legitimately limited by calls of public interest" except when the rights conflict.
- **Inalienability**: These rights cannot be surrendered.

Internet access, consequently, can never be a human right, because the Internet is something that does not exist in nature and could impossibly satisfy the 'universality' requirement. Indeed, how can one have a *human* right to Internet access now, if the Egyptian people of 500 BC did not have the same right? They were, after all, humans. Something either is or is not a human right; it cannot 'become' or 'cease' to be a human right.

Similarly, things like housing and education can also not be human rights because up until very recently, housing and education were considered to be the responsibility

of parents and communities, and not the State. Motala and Ramaphosa's contention that South Africa's 'version' of the Rule of Law must factor in recent "developments in international human rights" cannot therefore stand,[85] as it depends too much on changing circumstances and would thus negate the nature of the Rule of Law as a doctrine of intransient *principles*.

Things that require positive action on behalf of others cannot be human rights. Human rights, by their nature, mandate negative action – i.e. omissions – in that others must *abstain* from violating those rights which accrue to us by virtue of our humanity.

In an article for the Foundation for Economic Education, Jeffrey Tucker writes that a McDonald's Big Mac "is not a human right that nature provides. Its existence was not inevitable; it had to come into being through human effort, marketing, promotion, hard work, high risk, daring, suffering, and persistence, in a society where enterprise is valued and people are free to take risks in the service

[85] Motala and Ramaphosa (footnote 79 above) 369.

of others".[86] This reasoning applies to a host of other items which are today considered human rights.

One needs to pay something when others have to engage in labour to provide it. Water, for example, is often said to be a human right. However, we rarely drink water from nature nowadays. It is, instead, subjected to extensive treatment processes to ensure we drink clean water that is free from harmful bacteria. Those workers at the water treatment facilities need to be paid for their effort; and the inventors, investors, and manufacturers of the equipment that treats the water similarly deserve to be rewarded, otherwise creativity, innovation, and development would come to a grinding halt.

The moment one speaks of the State having to 'provide' something freely, one is not considering human rights, but some other kind of legal entitlement, generally known as 'welfare'.

The Rule of Law protects *core* human rights, such as the rights to life, liberty, and property, and those rights related to due process;[87] all of which are part of the fabric

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86 Tucker J. "There is no human right to a Big Mac." Foundation for Economic Education. https://fee.org/articles/there-is-no-human-right-to-a-big-mac/. Accessed: 17 July 2017.

87 Venice Commission (footnote 78 above)

of law itself. These rights are not 'given'. The right to property does not mean the State will give property to the people, and the right to freedom of expression, does not mean the State, or anyone else, is obliged to provide one with a platform to express themselves. These 'negative' or 'freedom' rights require no provider – simply recognition and protection, which is what the Rule of Law does.

Zywicki goes as far as to say that there is not truly widespread disagreement as to the definition of the Rule of Law – as Dicey's conceptualisation of it has stood the test of time – but, instead, the "ambiguity arises from the attempts of critics of the rule of law to redefine the core meaning of the rule of law to try to accomplish goals that are simply incompatible with the rule of law".[88] This is where the International Commission of Jurists floundered in 1959. It is also where I believe Motala and Ramaphosa erred in 2002, by reading their own political preferences into what the Rule of Law and constitutionalism means.

[88] Zywicki (footnote 59 above) 3.

CHAPTER 4
DISCRETIONARY POWER
AND DELEGATED LAW-MAKING

QUASI-LAW AND SUBSTANTIVE VS TECHNICAL RULES

The Rule of Law's aversion to arbitrariness is meant to ensure that citizens are reasonably able to accord their behaviour with what the law expects of them. When legal rules and obligations are not clear or accessible, this is impossible. But a more pernicious form of legal uncertainty comes in the form of discretion, whereby citizens do not know how the law will apply to them or their affairs until an official has made a determination. The aversion to discretion is what is meant in the saying that society should be governed by the Rule of Law, and not the 'rule of man'. As far as possible, citizens must be bound by known and clear rules that they themselves can reasonably interpret and adhere to. But this should not be construed as a complete rejection of discretion in and of itself.

Discretion is and always has been a necessary part of governance, since humans govern humans. For anything to happen in such governance, those humans will need to apply their minds and make a decision based on the

conclusion they have reached. Government officials use discretion to determine which rules to apply to which situation, and thus some discretionary power is a natural consequence of any system of legal rules. However, the discretion must be exercised per criteria that accord with the principles of the Rule of Law, and the decision itself must also accord with those principles.

Lord Halsbury, Lord Chancellor of Great Britain, in the 1891 House of Lords case of *Sharp v Wakefield,* wrote that "'discretion' means [...] that something is to be done according to the rules of reason and justice, not according to private opinion [...]; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular".[89] This is, ideally, how discretion should operate, and that is only possible in accordance with known criteria. The reality of contemporary experience, however, has shown that discretion is frequently not exercised in this fashion.

Zywicki writes that criteria, or "rules", advances the Rule of Law in that the criteria distances "rule makers from the merits of individual cases, thereby leading to an

[89] *Sharp v Wakefield* [1891] AC 173 at page 179.

abstractness and even-handedness in the operation of rules".[90] In other words, strict criteria for the application of the law reduces the potential for corruption. These criteria also allow society to "form expectations" about how the law will be applied. This promotes stability and economic growth, given the market's aversion to surprises, especially from government.[91]

A common example of *arbitrary* discretion is when a law or regulation empowers an official to make a decision "in the public interest", or if it provides that a decision "may" be taken if the official "deems it appropriate".[92]

What is and what is not "in the public interest" is a topic of much debate, and empowering officials to apply the force of law in such a manner bestows upon them near-absolute discretion. The "public interest" should be only one criterion among other, more specific and unambiguous criteria.

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90 Zywicki (footnote 59 above) 9.

91 Zywicki (footnote 59 above) 10.

92 Apartheid security laws delegated powers to be exercised by executive functionaries *if they are 'satisfied' or if in their 'opinion'* certain conditions have been met. See Mathews (footnote 49 above). Contemporary laws which empower officials to make decisions for "the public interest" essentially assign the same, virtually absolute, level of discretion, for which few people have the resources to challenge in court.

Giving officials an open-ended discretion to apply (or not apply) the law where and how they deem it appropriate is entirely opposed to the Rule of Law. This is so, firstly, because the Rule of Law demands that the law, not the whims of personalities in government, be supreme over governance in society, and secondly, because officials are unelected and do not enjoy the same democratic legitimacy as Parliament when the latter goes about formulating rules for society.

The fact that some discretion should be allowed is unavoidable; however, the principle that officials may not make decisions of a *substantive* nature applies absolutely. This principle is known as the separation of powers, whereby each branch of government (the executive, the legislature, and the judiciary) preside over a domain into which the other branches may not venture. The legislature – Parliament – is responsible for making *substantive* law. A substantive provision of law, is, for instance, the prohibition of driving faster than 120 kilometres per hour on a public road. Substantive laws are those rules that govern conduct – they are the rules that voters are presumed to sanction when they go to the polls during a general election to choose representatives.

Any decision by an official must be of an *enforcement,* or *technical*, nature, i.e. they must do what the *legislation* substantively requires. With the example above, the *enforcement* of the substantive provision of law would be putting up the speed signs on the road and ensuring nobody violates the rule. Officials and police officers cannot, under a Rule of Law dispensation, decide what the speed limitation is, even though in many countries today, South Africa included, this is a function that the legislature has 'delegated' to the executive.[93]

"Quasi-law" is what American professors Bruce Frohnen and George Carey call those instruments which should provide for technical implementation, but instead contain substantive law.

In their book, *Constitutional Morality and the Rise of Quasi-Law*,[94] they say quasi-laws are measures that carry the force of law, but lack the character of law. They "create rights and duties like laws but lack essential legal attributes such as promulgation through prescribed

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93 Section 59 of the National Road Traffic Act (93 of 1996) provides that the "general speed limit" on roads and freeways "shall be prescribed". "Prescribe" is defined in section 1 as "prescribe by regulation."

94 Frohnen BP and Carey GW. *Constitutional Morality and the Rise of Quasi-Law*. (2016). Boston: Harvard University Press.

means and provision of predictable rules rather than mere delegation of discretionary power".[95]

In South Africa, quasi-law is most evident within the executive government. Among a myriad of other examples, the Department of Trade and Industry (DTI), acting without a mandate, has been trying to ban the sale of alcohol through its liquor policy,[96] and the Department of International Relations and Cooperation tried to withdraw South Africa from the International Criminal Court by mere executive fiat.[97]

Thankfully, the High Court found that the latter instance was invalid without parliamentary approval,[98] but, in the

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95 Frohnen BP. "The descent into quasi-law". (2016). *Online Library of Law & Liberty*. http://www.libertylawsite.org/2016/09/30/the-descent-into-quasi-law/. Accessed: 1 December 2017.

96 "Final Liquor Policy Paper". (2016). Department of Trade and Industry. https://www.thedti.gov.za/business_regulation/docs/nla/NLA_Policy.pdf. Accessed: 1 December 2017.

97 "Instrument of withdrawal from the Rome Statute of the International Criminal Court". (2017). Department of International Relations and Cooperation. https://www.parliament.gov.za/storage/app/media/CommitteeNotices/2017/february/16-02-2017/docs/Withdrawal_from_the_Rome_Statute_of_the_International_Criminal_Court_tabled_Friday_4th_November_2016.pdf. Accessed: 1 December 2017.

98 *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* 2017 (3) SA 212 (GP).

case of the former, our judiciary is likely to 'defer' to the so-called 'expertise' of the DTI.

Frohnen and Carey write that all three branches of government – not only the executive – have become accomplices in perverting the separation of powers. The legislature is the one to delegate essentially law-making power to the executive and the judiciary has been prone to endorse this state of affairs.

The Rule of Law's principal tenet is that those who administer the law – government officials – must do so in accordance with strict guidelines and rarely, if ever, according to their own discretion. Discretion, it is argued, enables officials to more appropriately adapt their decisions to the circumstances of the matter in hand, but it is incorrect to assume that adherence to reasonable, understandable and certain guidelines necessarily inhibits effective governance.[99]

Take the example of the power of mine safety inspectors to close entire mines if they, in their opinion, believe "a

[99] Hoexter C. "*South African Reserve Bank v Shuttleworth*: A constitutional lawyer's nightmare". (2016). 8 *Constitutional Court Review* 1. 345. This argument is almost always framed that in the 'modern', 'complex' world, officials must be allowed wide discretion to respond to unforeseen problems.

health threatening occurrence has occurred". While the High Court held that the inspector had acted irrationally, it did not pronounce on whether the empowering legislation itself was problematic. The legislation, after all, allowed the inspector this discretion.[100]

The Mine Health and Safety Act,[101] and this provision in particular,[102] amounts to quasi-law, and does not accord with the Constitution and the Rule of Law. It serves only to assign a discretionary power to an official, with no real criteria to which they should adhere. It would not preclude effective governance if the law in this case provided that the inspector should at least be able to show that the expressed concerns are valid and allow the mine to state its case.

Good governance would, for instance, require the inspector to apply to court for an interdict prohibiting the mine from further operation, which will put the matter before an impartial bench where both parties can lead evidence to support their respective cases. This is not necessarily something that will take too long, as it is well within Parliament's and the judiciary's ability to create

100 This case is discussed in more detail below.
101 Mine Health and Safety Act (29 of 1996).
102 Section 50(7A)(c).

specialised mining courts, or assign specific judges to mining matters, to be ready and on call for cases of this nature. This is what would happen in a *rechtsstaat* – a state governed by the Rule of Law – but not what is happening in the South African administrative state.

Countless examples of this quasi-law are found throughout our regulatory regime.

Our Constitutional Court has held,[103] in essence, that under the Currency and Exchanges Act,[104] the President can go so far as to suspend, in part or in whole, legislation that deals with currency, banking or exchange. The Act, bizarrely, provides in section 9(1) that the President:

> … may make regulations in regard to any matter directly or indirectly relating to or affecting or having any bearing upon currency, banking or exchanges.

The Act goes on, with its most brazen violation of the separation of powers and the Rule of Law, to empower the President in section 9(3) to:

> … suspend in whole or in part this Act or any other Act of Parliament or any other law relating to or affecting or having

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103 *South African Reserve Bank and Another v Shuttleworth and Another* 2015 (8) BCLR 959 (CC).

104 Currency and Exchanges Act (9 of 1933).

> any bearing upon currency, banking or exchanges, and any such Act or law which is in conflict or inconsistent with any such regulation shall be deemed to be suspended in so far as it is in conflict or inconsistent with any such regulation.

These sections provide, in effect, that the President may rule South Africa by decree, because virtually every law imaginable, and virtually every law currently on the statute book, "affects" or "has a bearing on" either currency, banking, or exchange. Since 'currency', for example, is not defined in the Act, it can be taken to mean anything which might involve the use of rands. This means that the Wills Act,[105] the Intestate Succession Act,[106] the Marriage Act,[107] the Promotion of Equality and Prevention of Unfair Discrimination Act (the Equality Act),[108] and any and every other Act which provides for monetary penalties or mentions indirectly or implicitly that money will or may be used for something, may be suspended by the President. An anti-corruption law, then, can be suspended, at least in its punitive provisions, by a corrupt President because the law provides for a fine (i.e.

105 Wills Act (7 of 1953).
106 Intestate Succession Act (81 of 1987).
107 Marriage Act (25 of 1961).
108 Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000).

relates, somehow, to currency) that is to be paid by a convicted corrupt official.

Indeed, section 9(3) above elevates regulations proclaimed by the President to a status even above that of legislation as enacted by Parliament.

How the Constitutional Court allowed this legislation to stand is anyone's guess.[109]

"The nature of the power the Act confers on the President to make regulations in regard to currency is unusually wide," said Chief Justice Mogoeng Mogoeng on behalf of the majority of the bench, "but its unusual width meets the unusual circumstance of the subject matter".[110]

This is not appropriate legal reasoning, especially in light of the fact that it disregards completely the co-equal supremacy of the Rule of Law contained in section 1(c) of the Constitution. One cannot imagine the Constitutional Court condoning, for example, a law that prohibits black people from entering Pretoria, which would be

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109 In the case of *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) the court, however, found that the delegation of plenary legislative powers to the executive – i.e. to engage in the amending, repealing, or suspension of law process – is not compatible with the constitutional separation of powers principle.

110 At para 70.

completely unconstitutional. Similarly, given that the Rule of Law is *as supreme* as the Constitution itself, legislation like the Currency and Exchanges Act should certainly be struck down, regardless of how complex or specialised the subject nature of the Act is.

Only one judge, Johan Froneman, dissented, pointing out the obvious: That the President has been empowered to rule by decree. According to Judge Froneman:

> "It is difficult to conceive of a more comprehensive divesting of legislative power from Parliament to the Executive than what is contained in section 9 of the Exchanges Act. Take it away and what remains of the Exchanges Act is a hollow shell. If the interpretation given to section 9(4) in the main judgment is accepted, it means that the President may, except for raising taxes, in his discretion legislate by way of regulation about anything relating to currency, banking or exchanges without constraint. That amounts to assigning plenary legislative power to him. The Constitution does not allow that, no matter how important the regulation of international finance may be".[111]

The Short-Term Insurance Act,[112] as another example, empowers the registrar to refuse to register an insurance provider if he deems it in the public interest. "The public interest" remains undefined in this Act, as it does in

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111 At para 111.

112 Short-Term Insurance Act (53 of 1998).

countless other pieces of legislation, meaning, effectively, if the registrar has a hunch that some conduct by an applicant is somehow problematic, or thinks the applicant has shown some kind of disrespect toward insurance regulators, may simply refuse to allow that applicant to become an insurance provider. This establishes a complete dependency by prospective private providers of insurance on the good graces of personalities within government – a clear manifestation of the rule of man and not the Rule of Law.

Public participation in creating policy is also becoming a bizarre exercise. The Minister of Telecommunications and Postal Services, for instance, felt quite confident in declaring South Africa's new ICT policy to be "final",[113] *months* before his department released the socio-economic impact assessment done for the policy. How can a policy be final before the public knows whether or not it will be beneficial?

The Constitutional Court has, more often than not, been giving Parliament's delegation of powers the stamp of

[113] "Telecommunications and Postal Services on implementation of National ICT Policy White Paper." (2016). Department of Telecommunications and Postal Services. http://www.gov.za/speeches/national-ict-policy-white-paper-14-dec-2016-0000/. Accessed: 6 March 2017.

approval under the guise of 'deferring' to the legislature's competency. And our 'competent' elected representatives are allowing faceless, nameless officials to rule every facet of our lives. Governance is now perceived by those in power as a corporate micromanagement of society, where the consent of the governed need simply be vaguely gauged once every five years.

HARD CASES MAKE BAD LAW

The popular saying that *hard cases make bad law* means that the law does not always have a clear-cut answer to problems which might call for legal adjudication. And because the judge or official must then use their discretion rather than merely revert to what the law strictly provides, it sets a potentially bad or dangerous precedent upon which subsequent judges and officials will also rely.

In the United States, Professor Stephen Macedo argues, however, that even hard cases have a correct answer. This correct answer is arrived at through "moral judgment".[114]

Discussing the right to privacy under the US Constitution, Macedo writes that this moral judgment would be based on asking "which interpretation of the privacy right constitutes a better vision of what America stands for?"[115] What America stands for is not arrived at by coldly looking at its history, but rather an analysis of the American tradition. "A tradition cannot be discerned," writes Macedo, "without the aid of moral principles distinguishing valuable from vicious practices". Tradition "represents a distillation of valuable practices from their suspension in a history that includes actions and events we wish to rise above". The American tradition is the "reflective judgment about what [Americans] stand for at [their] best, what [they] aspire to".[116]

Macedo's argument in dealing with hard cases is not dissimilar from that of the legal philosopher Ronald Dworkin.

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114 Macedo S. *The New Right v. The Constitution.* (1987). Washington DC: Cato Institute.

115 Macedo (footnote 114 above) 69.

116 Macedo (footnote 114 above) 74.

HLA Hart argued that there will always be those cases that judges are faced with for which there will not be a clearly-settled legal rule; and in those cases, the judge has discretion. In the context of Hart's argument, according to Professor Adrienne van Blerk, discretion means that the judge may decide the hard case on "extralegal grounds", acting "as a kind of legislature" who "must consider his unfettered discretion in a forward-looking sense in the best interests of the community".[117]

Dworkin disagreed, arguing that there is no discretion on the part of the judge. Instead, the law "also comprises principles and standards" which "incline a decision one way or another, though not conclusively".[118] These principles are discerned from "the deep-rooted and historical values of the legal system and the 'political morality' of the community".[119]

In South Africa, we are fortunate that the constitutional drafters did not leave as much doubt as the American Founding Fathers as far as the political morality of South Africa is concerned. The Founding Provisions in the

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117 Van Blerk A. *Jurisprudence: An Introduction*. (1998). Durban: LexisNexis Butterworths. 85-86.

118 Van Blerk (footnote 117 above) 86.

119 Van Blerk (footnote 117 above) 87.

Constitution clearly and unambiguously provide the values upon which the South African state is founded and what the content of our legal tradition is, ensuring that there will always be a correct legal answer for a court to arrive at.

Professor Koos Malan argues that if we are to be true to the Rule of Law, we must resist giving in to the temptation to follow hard cases into bad law. Malan writes that allowing "a hard case to force a legally unwarranted exception [to a legal rule]" will "haunt future decision-making" and compromises the law in question. This will lead to a slippery slope where "others, claiming that their cases are also hard, are going to press for similar exceptions". By having the precedent set by the previous hard case judgment, these 'others' will have a legal basis for the exception, and it will become progressively more "difficult to justify why another exception" cannot be made in light of previous exceptions. With these exceptions, Malan writes that the Rule of Law "is further compromised in favour of arbitrary decision-making, which is another step towards inconsistent and

unpredictable lawlessness". To avoid this, judges must "never surrender to a hard case".[120]

The converse of the saying that hard cases make bad law is equally true – that *bad law makes hard cases* – and perhaps speaks more to its relevance to the Rule of Law.

To avoid hard cases, the law itself must live up to constitutional values and the Rule of Law. Faulty law will inevitably lead to cases demanding some sort of bending of the rules. The law must, therefore, be as clear and unambiguous as possible, and accord with the legal tradition of the community. In South Africa, this invariably means any law must be consistent with the values of the Constitution, especially the Founding Provisions.

REGULATORY BULLYING

When we operate from the firm understanding that South Africa must be governed by predictable, known, and non-arbitrary decisions, then it follows that those who are affected by government decisions should be able to speak out against government when it does not live

[120] Malan K. "The rule of law versus *decisionism* in the South African constitutional discourse." (2012). 45 *De Jure*. 279.

up to this standard, or when improper legislation that violates the Rule of Law, like the Currency and Exchanges Act and the Short-Term Insurance Act is passed.

And when they speak out, they should feel comfortable doing so without fearing some kind of retribution by the regulators in their sector.

All citizens, as well as entrepreneurs and providers of goods and services, must have the freedom to openly oppose government, especially capricious officials, without fear of reprisal.

In theory, we have this right. Section 16(1) of the Constitution guarantees freedom of expression and section 17 guarantees the right to assembly, demonstration, picket, and petition. However, in practice, this is often not the case, especially in industries where the dead hand of government is felt every day, and it all boils down to a combination of government's disregard for the Rule of Law, to bullying regulators, and to business fear and apathy.

By granting officials discretionary powers that are unconstrained and by granting officials the power to, effectively, make substantive law, Parliament has abandoned its historical duty as lawmaker and the representative of the people within the scheme of the separation of powers. Picture is my own.

The financial services industry immediately comes to mind, where two decades of endless regulatory 'reform' has heralded a "state within the state", as Professor Robert Vivian calls it, in which civil servants have their own quasi-law-making bodies, along with their own tribunals which adjudicate disputes and keep and spend the fines that they levy.[121] The erstwhile Financial Services Board, for example, enacted laws called by a host of other names like 'directives', 'decisions', or 'notices', but which amount to substantive law. The new Financial Sector Conduct Authority will likely conduct itself similarly.

The mining industry is another that is similarly plagued and entirely dependent upon the grace and favour of their regulatory overlords to grant licences and permits, virtually at their whim. But more on the mining industry in CHAPTER 8 below.

Bureaucratic empires with their own systems of law-making and where each industry segment is run much

[121] Vivian RW. "Impact assessment signals Twin Peaks Act can be next state-induced calamity". (2016). *Business Day*. https://www.businesslive.co.za/bd/opinion/2016-11-15-impact-assessment-signals-twin-peaks-act-can-be-next-state-induced-calamity/. Accessed: 21 July 2017.

like the personal fiefdom of the regulator, have no place in a constitutional democracy like South Africa.

The bullying is not always overt, of course.

More often than not, it is simply the *fear* of being bullied or dealt with unfairly or arbitrarily by bureaucrats that makes enterprises keep quiet. This is a grave manifestation of uncertainty in the regulatory environment that adherence to the Rule of Law would solve. These companies may well have nothing to hide, but vindictive government investigations, closures or suspensions can take up a great deal of executive time and quickly run into millions of lost rands – both for the company, the economy, and the fiscus.

In 2016, the Labour Court set aside a decision by the Mine Health and Safety Inspectorate (MHSI) that brought all operations at an AngloGold Ashanti mine to a standstill, costing the company and the country many millions in lost productivity. This event was briefly mentioned above.

The MHSI, operating in terms of the Mine Health and Safety Act, ordered the company's entire Kopanang mine closed after it found fault with only one, small part of the mine. Section 54(1) of the Act empowers the MHSI to order an entire mine closed if they have "reason to

believe" that some practice or condition at a mine endangers the health and safety of people at the mine. For *each day* the mine was closed, AngloGold Ashanti lost R9.5 million.[122]

While this was more a case of bad judgment than one of bullying, mining houses would clearly rather prostrate themselves in supine obeisance than risk upsetting these salaried wards of the State and have something similar happen again.

The Labour Court found that the inspectorate had acted irrationally,[123] but the inspectorate nonetheless retains the dictatorial powers bestowed upon them by the Mine Health and Safety Act due to our parliamentarians having forgotten about the constitutional imperative of the Rule of Law. Indeed, the fact that our laws even remotely allow officialdom to act virtually unfettered is an insult to our legal order.

To add insult to injury, these government departments have an endless supply of money to fund legal battles that are (all too rarely) launched against it by firms fed up

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122 *AngloGold Ashanti Limited v Mbonambi and Others* (2017) 38 ILJ 614 (LC) at para 5.

123 At para 36.

with what they consider unbearable, government-created anti-growth conditions.

Whereas companies rely on funds earned by serving the market, these bureaucratic fiefdoms are able to launch virtually endless challenges using the bottomless pit of taxpayer money. After years of litigation, many firms simply give up and go where they are welcomed and where the Rule of Law applies.

CHAPTER 5
CAN THE CONSTITUTION VIOLATE THE RULE OF LAW?

CONSTITUTIONAL COHERENCE

There are significant implications for conceiving of the Founding Provisions as "the Constitution of the Constitution". Indeed, it provides the basis for the rest of the Constitution, and section 1 of the Founding Provisions can only be amended with an historically-elusive 75% majority of the votes in the National Assembly.[124]

Its provisions stipulate that South Africa is democratic, that society must be non-racial and non-sexist, and that both the Constitution and the Rule of Law are the supreme law of the land. It is these provisions, among others, that inform the remainder of the Constitution. The Founding Provisions provide the very character and basic structure of the Constitution.

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[124] Neither the National Party, during Apartheid, nor the African National Congress, after Apartheid, have attained 75% of the seats in the lower house of Parliament.

The Constitution itself, however, appears in various provisions to fall foul of the pure principles of the Rule of Law.

For instance, section 93(1)(a) provides that the President may appoint "any number" of deputy ministers from the National Assembly to Cabinet. This power of the President is not constrained in any substantive way by criteria or conditions. For example, it does not oblige the President to consult anyone, it does not require the appointment to be necessary or reasonable nor require justification to Parliament.

Without constraint, this provision can lead to absurd results: The entire National Assembly can hypothetically be made part of the executive government after having had the President appoint hundreds of deputy ministers. This would practically destroy any notion of the separation of powers, given that the national legislative and executive authorities would overlap completely. The decision would also be irrational because there is no legitimate government purpose in appointing the whole legislature or even a substantial part thereof to the executive.

This absurd event would never occur, given that the National Assembly has various opposition parties and it is unlikely that a partisan president would want the opposition occupying such a substantial number of offices in Pretoria. However, this provision allows for it to hypothetically happen, and thus patently violates the Rule of Law.

Section 1(c), however, provides that the Constitution and the Rule of Law are co-equally supreme law. The text of the Constitution, as enacted in 1996, thus cannot violate the Rule of Law, as the Rule of Law does not take precedence over the Constitution. Similarly, the tenets of the Rule of Law cannot violate the text of the Constitution, as the Constitution does not take precedence over the Rule of Law.

There cannot thus be conflict between the constitutional text and the Rule of Law since, in any event, a court would apply what it reads in the Constitution, as the principles of legal interpretation dictate. The Rule of Law, which permeates the Constitution, informs that application.

Going back to the above example, the President's power to appoint any number of deputy ministers from the National Assembly must be read with the separation of

powers in mind. A court must, having regard to this Rule of Law principle, find it unconstitutional if the President appoints every Member of Parliament as a deputy minister.

Another example is section 25(2)(a) of the Constitution, which allows the State to expropriate private property "in the public interest". If this were a provision of ordinary legislation, it would be invalid because it violates the Rule of Law principle that the law must be clear and unambiguous and that the law must protect basic human rights. However, because the provision is part of the constitutional text as enacted in 1996, it carries the same weight as the principles of the Rule of Law and is valid. In light of the fact that the Rule of Law permeates this provision, the courts must interpret the provision in line with the principles of the Rule of Law and must ensure that the provision is enforced in line with those principles.

If, for example, expropriation takes place in terms of section 25(2)(a), the State must give adequate notice to the owner, must give detailed and accessible reasons for why it believes the expropriation in question is "in the public interest," and those reasons must be challengeable in court, according to the principles of rationality (i.e. that government has evidence which shows a connection

between the interests of the public, and the expropriation of that particular property – for instance, a restitution claim). The decision must also be value-neutral and not merely the implementation of a political programme, which is often ideological and thus falls foul of the requirement that law be objective and reasonable.

Those provisions which were part of the constitutional text when the Constitution was promulgated were elevated to an equal rank with the Rule of Law, and thus cannot 'violate' the Rule of Law. All of those apparently-incompatible provisions must be interpreted to accord with the Rule of Law and applied in such a way that they do, in practice, accord with the Rule of Law.

It is, however, important to note the emphasis on *the Constitution as it was enacted in 1996*. For this, one must distinguish between the Constitution and amendments to it, for an amendment to the Constitution has an inherently different nature. The Constitution was the product of a years-long negotiation process that culminated in its adoption by the Constitutional Assembly and certification by the Constitutional Court. These two latter institutions thus exercised a form of *constitutive power* by, essentially, creating the Constitution anew. An amendment to the Constitution,

on the other hand, is the result of a form of *constituent power*, meaning the power to amend the Constitution is found in the Constitution itself. We now need to turn our attention to whether amendments to the Constitution can infringe on the Rule of Law.

AMENDMENTS TO THE CONSTITUTION

The Constitution is not an absolutely-static or inflexible instrument. Section 44(1)(a)(i) of the Constitution gives the National Assembly the power to amend the Constitution and section 44(1)(b)(i) gives the National Council of Provinces the power "to participate in amending the Constitution". This is the source of Parliament's constituent (and not constitutive) power to amend the Constitution, which is Parliament's constitutive instrument.

Amendments to the Constitution are thus entrusted to Parliament, and Parliament must adhere to section 74 in this process. Section 74, in full, provides:

> Bills amending the Constitution
>
> 74. (1) Section 1 and this subsection may be amended by a Bill passed by –

(a) the National Assembly, with a supporting vote of at least 75 per cent of its members; and

(b) the National Council of Provinces, with a supporting vote of at least six provinces.

(2) Chapter 2 may be amended by a Bill passed by –

(a) the National Assembly, with a supporting vote of at least two thirds of its members; and

(b) the National Council of Provinces, with a supporting vote of at least six provinces.

(3) Any other provision of the Constitution may be amended by a Bill passed –

(a) by the National Assembly, with a supporting vote of at least two thirds of its members; and

(b) also by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendment –

(i) relates to a matter that affects the Council;

(ii) alters provincial boundaries, powers, functions or institutions; or

(iii) amends a provision that deals specifically with a provincial matter.

(4) A Bill amending the Constitution may not include provisions other than constitutional amendments and matters connected with the amendments.

(5) At least 30 days before a Bill amending the Constitution is introduced in terms of section 73(2), the person or committee intending to introduce the Bill must –

(a) publish in the national Government Gazette, and in accordance with the rules and orders of the National Assembly, particulars of the proposed amendment for public comment;

(b) submit, in accordance with the rules and orders of the Assembly, those particulars to the provincial legislatures for their views; and

(c) submit, in accordance with the rules and orders of the National Council of Provinces, those particulars to the Council for a public debate, if the proposed amendment is not an amendment that is required to be passed by the Council.

(6) When a Bill amending the Constitution is introduced, the person or committee introducing the Bill must submit any written comments received from the public and the provincial legislatures –

(a) to the Speaker for tabling in the National Assembly; and

(b) in respect of amendments referred to in subsection (1), (2) or (3)(b), to the Chairperson of the National Council of Provinces for tabling in the Council.

(7) A Bill amending the Constitution may not be put to the vote in the National Assembly within 30 days of –

(a) its introduction, if the Assembly is sitting when the Bill is introduced; or

(b) its tabling in the Assembly, if the Assembly is in recess when the Bill is introduced.

(8) If a Bill referred to in subsection (3)(b), or any part of the Bill, concerns only a specific province or provinces, the National Council of Provinces may not pass the Bill or the relevant part unless it has been approved by the legislature or legislatures of the province or provinces concerned.

(9) A Bill amending the Constitution that has been passed by the National Assembly and, where applicable, by the National Council of Provinces, must be referred to the President for assent.

Section 74 is a deeply-entrenched provision, and, like section 1, can only be changed with a supporting vote of

75% of the members of the National Assembly. The remainder of the Constitution can be amended with two-thirds of the votes in the National Assembly. In both cases, only six of the nine provinces represented in the National Council of Provinces need to vote in favour of the amendment for it to pass.

Dr Yaniv Roznai, however, asks a pertinent question not explicitly addressed by this otherwise comprehensive section:

> "Is the scope of the amendment power sufficiently broad to permit any amendment whatsoever, even one that violates fundamental rights or basic principles?"[125]

Thus, can an *amendment* to the Constitution 'violate' the Rule of Law and the other sections in the Founding Provisions? It would seem bizarre to say that yes, it can. This would mean that an amendment would be invalid and unconstitutional. The whole point of the amendment power, after all, is to be able to change what provisions in the Constitution say.

Dr Roznai's theory of unamendability (which he calls *foundational structuralism*) can be summed up as follows:

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[125] Roznai Y. "Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers". (2014). Ph.D. thesis. London School of Economics and Political Science. 13.

Constitutions are built on certain principles, or foundations, that constitute their identity. These foundations that hold up the entire constitutional structure cannot be amended, because this would amount to effectively repealing the Constitution and creating a new one in its place.[126]

While Roznai acknowledges that a completely unamendable constitution would amount to constitutional failure, and that "in order to maintain itself and progress with time, a constitution must be able to change", he argues that certain types of constitutional amendments themselves can amount to constitutional failures. If these amendments change the identity of the Constitution by altering its basic principles, that constitutional dispensation is effectively replaced with a completely different one, which is not ordinarily within the scope of amendment provisions. According to Roznai, an "unlimited amendment power collapses the distinction between constitutional-making and constitutional-amending".[127]

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126 Roznai (footnote 125 above) 237.

127 Roznai (footnote 125 above) 237.

In a seemingly strong endorsement of this view, Professor Dainius Žalimas, President of the Constitutional Court of Lithuania, said in a speech celebrating the anniversary of the Constitutional Court of Kosovo, that courts could set aside amendments that are otherwise procedurally correct "if that amendment would substantively violate the nation's constitutional identity".[128]

He continued, arguing that this should not be considered "dead hand constitutionalism", but rather protective measures that disallow amendments which "violate the very substance" of a constitution's principles.

It would appear that, in South Africa, there is Constitutional Court authority backing up this position, although it is one of those questions the court saw fit not to address in particular, but only mention in passing. In the 1996 case of *Premier of KwaZulu-Natal v President of the Republic of South Africa* the then-Deputy President of

[128] Žalimas D. "Eternity clauses: A safeguard of democratic order and constitutional identity". Speech celebrating the fifth anniversary of the Constitutional Court of Kosovo. http://www.gjk-ks.org/repository/docs/Speech_of_the_President_of_the_Constitutional_Court_of_Lithuania_Prof.Dr._Dainius_alimas.pdf/. Accessed: 28 November 2017.

the Court, Ismail Mahomed, said for the unanimous bench:

> "It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and re-organizing the fundamental premises of the Constitution, might not qualify as an 'amendment' at all."[129]

Mahomed continued, writing that in India it is not possible to amend the Constitution if the amendment destroys "the basic features and structure of the Constitution". Mahomed quotes Justice Dhananjaya Yeshwant Chandrachud of the Indian Supreme Court in the case of *Indira Nehru Gandhi v. Shri Raj Narain*:

> "The word 'amendment' postulates that the old Constitution must survive without loss of identity [...] the old Constitution must accordingly be retained though in the amended form, and therefore the power of amendment does not include the power to destroy or abrogate the basic structure or framework of the Constitution."[130]

According to Mahomed, "the supremacy of the Constitution itself, the rule of law, the principle of

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129 *Premier of KwaZulu-Natal and Others v President of the Republic of South Africa and Others* 1996 (1) SA 769 (CC) at para 47.

130 *Indira Nehru Gandhi v. Shri Raj Narain* 1975 (Supp.) SCC 1.

equality, the independence of the judiciary and judicial review are all basic features of the Indian Constitution which cannot be so 'amended'."[131] However, the Constitutional Court did not endorse the notion that certain constitutional amendments, which comply with the procedure, are substantively unconstitutional. The court also did not reject it and made a similar judgment in the second *UDM* case in 2002. Like in many other matters, the courts are hesitant to make precedent-setting rulings on issues which are not, strictly speaking, relevant to the matters before them.

In June 2018, former Constitutional Court justice, Albie Sachs, in a presentation to Parliament's Constitutional Review Committee on the question of whether to amend the Constitution to allow for expropriation of property without compensation, said that while amending the Constitution is certainly allowed, amendments should not destroy constitutionalism. He specifically chose judicial review as a fundamental tenet of constitutionalism that cannot be amended out of the Constitution.[132]

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131 At para 48.

132 Herman P. "Land: Whatever you decide, it must be reviewable, Albie Sachs tells MPs". (2018). *News24*.

The Constitution itself does leave the door open to declaring (procedurally correct) amendments unconstitutional.

Section 167(4)(d) provides that the Constitutional Court may "decide on the constitutionality of **any** amendment to the Constitution".[133] Unlike subsections (4)(c)[134] and (4)(f),[135] this provision's operation does not depend upon other provisions. Thus, it does not say that the court may decide the constitutionality of amendments *"in terms of"* section 74. Instead, *"any"* amendment is open to constitutional scrutiny.

As is evident from the above, the Indian Supreme Court has developed something known as the 'basic structure' doctrine which, in the case of *Kesavananda Bharati v. State of Kerala*, was summed up as meaning that Parliament cannot use its constitutional amending "power to repeal, abrogate the Constitution or damage,

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https://www.news24.com/SouthAfrica/News/land-whatever-you-decide-it-must-be-reviewable-albie-sachs-tells-mps-20180608-2. Accessed: 12 June 2018.

133 My emphasis.

134 Section 167(4)(c) provides that the court may "decide applications **envisaged** in section 80 or 122" (my emphasis).

135 Section 167(4)(f) provides that the court may "certify a provincial constitution **in terms of** section 144" (my emphasis).

emasculate or destroy any of the fundamental rights or essential elements of the basic structure of the Constitution or of destroying the identity of the Constitution".[136]

According to Roznai, the basic structure doctrine in India includes the "general features of a liberal democracy, such as the supremacy of the Constitution, the rule of law, separation of powers, judicial review, freedom and dignity of the individual, unity and integrity of the nation, free and fair elections, federalism, and secularism".[137] In South Africa, the so-called 'basic structure' of the Constitution is heavily informed by the Founding Provisions and the Bill of Rights. The principles contained in schedule 4 of the interim Constitution which the Constitutional Assembly was obliged to write into the current Constitution might also provide guidance in determining the imperative structure of the Constitution.

There is thus considerable overlap between the Indian and South African contexts, as the Founding Provisions provide that among other things the supremacy of the Constitution and the Rule of Law, human dignity,

136 *Kesavananda Bharati v. State of Kerala* 1973 4 SCC 225 at para 1260.

137 Roznai (footnote 125 above) 58.

equality, and freedom, regular elections for a multi-party system, are all features of the South African state.

According to Professor Allan at Cambridge University, even when the Rule of Law is not written into a constitution explicitly, as it is in South Africa, and, for instance, Georgia's case,[138] it is still part and parcel of any common law legal order and carries the same effective weight as if it were written down.[139] In other words: Try as one may, one cannot get around the Rule of Law. But, as we know, the Rule of Law in South Africa "permeates the entire Constitution." And if the Rule of Law truly permeates the Constitution, it follows that an arbitrary, unreasonable, and human rights-violating amendment to the Constitution – regardless of whether the amendment is enacted in a procedurally correct way – would fall foul of the Rule of Law, and, thus, be unconstitutional.

When the Constitution was enacted, with its Rule of Law provision, a type of 'barrier' was enabled around the

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138 The Preamble to the Constitution of Georgia, 1995, provides that it is the "firm will" of the citizens of Georgia "to establish a democratic social order, economic freedom, a rule-of-law based social State".

139 Crawford LB. "The Rule of Law as an assumption of the Australian Constitution." (2017). *Australian Public Law Blog*. https://auspublaw.org/2017/06/the-rule-of-law-as-an-assumption-of-the-australian-constitution/. Accessed: 10 July 2017.

constitutional text as it stood in 1996. Think of the Constitution as a type of gas cylinder and the Rule of Law as the gas which permeates the cylinder. Whatever new element is introduced into the cylinder must be compatible with the gas which it already contains. Indeed, fire would be an incompatible element, even though the fire might have been compatible had the cylinder still been empty, i.e. without the Rule of Law 'permeating' it.

It follows, therefore, that new amendments to the Constitution must accord with the Rule of Law.

Whether the courts would agree with this is a separate and unrelated question. Indeed, as the natural law scholar, Professor John M Finnis, notes in the seminal *Natural Law and Natural Rights*, natural law and its principles apply regardless of being "overlooked, misapplied or defied". Using the example of the principles of mathematics, he writes that "they would 'hold good'" even though those principles were unknown to medieval bankers.[140]

While the judiciary is an indispensable part of the legal system, it is not infallible, and is often prone to be

[140] Finnis JM. *Natural Law & Natural Rights*. (2011, 2nd edition). Oxford: Oxford University Press. 24.

influenced by whatever the dominant political ideology of the day happens to be. A misapplication of the concept of the Rule of Law does not invalidate the concept itself.

Any constitution is meant for the ages. The Constitution of the United States – a standard-setter for constitutionalism – has endured for 230 years and been amended only 27 times. South Africa's constitution has been amended 17 times in 23 years, with most amendments being technical or procedural. Substantive amendments, however, such as removing the right to compensation when property is expropriated, appear to be on the horizon.

The Bill of Rights, which comes immediately after the Founding Provisions in the Constitution, is the most effective barrier to unrestrained governmental authority, and tends to overshadow the Founding Provisions in our public discourse. South Africans have, unfortunately, thus allowed strikingly obvious violations of the Founding Provisions to occur, not only by the executive government, but also by Parliament and, on occasion, by the courts. Each new piece of legislation that assigns more generous discretionary powers to regulators, tosses the Rule of Law aside. The Rule of Law is similarly

disrespected when the courts regard such legislation as constitutionally valid.

So overlooked are the Founding Provisions that, in recent years, there have been some absurd and dangerous calls for constitutional changes that fall foul of what these provisions envisage for our society.

Jimmy Manyi, then of the Progressive Professionals Forum,[141] and Meokgo Matuba of the ANC Women's League,[142] have called for a return to parliamentary sovereignty, where the whim of Parliament, not a constitutional instrument, is the supreme law.

The Public Protector has recommended that the Constitution be amended to remove the Reserve Bank's mandate to protect the value of the currency. The

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141 Mkentane L. "Forum calls for SA to ditch Constitution". (2017). *Independent Online*. http://www.iol.co.za/news/politics/forum-calls-for-sa-to-ditch-constitution-7498118/. Accessed: 21 July 2017.

142 Gallens M. "Constitutional democracy is not working, courts have too much power – ANCWL". (2017). *News24*. https://www.news24.com/SouthAfrica/News/constitutional-democracy-is-not-working-courts-have-too-much-power-ancwl-20170622/. Accessed: 1 December 2017.

ensuing drama itself devalued the rand in relation to the US dollar.[143]

And, over the years, various politicians and associations have called for section 25 of the Constitution, the provision that protects the private property of all South Africans from arbitrary deprivation, to be repealed or otherwise watered down, because it is considered an impediment to certain ideological aspirations. This has come to a head in 2018 and 2019, when it seems likely that the Constitution will, in fact, be amended to remove the absolute right to compensation when property is expropriated.

All of these calls are reckless, short-term political thinking, devoid of basis in the spirit of our Founding Provisions. Constitutionalism and the Rule of Law require long-term thinking, which recognises that the government of today is not the government of tomorrow, and that the outrage currently dominating public opinion will not always be around.

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143 Keppler V. "Experts slam Mkhwebane's suggested changes to the constitution". (2017). *The Citizen*. http://citizen.co.za/news/1546791/experts-slam-mkhwebanes-suggested-changes-constitution/. Accessed: 21 July 2017.

If the Constitution should lose its basic character as a shield for the South African people against undue government overreach within the period of only one political party's rule, there can be no doubt that tyranny threatens and freedom could again slip from our grasp.

CHAPTER 6
PUBLIC PARTICIPATION

OVERVIEW

On 23 February 2017, the then-Deputy Minister of Finance, Mcebisi Jonas, said South Africa needs an outspoken citizenry and a robust media that speaks out or challenges government policy when they disagree with it.[144]

South Africa is fortunate to have a justiciable constitution that not only facilitates a participatory democracy, but also encourages it. There is much evidence, however, that government itself does not always adhere to the principles of public participation, and, when it appears to do so, it is not done in good faith.

Some of the key constitutional provisions obliging public participation include the following:

- Section 33 gives all South Africans the right to *just administrative action* that is reasonable and procedurally fair.

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144 Le Roux I. "Jonas calls on citizens to speak out on govt policies". (2017). *Eyewitness News*. http://ewn.co.za/2017/02/23/jonas-calls-on-citizens-to-speak-out-on-govt-policy/. Accessed: 24 February 2017.

- Section 59(1)(a) obliges the National Assembly to "facilitate public involvement in the legislative" process as well in the committees and other processes of the legislature.
- Section 152(1)(e) provides that local governments must "encourage the involvement of communities and community organisations in matters of local government".
- Section 195 of the Constitution requires that the public administration respond to the needs of the people and encourage the participation of the public in policy-making. It further requires transparency and the provision of timely, accessible, and accurate information.

Professor Ben Nwabueze writes that democracy does not simply mean the elected majority party gets to rule. Instead, it means self-government "conducted by the people as a collectivity and as individuals". Self-governance implies "personal participation" by the people in democratic processes and not merely community participation. According to Nwabueze,

democracy places "the highest premium [...] on the participation of the individual in government".[145]

With provisions requiring public participation included in our highest law, one wonders how it is possible that the Department of Telecommunications and Postal Services (DTPS) managed to publish the Information and Communication Technologies (ICT) White Paper[146] in October 2016 without having informed the public – let alone stakeholders – about substantial proposed changes.

The Green Paper, Discussion Paper, and Review Report, which came before the White Paper, were all subject to public participation, leading to what appeared to be some interesting and relatively good new developments in South Africa's ICT industry. That all went out of the window with the publication of the White Paper, which surprised the industry with threats of expropriation of

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145 Nwabueze BO. *Judicialism in Commonwealth Africa.* (1975). New York: St. Martin's Press. 230.

146 "National Integrated ICT Policy White Paper". (2016). Department of Telecommunications and Postal Services. https://www.dtps.gov.za/images/phocagallery/Popular_Topic_Pictures/National_Integrated_ICT_Policy_White.pdf/. Accessed: 1 December 2017. For a full discussion of the White Paper, including constitutional concerns, see Van Staden M and Emerick N. *The Real Digital Divide: South Africa's Information and Communication Technologies Policy*. (2017). Johannesburg: Free Market Foundation.

already-allocated radio frequency spectrum and what appeared to be a proposed monopoly in the ICT sector. The Electronic Communications Amendment Bill, published in November 2017, carried many of the White Paper's key provisions into law.

How, in addition, has the DTI facilitated its new liquor policy-after various industry stakeholders pointed out an illogical consequence of the ill-considered provisions. The liquor policy bizarrely provides that liquor cannot be sold within 500 metres of a wide variety of listed areas and facilities, such as schools, "transport facilities", and residential areas.[147] Nothing of significance in these regulations is defined, leaving the provisions wide open to interpretation by officials. The consequence of a generous reading – or any reasonable reading, in fact – of these regulations, is that the sale of alcohol in South Africa is effectively banned because there is no spot in a zoned area in this country which is at least 500 metres away from the listed locations.

The Constitutional Court has rightly observed that the constitutional obligation on government to ensure the

[147] As of writing, the liquor policy has not yet been brought into law.

public participates in policy-making does not mean it must blindly implement the expressed public preference.[148] It may happen that only persons inspired by bad faith and criminality write submissions on government policy. In these circumstances it would be unrealistic to expect government to heed these opinions

The government, however, must be willing to consider all views and to keep an open mind. The dogmatic and blind implementation of policy heedless of near-unanimous public opposition and obvious illogicality is not an indication of good or responsive governance. Whether government will implement expropriation without compensation despite the fact that a vast majority of South Africans oppose it,[149] will be interesting to see.

148 *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC).

149 "Race Relations: Reasons for Hope 2018 – Holding the Line". (2018). Institute of Race Relations. Johannesburg: Institute of Race Relations. 3. https://irr.org.za/reports/occasional-reports/files/reasons-for-hope-2018-2014-holding-the-line.pdf. Accessed: 27 September 2018.

MANIFEST REASONABLENESS AND GOOD FAITH

The central tenet of the Rule of Law is that governance must not be arbitrary. The opposite of arbitrariness is *reasonableness*, of which *rationality* is an ingredient.[150] Law and policy must, thus, be informed by plausible evidence.

According to Professor Bernard Bekink, "there must be a rational relationship between" the proposed policy, law, or regulation, "and the achievement of a legitimate governmental purpose", otherwise it would be arbitrary. "If there is no rational connection", continues Bekink, "the actions of government will be contrary to the rule of law principle and thus unconstitutional and invalid".[151]

That government interventions must be reasonable remains only a nice sentiment unless the reasonableness is *manifested*. Reasonableness cannot be determined without reference to the intended *and the potential unintended consequences* of an intervention.

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150 Hoexter C. "The Principle of legality in South African administrative law". (2004). 4 *Macquarie Law Journal*. http://www5.austlii.edu.au/au/journals/MqLJ/2004/8.html/. Accessed: 1 December 2017.

151 Bekink B. *Principles of South African Constitutional Law*. (2012). Durban: LexisNexis South Africa. 63.

For instance, building a road tunnel through a mountain to connect two cities might on its own merits be a reasonable objective for government to undertake. However, if such a project destabilises the terrain and leads to the destruction of a populous village atop the mountain, it becomes assuredly unreasonable.

In other words, impact assessments must be done and must be *published*, and the government must take heed of the public's commentary on policy where evidence abounds that the policy will either not work or will have unintended negative consequences.

Without published impact assessments, government is called upon to *judge for itself* whether its *own* policies are reasonable, and this state of affairs would make the Rule of Law a redundant concept.

If the citizenry is to have a meaningful input into the decisions that affect their lives, they must know how the decision was arrived at, and on what basis, and their participation must be meaningful (in other words, government is required to participate in good faith) and not merely engage in a pretence.

The requirement of good faith is often overlooked by government.

Public participation is not fulfilled only by the provision of a platform for participation; indeed, those tasked with this responsibility are bound to pay close attention. Professor Mokoko Sebola writes that if "public influence is not considered" when there was an engagement opportunity, "no public participation can be claimed to have taken place".[152]

In the 2016 case of *e.tv v Minister of Communications*, the Supreme Court of Appeal held that when "a policy or policy amendment impacts on rights […] it is only fair that those affected be consulted. Fairness in procedure, and rationality, are at the heart of the principle of legality".[153]

It went on to conclude that the fact that the Electronic Communications Act[154] did not explicitly require consultation was irrelevant. Indeed, the principle of legality – the Rule of Law – "which encompasses the obligation to act rationally", required it.[155]

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152 Sebola MP. "Public participation in South Africa's policy decision-making process: The mass and the elite choices." (2016). 14 *International Public Administration Review*. 56.

153 *e.tv (Pty) Ltd and Others v Minister of Communications and Others* 2016 (6) SA 356 (SCA).

154 Electronic Communications Act (36 of 2005).

155 At para 45. The principle of legality is discussed in CHAPTER 3 above.

The principles of the Rule of Law may, strictly speaking, not be applicable in the *policy* phase of legislation or regulation. Section 195 of the Constitution, however, does appear to mandate public participation in this phase.

Policy, more often than not, is the first step toward eventual law. If the policy is defective, it follows, therefore, that the law will also be defective. It remains important, thus, for the Rule of Law to be applied during the policy phase.

CHAPTER 7
THE COURTS

THE ROLE OF COURTS

> "It is the primary function of the court to protect the rights of individuals which may be infringed and it makes no difference whether the individual occupies a palace or a hut."
>
> Chief Justice Lord John Henry de Villiers

Chief Justice De Villiers was not citing a provision in an old constitution or in any existent legislation of the time when he made the statement quoted above in *Zgili v McCleod* in the Supreme Court of the Cape Colony in 1904.[156] He was referring to the inherent function of a court – the protection (and enforcement) of individual rights. Professor Dalmo de Abreu Dallari echoed this notion when he wrote:

> "In modern, democratic societies subject to the Rule of Law, it is the work of the judiciary to protect human rights and to punish those who violate those rights."[157]

Constitutionalism, it will be recalled, means, for government, *that which is not allowed is forbidden*, and

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156 *Zgili v McCleod* (1904) 21 SC 150.

157 Dallari D. "National jurisdictions and human rights" in *Justice – Not Impunity*. (1992). Geneva: International Commission of Jurists. 201.

for the citizen, *that which is not forbidden is allowed*. The root of constitutionalism is the concept of a constitution, which is the framework for how government must operate. All governmental action in conflict with this framework is unlawful.

The courts, through their technical function of interpreting the law and adjudicating disputes, must ensure this framework is adhered to.

Because it is the function of the law to protect rights, it follows that the courts are primarily responsible for ensuring that the executive and the legislature adhere to the law. This invariably means that the courts, by holding government to the Constitution and the Rule of Law, engage in the protection of rights.

COUNTER-MAJORITARIANISM

In 2015, the South African government hosted the Sudanese president, Omar al-Bashir, as part of an African Union summit. Al-Bashir had, and continues to have, two outstanding International Criminal Court (ICC) warrants for his arrest due to his involvement in the genocide and strife in the Darfur region of Sudan.

The South African Litigation Centre made an urgent application on 13 June 2015 to the High Court to order the South African government to deny al-Bashir exit from the country until such a time as the court could determine whether al-Bashir was to be arrested. The High Court made this order.

The next day, while the court was hearing arguments about whether government was under an obligation to arrest al-Bashir, the South African government facilitated al-Bashir's prompt departure from Air Force Base Waterkloof back to Sudan.[158] The government ignored a standing court order, then proceeded to rationalise it thereafter, claiming that the agreements South Africa had entered into with the African Union obliged government to defend al-Bashir from legal jeopardy.

It is rare for government to openly admit that it violated a standing court order and then attempt to excuse it. The effective functioning of the judiciary depends entirely upon the cooperation of the executive branch of government, and, when the executive refuses to

158 Bowcott O. "Sudan president Omar al-Bashir leaves South Africa as court considers arrest". (2015). *The Guardian.* https://www.theguardian.com/world/2015/jun/15/south-africa-to-fight-omar-al-bashirs-arrest-warrant-sudan/. Accessed: 3 December 2017.

cooperate, the judiciary has no power to back its authority. Such conduct threatens the integrity of the constitutional order. Indeed, in condemning the conduct of government, the High Court said:

> "A democratic State based on the rule of law cannot exist or function, if the government ignores its constitutional obligations and fails to abide by court orders. A court is the guardian of justice, the corner-stone of a democratic system based on the rule of law. If the State, an organ of State or State official does not abide by court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues."[159]

In July 2017, the ICC found that South Africa did, in fact, fail to adhere to its international obligation to arrest al-Bashir.[160] Amidst this, South Africa is in the process of leaving the ICC due to government's belief that its continued involvement with the organisation places South Africa, as an ostensible neutral mediator on the African continent, in a difficult position.

The al-Bashir episode – nothing less than a constitutional crisis – led to the re-emergence of the narrative that the judiciary is 'untransformed' and that it is acting 'anti-

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159 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* 2016 (1) SACR 161 (GP) at para 37.

160 "ICC rules SA had a duty to arrest Bashir". (2017). *TimesLive*. https://www.timeslive.co.za/politics/2017-07-06-icc-rules-sa-had-a-duty-to-arrest-bashir/. Accessed: 1 December 2017.

majoritarian'. Indeed, S'dumo Dlamini, President of the Congress of South African Trade Unions (Cosatu), which represents millions of employed South Africans mostly in the public service, once described the judiciary as a "threat to democracy".[161]

This narrative usually surfaces whenever an opposition party or non-governmental organisation wins a victory in court against the government and is a useful illustration of the fundamental misunderstanding of the role of the judiciary in society.

Among Dlamini's claims were that the judiciary often undermines the interests of 'the majority' (this notion usually carries an unnecessary racial connotation) of citizens and that it is untransformed. It is not necessarily to do with the fact that many judges are still white, but rather that Cosatu believes judges are not being proactive in advancing the "socio-economic rights of the working class". Dlamini says the courts must "not tolerate inequalities inherited from apartheid capitalism".

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161 Shange N. "SA judiciary a threat to democracy – Cosatu." (2015). *News24*. http://www.news24.com/SouthAfrica/News/SA-judiciary-a-threat-to-democracy-Cosatu-20150805/. Accessed: 10 July 2017.

He also asserted that the then-Public Protector, Advocate Thuli Madonsela, was part of a campaign by the opposition in Parliament to replace majority rule and "delegitimise the popular democratic government".

Motala and Ramaphosa echoed these sentiments in 2002, writing that when the courts interpret the socio-economic (welfare) rights provisions of the Constitution, and apply the section 36 limitation of rights provision, they should not engage in "deference to the common law in a way that freezes the economic status quo".[162]

Quoting Herman Schwartz, who wrote in favour of the inclusion of welfare rights in post-communist constitutions in Eastern Europe, Motala and Ramaphosa argue that the Constitution does not simply provide for the structure of government, but also directs government institutions "to funnel resources from the privileged sector toward the general welfare of the majority". In arguing this point, the authors refer to the various rights in the Constitution which provide for social welfare.[163]

The idea that the will of the majority, as expressed in a democratic election, must take precedence over

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162 Motala and Ramaphosa (footnote 79 above) 41.

163 Motala and Ramaphosa (footnote 79 above) 390.

constitutionalism as interpreted by the courts, is fundamentally misplaced. This view takes no account of the duty of the courts, as the interpreter of law and the guardian of individual rights against State power, to construe the Constitution in accordance with that obligation.

The judiciary is not a representative of the people, and it was never intended to be. The legislature – Parliament – is responsible for democratic representation, and, to a lesser extent, the President as well in his capacity as the head of state.

The judiciary, however, is an interpreter and an adjudicator of the law – constitutional law, common law and statutory law (as enacted by Parliament). It need not, and in fact must not, represent the opinions of the majority or give effect to the wishes of the majority lest it become a repository of populist opinion.

Furthermore, according to Nwabueze, a constitutional democracy means that society is governed according to predetermined rules, not majoritarian whims. "A representative majority that is not bound or limited by rules beyond its power to reverse", writes Nwabueze, "is

not a democratic body, but an autocratic and arbitrary one".[164]

Secondly, Motala and Ramaphosa's argument amounts to a *non sequitur*, meaning their conclusion does not follow from their reasoning.

The Constitution does not direct State "institutions to funnel resources from the privileged sector" to "the majority" – nor do the welfarist provisions of the Bill of Rights imply wealth needs to be redistributed. Indeed, the authors' political biases are evident in this argument and deserve some scrutiny.

A distinction must be made between *provision of social welfare* and *redistribution*. The former has long been accepted as a mandate of government, but the latter is an avowedly-ideological idea borne out of socialist thinking.

The argument is also based on the zero-sum fallacy in economics, which assumes that for one individual or group to have something, it must come at the expense of another individual or group. It ignores the possibility of wealth *creation* entirely, positing instead that there is a

[164] Nwabueze (footnote 145 above) 166.

fixed amount of wealth in the economy that must be more evenly distributed among the people. The reality is, of course, that wealth *is* created, and that to build one individual or group of people up, it need not, and ideally should not, come at the expense of others.

The Constitution does not envisage a redistributionist state but provides a framework for wealth creation. This is done by the guarantee of the right to private property, to freely seek employment, and to choose one's profession, thus accumulatively guaranteeing a right to individual enterprise.

Thirdly, Motala and Ramaphosa make the unfortunate common mistake of treating the Constitution as a transient instrument.

Constitutions, by their nature, are not transient. They are intended to be permanent fixtures in society that apply to all relevant situations for the foreseeable future. The "privileged sector" and "the majority" are not fixed entities identified by the Constitution, but classes with different members at different times in different contexts. To interpret the Constitution as mandating this 'funnelling' of resources would mean that even after the legacy of Apartheid has been redressed, people who

fairly accumulate wealth must still have the products of their labour taken by government and given to others. Surely no justiciable constitution proposes to punish the success of innocent parties. In fact, the Constitution does not discriminate based on wealth, socioeconomic status, or membership of the minority or majority groupings in society, whatever they may be. The Constitution is written for all South Africans and entrenches the principle of equality before the law.

This is not to say that the Constitution does not enjoin government to redress the legacy of Apartheid – it certainly does – but the Constitution does not encourage 'us versus them' politics. Section 9 provides that the State must protect and advance persons "disadvantaged by unfair discrimination" and section 25(5) and 25(8) provides that the State may engage in land reform to redress the legacy of "past racial discrimination." None of these provisions, however, state or imply that there must be a transfer of wealth – redistribution – from the so-called haves to the have-nots.

The Founding Provisions guide us in how the courts are to interpret the welfare provisions of our supreme law: In a non-racist, non-sexist manner that upholds the principles of the Rule of Law as well as the explicit

provisions of the Constitution. Section 39(1) provides that the Bill of Rights must, among other things, be interpreted in such a way as to promote "the values that underlie an open and democratic society based on human dignity, equality and freedom". The 'values' that underlie an open and democratic society obviously refers back, if not exclusively then in large part, to the Founding Provisions, which provide that South Africa is a democratic society with various listed values that underpin it.

Dlamini, Motala and Ramaphosa's statements amount to essentially arguing that judicial officers – judges and magistrates – must become political commissars. In the Soviet Union, commissars were often deployed into military units to ensure soldiers toed the line of the communist orthodoxy. The notion that judges must not uphold the law and protect all South Africans against the excesses of the executive government, but rather act as a rubber-stamp for the ruling party and ensure all of society plays its part in the ideological National Democratic Revolution, is dangerous and contrary to the Rule of Law.

What the majority wants, feels or believes, is irrelevant for the purposes of the judiciary, and rightfully so. In the

United States Supreme Court case of *Brown v. Board of Education*,[165] the court declared school segregation unconstitutional. This was despite the fact that the majority of Americans in some states might have approved of separate schools for whites and blacks. Similarly, in South Africa, the Constitutional Court declared the death penalty unconstitutional,[166] despite the fact that the overwhelming majority of South Africans, fed up with unnaturally-high levels of violent crime, want to see it resurrected.[167]

INTERPRETING THE LAW

The Constitution and the Rule of Law are not self-executing. When a constitutional provision is violated, a laser beam does not shoot out of the Constitution and punish the violator. The closest thing we have to that

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165 *Brown v. Board of Education of Topeka* 347 US 483 (1954).

166 *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

167 "Capital Punishment in South Africa: Was abolition the right decision?" (2016). Institute of Race Relations. http://irr.org.za/reports-and-publications/occasional-reports/files/draft-2-irr-capital-punishment-in-sa-211116.pdf/. See also: "Youth 'want death penalty reinstated'". (2013). *News24*. https://www.news24.com/SouthAfrica/News/Youth-want-death-penalty-reinstated-20130222/. Accessed: 1 December 2017.

'laser beam' is the judiciary. It interprets and enforces the Constitution and the Rule of Law.

It is correct to say that the South African Constitution does not endorse "'pure' liberalism with its emphasis on completely autonomous individuals and an essentially passive state",[168] however, this fact does not lead to the conclusion that government may do as it pleases in the ostensible pursuit of social justice. Where the Constitution does speak for itself, it is improper for the legal community – be it the courts or legal scholars – to read their own subjective ideological preferences, or assumptions, into the Constitution. As a libertarian, I have found it easy and liberating to acknowledge that there is much in the Constitution I vehemently disagree with. However, it would be inappropriate to suppose that by 'reading in' I can make the Constitution mean something that it does not.

Indeed, the then-acting judge of the Constitutional Court, Sir Sydney Kentridge, said in the 1995 case of *S v Zuma* "that the Constitution does not mean whatever we might wish it to mean".[169] This is an important point and a fixed

168 Motala and Ramaphosa (footnote 79 above) 390.

169 *S v Zuma* 1995 (2) SA 642 (CC) at para 17.

principle of constitutionalism. If a constitution could simply be interpreted as meaning whatever we want it to mean, that constitution itself would lack the rigidity essential to its viability.

At no point does the Constitution disallow, or even address, the notion that courts may not 'defer' to the common law if that deference might 'freeze' the apparent economic *status quo*. By asking the courts to purposefully venture an incorrect or biased interpretation of the law in order to advance socio-economic rights, Motala and Ramaphosa are asking the courts to become political participants in the governance of society. In other words, if the correct interpretation of the law means that the economic *status quo* will be left unchanged, then that remains the correct interpretation and the courts must apply it.

As Professor Motala himself wrote in 2011, when courts do not stick to the constraints inherent in a judiciary, they are "entangling themselves in a thicket, which is not legal

but political. The end result would be politics masquerading as law".[170]

If the judicial arm of government were to forsake its authority to *order* the legislature and the executive to act in accordance with the law as it stands, the Constitution, the law, and the Rule of Law would become meaningless.

Andrew Jackson, former President of the United States, once disagreed with a Supreme Court order prohibiting him from forcefully relocating Native Americans in a proto-Apartheid fashion from their homes in Georgia to Oklahoma. He remarked that "[The Chief Justice] John Marshall has made his decision; now let him enforce it!"[171] In rather explicit terms, the President said that his administration would not abide by court orders which defied the ideological direction of his party and government. This enabled great tyranny upon Native Americans.[172]

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170 Motala Z. "When a court turns politics into law". (2011) *The Witness*. https://www.news24.com/archives/witness/when-a-court-turns-politics-into-law-20150430. Accessed: 1 December 2017.

171 *Samuel A. Worcester v. Georgia* 31 US (6 Pet.) 515 (1832).

172 The so-called 'Cherokee Removal' followed, part of the broader removal of Native Americans from their ancestral lands to an area west of the Mississippi River. The series of removals became known as the 'Trail of Tears'.

If the teeth that the judiciary has left are plucked out, South Africa will certainly experience oppression equal to or worse than those experienced under Apartheid. With government simply ignoring the court in the al-Bashir case because it did not agree with the judgment, South Africans should be very concerned about the state of our constitutional system.

We should remain vigilant, and guard against having the last wall of defence against tyranny, destroyed.

POLITICISING THE JUDICIARY

The nineteenth century New York Supreme Court judge, Elisha Hurlbut, wrote that "the law is merely declaratory as to all natural rights. It does not create, but enforces them; the right depending not upon the law, but the law rather upon the right itself".[173]

The office that does the 'declaring' on behalf of the law is the judge. The judge applies the law, as it exists, to disputes. While a judge is expected to resolve disputes, their core technical function is to show how the law

[173] Hurlbut EP. *Essays on Human Rights and Their Political Guaranties.* (1845). New York: Greeley & McElarth. 9.

applies to the situation at hand. The separation of powers dictates that a judge should not engage in creating new law, but merely declare what the law is.

The ruling party, however, declared in 2017 that it wanted to ensure that "judges with a progressive philosophy and who advance judicial activism to give effect to social transformation [are] appointed to the Bench",[174] echoing Cosatu's earlier calls for the same.

Judicial activism means that the political considerations of the judge (the "progressive") are breathed into the law. Judicial appointments will become part of cadre deployment where only those who have shown loyalty to the ruling party's ideology will be considered fit for the job.

In the infamous 2013 case of *Agri SA v Minister for Minerals and Energy*,[175] which will be discussed below, the Chief Justice and the majority of the Constitutional Court came close to effectively amending the property rights provision of the Constitution by – erroneously – opining that when government calls itself the 'custodian' of the

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174 Mokone T. "ANC pushes for its kind of judges." (2017). *Sunday Times*. https://www.pressreader.com/south-africa/sunday-times/20170305/281642484961407/. Accessed: 10 July 2017.

175 *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC).

property it expropriates, rather than the 'owner', then no compensation is payable as required by the Constitution.

In other words, by using synonyms or clever wording, government can circumvent the Constitution with court approval. This issue was cloaked in language to ensure equitable access to natural resources, which is why it was considered "progressive". Fortunately, it was held that the facts of each case will prevail over the court's general statement, and two judges did dissent from the Chief Justice's opinion.

Judicial activism is, clearly, dangerous.

South Africa's judiciary, traditionally, has been non-partisan. During the previous regime, individualists such as Oliver Schreiner made it to the highest court in the country – the Appellate Division – despite their disapproval of Apartheid. The courts' strict adherence to the principles of law often frustrated government tyranny, such as when the Appellate Division temporarily stopped Parliament from removing coloured voters from the Cape voters' roll in the early 1950s.[176] The courts often interpreted tyrannical provisions in security legislation

[176] See CHAPTER 2 above.

narrowly, or *in favorem libertatis* – in favour of the liberty of the individual. The bench was not a "National Party" bench, but rather a bench of non-partisan judges.

Contrast this with the situation in the United States, where it is not uncommon to refer to justices on the Supreme Court as "Democrats" or "Republicans", depending on who appointed them and what they believe politically. Democrats and Republicans who run for President have made it a central part of their platforms to only appoint judges with political beliefs that align either with conservatism (often on the question of abortion) or progressivism (often on the question of affirmative action).

The appointment of new judges to America's highest court has become such an intensely-political issue that the Supreme Court at times was rendered dysfunctional. The former president, Barack Obama, could not make an appointment to the bench because the Republican-controlled Senate held up the process and refused to hear Obama's nominations. The court was forced to hear cases with an even bench, meaning sometimes no majority judgment could be delivered and thus the lower courts' judgments remained in force. This was until the new president, Donald Trump, appointed Neil Gorsuch to

the Supreme Court, breaking the tie. South Africa will do well to avoid making the judiciary the third house of Parliament.

Wanting to appoint only 'progressive' judges, more likely than not, will lead to a significant expansion of government power at the expense of the rights of all South Africans. To the ruling party, progressive judicial activism will likely mean that the courts should allow government to bring about "radical economic transformation" by decree and with no inhibitions.

"The ANC is the government," said one commenter in defence of the ruling party's intentions. But constitutional democracy places less emphasis on which political party governs at any particular time and more emphasis on the values in the Constitution itself. Any argument in favour of giving government *carte blanche* is inevitably an argument against constitutionalism, as the nature of a constitution is to place limits on government power.

The independent and impartial judiciary is what kept Apartheid South Africa from becoming a totalitarian dictatorship. While the courts could not stop Apartheid, they succeeded in applying the principles of the Rule of

Law which frustrated, delayed, and, at the very least, annoyed the National Party government.

A non-partisan judiciary is a prerequisite for a free society where each individual and their rights are the guiding principles for judgment.

DEFERENCE AND THE SEPARATION OF POWERS

In political discourse, the concept of *judicial deference* and the *separation of powers* are often used interchangeably. But only one of these two concepts are entirely compatible with the Rule of Law.

The modern state has three branches of government: The legislature, which creates new law, the executive, which enforces law, and the judiciary, which interprets the law and adjudicates disputes arising from the law.

The *separation of powers*, briefly, means that each branch of government concerns itself with its own domain exclusively. That Parliament will only create law, that the executive will only enforce the law, and that the judiciary will only interpret the law and adjudicate disputes. This principle means that each of the three branches has an equally important role to play in the governance of

society, and that the one should not intrude upon the terrain of the other.

The separation of powers can, of course, not be applied as an absolute rule. South Africa's political system begets a high degree of overlap, especially between the executive and legislature, due to the President being elected from Parliament, and Cabinet ministers and deputy ministers remaining part of Parliament. Further, the Judicial Services Commission (JSC) which screens and recommends potential new judges, consists of Members of Parliament and commissioners nominated by the President, and the President then also appoints the judges from the JSC's nominations. Whether this is an ideal setup or not is a different question, but the fact is that a complete separation of powers in South Africa is impossible.

It is not in dispute, however, that the superior courts (the High Court, Supreme Court of Appeal, and the Constitutional Court) must ensure that legislation and conduct adhere to the letter and spirit of the Constitution and the Rule of Law. Section 165 of the Constitution vests judicial authority in the courts, which means, among other things, that a court order is binding on those organs of State to which it applies (a fact ignored by

government when it allowed Omar al-Bashir to leave South Africa), and section 167 specifically endows the Constitutional Court with the authority to decide the constitutional validity of laws or conduct.

Despite the fact that this principle is unanimously acknowledged in South Africa[177] the courts have engaged in excessive deference, especially to the executive branch.

Judicial deference means the courts believe the government department or branch in question has more expertise on a matter in question than they (the judges) do, and thus they 'defer' to the wise judgment of the other branch. Professor Cora Hoexter describes deference as "a judicial willingness […] to acknowledge the expertise of those agencies in policy-laden or polycentric issues; [and] to give their interpretations of fact and law due respect".[178]

The principle of the separation of powers dictates that each branch of government has a domain over which it has exclusive jurisdiction. Deference, on the other hand,

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177 In the United States, this is not necessarily the case. A fierce debate rages there about whether the US Constitution truly empowers the judiciary to test the validity of legislation, despite the judgment of *Marbury v. Madison* 5 US 137 (1803) saying that it does.

178 Hoexter C. *Administrative Law in South Africa*. (2012, 2nd edition). Cape Town: Juta. 151.

operates within the legitimate domain of the courts. Indeed, in a separation of powers issue, the courts cannot 'defer' because there is nothing to defer – the courts either may or may not do what is contemplated. For example, a court cannot decide that all intestate estates must go to the deceased's paternal aunts – that is a matter for the legislature. The court does not in this case 'defer' to the legislature, because the court is not entitled to make law in the first place. However, if a housing authority is taken to court because it paid too little compensation for property which it had expropriated, and the court decides that the housing authority is 'better placed' to determine the appropriate compensation than the court, then deference has taken place. This is so because it is within the domain of the courts to adjudicate disputes and ensure the Rule of Law – not the whim of the housing authority – reigns as the order of the day.

Professor Allan addresses the notion of deference to the will of the legislature head on. His thoughts on this matter are especially instructive because the context in which he writes is that of the United Kingdom, where Parliament is still formally sovereign and subject to far fewer explicit constitutional constraints than the South African Parliament. Allan writes:

> "If we acknowledge the 'blight' case by outdated concepts of 'sovereignty', we will repudiate democratic positivism as inconsistent with our commitment to human and constitutional rights. We will acknowledge a legitimate sphere of legislative and executive autonomy; but we will not pretend that the content of individual rights is finally a matter for majoritarian determination, according to numbers of votes in the legislature. […] the decisions of the 'political branches of government should be loyally accepted insofar as they are consistent with the constitutional rights enshrined in the general law; and such decisions should be rejected where, in the court's best judgment, they violate these rights. The only 'deference' called for, in a liberal democracy worth the name, is obedience to rules or decisions that comply with the constitutional constraints that competent legal analysis identifies."[179]

Allan continues, noting that deference is "pernicious" if "it permits the abdication of judicial responsibility in favour of reliance on the good faith or good sense or special expertise of public officials, whose judgments about the implications of rights in specific cases may well be wrong".[180] When courts engage in such conduct, Allan argues, they abandon their necessary "impartiality between citizen and state" by supposing the "superior

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179 Allan TRS. "Human rights and judicial review: A critique of 'due deference'." (2006). 65 *Cambridge Law Journal* 3. 673.

180 Allan (footnote 179 above) 675.

wisdom of the public agency (or of Parliament)", and this necessarily leaves the citizen "without any independent means of redress for an arguable violation of rights".[181]

The Constitution, in South Africa's case, requires the courts to conscientiously ensure that the Constitution and the Rule of Law are being adhered to by all organs of State, without regard to anyone's 'expertise' on any matter. Deference *per se* has no constitutional basis.

It has been consistently bothersome that, on the one hand, the executive government is allowed to create quasi-judicial bureaucracies within itself, taking more and more responsibility away from the courts, while, on the other hand, the courts practice an almost religious adherence to its flawed deferential conception of the separation of powers.

This creates a situation in South African civil society where the courts are not afforded their proper respect and where people increasingly find their disputes adjudicated by civil servants and not judges. Indeed, many government agencies adjudicate disputes between the agency itself and complainants! This expansion of

[181] Allan (footnote 179 above) 676.

executive power, and apparent contraction of judicial control, is one of the greatest threats to the Rule of Law.

For instance, the erstwhile Financial Services Board and the Competition Tribunal both exercise functions that can be described as judicial, with 'cases' coming before 'judges' who then make a 'finding' and impose a 'penalty'. Both these institutions are, however, executive agencies. According to the orthodox theory of modern statecraft, their having judicial functions is seen to be necessary and proper, and not a violation of the separation of powers.[182] On the other hand, it would be seen as a grave violation of the separation of powers if a court were to find that the regulation of Bitcoin by Parliament violates section 25 of the Constitution. In fact, such a finding by a court would not be a violation of the separation of powers but would simply be an – admirable – failure to 'defer'. There is a double standard in South African political discourse being applied to the executive and the courts.

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[182] The Constitution at various junctures refers to "independent and impartial" tribunals or forums, in addition to the courts. It does not, however, explicitly empower the executive branch to essentially usurp judicial authority. In fact, the Constitution explicitly vests judicial authority in the courts, which imply that any tribunals or forums must properly be considered judicial. There is a case to be made for the fact that most executive 'tribunals' not accorded the full status of a court in an Act of Parliament today are unconstitutional.

It is true that judges are not experts in all fields of public policy, or necessarily any at all. But they are supposed to be experts in one particular field: the law. And where the Rule of Law is violated – even on a matter that is entirely within the expertise of a government department and is entirely policy-based – the courts must intervene.

A host of legal scholars of libertarian persuasion will disagree with this point. To them, the only thing worse than elected politicians making laws that interfere with their lives, is unelected judges 'making laws' that interfere with their lives. For instance, in a commentary on the American Supreme Court case of *Roe v. Wade*[183] – which legalised abortion – Mark Pulliam writes:

> "Divining a 'right' to sexual autonomy or privacy from [the US Constitution, which] does not even remotely address the topic, is the quintessential act of judicial legislation – an unprincipled usurpation of policymaking entrusted to the democratically-accountable branches of government."[184]

Legislating from the bench has always been a cause for concern for those who favour a limited government, but

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183 *Jane Roe, et al. v. Henry Wade, District Attorney of Dallas County* 410 US 113 (1973).

184 Pulliam M. "Prospects for constitutionalism." (2016). *Library of Law and Liberty*. http://www.libertylawsite.org/2016/12/21/prospects-for-constitutionalism/. Accessed: 10 July 2017.

courts making pronouncements that have the effect of bringing the democratic branches of government in line with the tried-and-tested principles of the Rule of Law (whether procedural or substantive), have a far more remote chance of leading to adverse consequences than an overzealous legislative or executive branch. Indeed, the court in *Roe* above did not legislate – it protected individual rights by ensuring the Fourteenth Amendment to the Constitution is adhered to.

In South Africa, the problem is two-fold.

On the one hand, Parliament has all but delegated its power to enact law to the executive branch by bestowing excessive discretionary and law-making powers (under the guise of 'regulations', 'notices', and 'directives', etc.) upon ministers, and worse yet, bureaucrats and officials. And on the other hand, the courts have refused to strike down these statutes because the courts are convinced that wide discretionary and law-making powers are part of a modern State and that they must thus defer.

This places the Rule of Law in a precarious position as the doctrine requires that discretionary powers be narrowly formulated and limited to technical implementation of parliamentary law. The Rule of Law absolutely prohibits

non-parliamentary law-making and unfettered discretion.

In the case of *International Trade Administration Commission v SCAW SA* case, the legislation in question – the International Trade Administration Act – provides the Minister of Trade and Industry with the power to prohibit imports and exports of certain goods absolutely, with no real guiding criteria.[185]

Parliament does not, accordingly, ban the goods; it gives the Minister, who can be anyone, this essential law-making power, rendering this fertile territory for the exercise of arbitrary discretion, and, consequently, for corruption. (Imagine the kinds of bribes a big company, which deals in the goods the Minister seeks to ban, would be willing to pay to persuade them to change their mind.)

The Constitutional Court, unfortunately, deferred, holding:

> "[It seems] self-evident that the setting, changing or removal of an antidumping duty in order to regulate exports and imports is a patently executive function that flows from the power to formulate and implement domestic and international trade

[185] Section 6 of the International Trade Administration Act (71 of 2002).

> policy. That power resides in the kraal of the national executive authority."[186]

The court should have intervened and found that the Act itself violates the Rule of Law. But, instead, under the façade of respecting the separation of powers, the court deferred, allowing an obvious violation of the Constitution and the Rule of Law to go unhindered.

It might be that the power to formulate international trade policy is an executive function, which is protected by the separation of powers doctrine. The Rule of Law, however, permeates all law and government conduct. Striking down the provision for not containing criteria for how the Minister must exercise its power would not have violated the separation of powers because the court would have been acting within its just domain of ensuring all law complies with the Constitution and the Rule of Law. The court would not be making trade policy – i.e. infringing on the executive domain – as all it would be doing is declaring the provision void for violating an already-existing constitutional principle of the law.

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186 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* SA 618 (CC) at para 102.

Therefore, between judicial deference and the separation of powers, the separation of powers is compatible and, indeed, necessitated by the Rule of Law, whereas judicial deference is not. A court may not absolve itself of its duty to ensure law and conduct accords with the Constitution and the Rule of Law, which is what deference amounts to.

DEFERENCE AND SOCIAL WELFARE

According to Motala and Ramaphosa, the courts must defer to the legislature as the role of the judiciary "is to protect the political process, rather than ensuring some particular result". They write that social welfare is "the legislature's goal" and that the court must defer to the legislature in social and economic affairs.[187]

It is unclear where the authors get the idea that the judiciary exists to "protect the political process" or that legislatures are meant primarily to serve a social welfare purpose. Neither the Constitution, the principles of the Rule of Law, nor the historical justifications for the

[187] Motala and Ramaphosa (footnote 79 above) 42.

institution of the judiciary or legislature[188] posit these as the primary purposes of those branches of government.

Indeed, a far more accepted and logically-sound position is that the judiciary exists to protect individual rights from government encroachment,[189] and that the legislature must create laws which protect person and property and ensure society does not descend into chaos.[190]

They continue, writing that due to South Africa's Apartheid history and its resultant legacy, society is polarised between the haves (white South Africans) and the have-nots (black South Africans), and that there is an ostensible expectation among black South Africans that the new legal order must bring about an improvement in their material welfare.

This reminds me of a story told by Temba Nolutshungu, a director at the FMF. According to Nolutshungu, his grandmother used to lament the fact that the Apartheid government was continuously interfering in the

188 Leoni B. *Freedom and the Law.* (1961). Los Angeles: Nash Publishing. 10-11.

189 Allan (footnote 179 above) 671.

190 Allan TRS. "Legislative supremacy and the rule of law: Democracy and constitutionalism". (1985). 44 *Cambridge Law Journal* 1. 112-117.

community's business. If only government had left black South Africans alone, all would have been well.

The problems South Africa faces today are all traceable back to government interventionism – indeed, the late ANC National Executive Member and Minister of Environmental Affairs, Edna Molewa, wrote that the "interventionist apartheid state" caused the perverted distribution of wealth in contemporary South Africa.[191] None of this is due to a limited government, but rather an overactive government.

Motala and Ramaphosa, however, argue for an extreme kind of deference not entirely dissimilar from the pre-constitutional era when Judge Holmes said that it was for Parliament, not the courts, to decide what is and is not in the best interests of the people of South Africa, regardless of whether or not Parliament's enacted laws are horrendous, anti-economic, or anti-humanitarian. What Parliament says, goes.

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191 Molewa E. "EDNA MOLEWA: Radical transformation the only way to halt monopoly grip on economy". (2017). *Business Day*. https://www.businesslive.co.za/bd/opinion/2017-09-29-radical-transformation-the-only-way-to-halt-monopoly-grip-on-economy/. Accessed: 1 December 2017.

The authors do not realise the irony of arguing that the courts should not attempt to ensure a particular outcome for cases but then strongly imply that the courts must ensure the ostensible wishes of 'the majority' as manifested by legislation should win out in the end.

Motala and Ramaphosa go even further, writing that there are various 'gaps' in the Constitution which the courts – and the Constitutional Court in particular – need to 'fill' by considering African legal culture and European "welfarist constitutions". The courts should not, on the other hand, rely on the "common law and its assumptions of rugged individualism" in order to "invalidate affirmative social action or redistribution choices enacted by the legislature".[192]

Implicit in this argument is that the judiciary must avoid enforcing the tenets of the Rule of Law, or even the Constitution itself, if that would have the effect of overriding legislative interventions aimed at social welfare objectives. This argument also leads to the obvious question of why and by what standard should European social welfare law and African legal traditions take precedence over common law protections for

[192] Motala and Ramaphosa (footnote 79 above) 43.

individual rights? The Constitution itself does not answer this question, as it can be said to protect individual rights and welfare in equal measure.

Unfortunately, I believe this is another instance of the authors substituting the law for their own, subjective political views, thereby contradicting their earlier statement as to how the courts must function.

This is not to say that the Constitution is a classical liberal constitution like that of the United States. However, simply because the Constitution does obligate the State to undertake certain forms of welfare and social interventions, all of which are explicitly enumerated in the Bill of Rights, does not mean this is a ticket for government to engage in whatever actions it deems appropriate to provide for the welfare of the people. It must do what the Constitution obliges, within the confines of the Rule of Law, and no more.

Indeed, the people of South Africa have through the Constitution given the judiciary the power to ensure politicians act within the boundaries of the Rule of Law and the Constitution. In this respect, it would be highly improper – indeed undemocratic – for courts to defer and allow Parliament to undertake whatever grand social

experiment it wishes, as that would amount to rubberstamping unlawful and potentially oppressive government action. It would also amount to defying the democratic will of the people as ultimately expressed by the Constitution.

As a concluding note, the law, as an institution, was never intended to ensure the material welfare of legal subjects. The law came about as a response to the dog-eat-dog conflict which characterised pre-legal societies, where disputes were settled with the death or maiming of one or all the participants in the conflict. The law and property rights (which will be discussed below) are tools of conflict avoidance.

The law is inseparable from the social contract, whereby individuals in the 'state of nature' sacrificed their right to self-help to government, and government in turn was obliged to protect the persons and property of those individuals.

By giving the law a function reserved for the compassionate members of society acting voluntarily through charity, the law is perverted, and potential tyranny is enabled. It is thus quite unfortunate that so-called 'second-generation rights' were included in the

Constitution. However, the fact is that they *were* included, and thus government acts legally and properly when giving effect to those rights. It must, however, do so within the confines of the Constitution and the Rule of Law, and not according to the ideological preferences of the politicians, officials, or judges in question.

CHAPTER 8
PROPERTY RIGHTS

PROPERTY RIGHTS AND THE LAW

"You can have tyranny with private property," wrote Professor Richard Pipes for the Hoover Institution, "but you cannot have freedom and the rule of law without it".[193]

For the concept of the Rule of Law to make sense, there needs to exist a conception of 'the private'. In other words, bearing in mind that the Rule of Law is an aversion to arbitrariness in governance, that arbitrariness *must be directed at something, from something*. As we know, this arbitrariness is from the State to the private actor, be it an individual or a corporate entity.

The link between the Rule of Law and property rights is embedded within the nature of the law itself. The law came about as a means to protect persons and their property from violence.

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193 Pipes R. "Private property, freedom, and the Rule of Law". (2001). *Hoover Institution.* http://www.hoover.org/research/private-property-freedom-and-rule-law/. Accessed: 21 July 2017.

John Locke, the classical liberal philosopher and father of constitutionalism, wrote in his 1689 book *Two Treatises of Government,*[194] that individuals had self-ownership, and from this originated individuals' right to own property:

> "Though the earth and all inferior creatures be common to all men, yet every man has a 'property' in his own 'person.' This nobody has any right to but himself. The 'labour' of his body and the 'work' of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this 'labour' being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others."[195]

Frederic Bastiat, known for his 1850 book *The Law,*[196] echoed Locke. Bastiat wrote that people can prosper only by "perpetual search and appropriation", meaning the application of our "faculties to objects", which includes labour. This, according to Bastiat, "is the origin of property".

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194 Locke J. *Two Treatises of Government*. (1823 edition). London: Thomas Tegg.

195 Locke (footnote 194 above) 116.

196 Bastiat C-F. *The Law*. (2007 edition). Auburn: Ludwig von Mises Institute.

Bastiat then described the opposite of property rights – "plunder" – writing that man may also "live and enjoy, by seizing and appropriating the productions of the faculties of his fellow men. This is the origin of plunder".[197]

Society enters into an 'agreement' with the State to avoid this plunder. In exchange for protection of their persons and property, individuals agree to adhere to the law which does the protecting, and, therefore, not resort to self-help. This agreement is known as the 'social contract', and the social contract is the framework within which governance must take place. Bastiat sets out this framework thus:

> "When law and force keep a man within the bounds of justice, they impose nothing upon him but a mere negation. They only oblige him to abstain from doing harm. They violate neither his personality, his liberty, nor his property. They only guard the personality, the liberty, the property of others. They hold themselves on the defensive; they defend the equal right of all."[198]

This social contract, however, has not been adhered to. According to Bastiat, the law has been used "in direct opposition to its proper end". The law "has placed the

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197 Bastiat (footnote 196 above) 15.

198 Bastiat (footnote 196 above) 19.

collective force in the service" of the plunderers – "it has converted plunder into a right, that it may protect it, and lawful defense into a crime, that it may punish it".[199]

What Bastiat is referring to here is the law being used as a tool for *redistribution* of property, which evidently violates the private property rights of the individual and is a breach of the social contract.

Restitution of property, on the other hand, is compatible, indeed mandated, by the social contract. Where a rightful owner has had their property taken from them by someone else, be it a criminal or government, they do not lose ownership, as one of the entitlements of ownership is the right of vindication of one's property. This is true even for expropriation. The Apartheid government used its lawful expropriation powers liberally during the previous era, and this is considered illegitimate, rightly, under our current constitutional dispensation. Expropriation must be just – not merely legal – to qualify as a valid transfer of property.

The role of the law in society, thus, according to Bastiat, is the protection of persons and property. In other words,

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[199] Bastiat (footnote 196 above) 4.

"it is the collective organization of the individual right to lawful defense".[200] From this it follows that a law which violates individual and property rights is no 'law' at all, given that law's nature is protective rather than destructive.

As Konrad Graf wrote in interpreting Bastiat's work, a "rights-violating 'law' is categorically self-contradictory".[201] Professor John Dugard, apparently to some extent agreeing with this natural law principle, once described South Africa's Apartheid 'laws' as 'lawless'.[202] Apartheid law went beyond the role of law as "the collective organisation of the individual right" to defence of persons and property, and instead was a system of social engineering, whereby the 'law' had a different purpose entirely.

Property rights and law are opposite sides of the same coin – they cannot, and, indeed, do not, exist without one another. The Rule of Law as a legal doctrine thus begets

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200 Bastiat (footnote 196 above) 2.

201 Graf K. "Action-based jurisprudence: Praxeological legal theory in relation to economic theory, ethics, and legal practice". (2011). 3 *Libertarian Papers*. 11. http://libertarianpapers.org/wp-content/uploads/article/2011/lp-3-19.pdf/. Accessed: 3 December 2017.

202 Dugard J. "Should judges resign? (and lawyers participate?)" in Corder H (ed). *Democracy and the Judiciary*. (1989). Cape Town: Institute for a Democratic Alternative for South Africa. 59.

the existence and protection of property rights. As South Africans, we are thus fortunate that the Constitution includes strong protection for both the Rule of Law and property rights.

PROPERTY RIGHTS AND THE ECONOMY

Even from a purely utilitarian perspective, the Rule of Law and property rights are of critical importance.

In its 2016 *Rule of Law Index*, the World Justice Project provided an example on the importance of the Rule of Law to a country's economic well-being, focusing on property rights:

> "Imagine an investor seeking to commit resources abroad. She would probably think twice before investing in a country where corruption is rampant, property rights are ill-defined, and contracts are difficult to enforce. Uneven enforcement of regulations, corruption, insecure property rights, and ineffective means to settle disputes undermine legitimate business and drive away both domestic and foreign investment."[203]

[203] *World Justice Project Rule of Law Index 2016*. (2016). Washington, D.C.: World Justice Project. 14.

The near-zero investment in countries devoid of property rights, such as Venezuela, Zimbabwe, and North Korea, speaks to this point.

A person or company that has worked years to acquire substantial wealth would want to know that if they invest in a particular country, government or marauders will not simply swoop in and expropriate that wealth. As Professor Zywicki writes, the "link between the rule of law and economic growth derives from the micro-level incentives created by the conditions sustained by the rule of law". Investment, entrepreneurship, and capital development are encouraged in an environment where "arbitrary governmental activity" has been constrained, according to Zywicki.[204]

[204] Zywicki (footnote 59 above) 16.

Claude-Frédéric Bastiat (1801-1850) was a French politician, economist, journalist, and jurist known mainly for his broken window parable that appeared in the essay, "That Which We See and That Which We Do Not See". Bastiat also wrote *The Law* (1850), which sets out the nature and function of the law against the backdrop of nineteenth century France.

THE NATURE OF PROPERTY RIGHTS

The property rights of the individual are not merely a superficial medium by which the individual is able to exercise control over objects. Instead, property rights are foundational to various other rights. For example:

- Human dignity (section 10 of the Constitution): A dignified existence implies enjoying the fruits of one's labour and being able to leave a proprietary legacy for one's descendants without the State micromanaging one's affairs as if one were a ward.
- Life (section 11 of the Constitution): All individuals exercise control over their faculties and reason and are alone able to take responsibility for their own actions. This implies self-ownership, as quoted in Locke above. Self-ownership is the first manifestation of property rights. The notion of private property is therefore inherent in the right to life.
- Trade (section 22 of the Constitution): Freedom of trade necessitates the ability to trade in one's own property. Without private property, there can be no trade, as trade by its nature supposes a transfer of ownership from one to another.

- Housing (section 26 of the Constitution): Section 26(3) mentions South Africans' "homes". Ownership of the property of the home establishes a connection necessary for dignified living between the resident and the physical house. Being 'housed' on public property cannot create the 'homey' condition and places the resident's security of tenure in permanent question.

These are only a few examples of the foundational nature of property rights. Indeed, property rights are, along with freedom of expression, rightly considered by some to be the 'basic rights' from which all others follow.

The essence of property lies in *ownership*. Ownership is what converts an 'object' or a 'thing' into *property*. When something is unowned or cannot be owned – like the Sun and Moon – we would have no reason to conceive of it as anything other than a thing or object. In a world where only one person lives, without the possibility of there being others, the concept of 'property' would not exist because there is nobody to challenge this person's exercising of the entitlements of ownership.

Various entitlements flow from ownership, some of which will be listed below. However, the essence of all of them is that the owner has the right to decide what to do or not to do with his property (including his self – his own person). This is why deprivation of ownership is treated as a serious matter; indeed, the deprivation of black South Africans of their property by the Apartheid government was widely condemned, and to this day is a painful reminder of an oppressive past.

Some entitlements of ownership, as listed in Professor Neil van Schalkwyk and Pieter van der Spuy's *General Principles of the Law of Things*, are:

- Control;
- Use;
- Enjoyment of the fruits of the property;
- Encumbrance (i.e. to 'encumber' the property with limited real or personality rights, such as a bond);
- Alienation (i.e. to sell, destroy, donate, or otherwise dispose of the property);
- Vindication (i.e. to have the property returned to the rightful owner if someone else has taken unlawful control of it); and

- Defence (i.e. to defend the property against unlawful molestation or infringement).[205]

These entitlements of ownership are the vehicles by which property rights can emancipate the poor: it confers the dignity of ownership.

SECTION 25 – THE PROPERTY RIGHTS PROVISION

Section 25 of the Constitution provides, in full, the following:

> Property
>
> 25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
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> (2) Property may be expropriated only in terms of law of general application—
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> (a) for a public purpose or in the public interest; and
>
> (b) subject to compensation, the amount of which and the time and manner of payment of which have

[205] Van Schalkwyk LN & Van der Spuy P. *General Principles of the Law of Things.* (2012, 8th edition). 96.

either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including —

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section—

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster

conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6).

Section 25(1) is the foundation of the rest of the section, for, without it, the section would be redundant.

In the case of *S v Makwanyane*,[206] Judge Chaskalson held for a majority of the Constitutional Court, that a provision of the Constitution "must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular" other provisions in the chapter of which it is a part.[207] This supports the construction that the Constitution must be read holistically, bearing in mind the values and purpose of the entire text as well as the particular provisions, and especially bearing in mind the Rule of Law.

Section 25 must therefore be construed holistically. Section 25(1) provides that no person will be arbitrarily deprived of their property, and sections 25(2) and (3) provides that no expropriation can take place without compensation. This cannot be disregarded or treated as an afterthought in light of the other provisions in the section that are sometimes more politically convenient.

Sections 25(1) to (3) are what is known as a 'negative' right, otherwise known as a 'freedom' right, in that it protects individuals from government interference in

206 See footnote 166 above.
207 At para 10.

their proprietary affairs. The rest of the provision is mostly 'positive' in nature, meaning that it obliges the government to do something, rather than refrain from doing something. By these latter sections' nature, however, they depend upon section 25(1). Without the first subsection, none of the others would make sense or be enforceable.

It is important to deal with a contemporary argument that has been made by some law teachers that section 25 does not guarantee a 'right to private property'. Instead, it simply *protects against arbitrary deprivation of property*. This, some argue, means that one cannot say that South Africans have a right to own private property.

But this is a positivist, Apartheid-esque reading of the Constitution that focuses too much on formalism rather than substance. By "protecting against arbitrary deprivation" of property, the Constitution is inherently recognising the existence of private property rights! Despite this, the Constitution is not the source of rights, as nowhere does it purport to 'create' rights. Instead, it merely protects pre-existing rights. The fact that section 25 does not spell out that "you have a right to private property" is immaterial, since it is necessarily implied. It is, in any case, an inherent component of the Rule of Law.

SECTION 36 – THE LIMITATIONS PROVISION

The 'general limitations' provision found in section 36 empowers the State to limit any right in the Bill of Rights if the limitation adheres to the criteria set out in that section. Section 36 provides, in full, as follows:

> Limitation of rights
>
> 36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Mathews' conception of the Rule of Law allows for the limitation of rights, but only if those limitations are "clearly defined and limited to those which long experience has shown to be necessary qualifications of the substantive right". He also restated the principle of "everything being permitted which is not expressly forbidden" for individuals.[208]

The courts may take account of factors other than those listed in section 36(1)(a) to (e), but it has been customary for the courts to limit themselves to the listed factors.

Laws which limit rights must be "reasonable and justifiable in an open and democratic society".

According to the late Chairman of the Free Market Foundation, Michael O'Dowd, in the monograph *South Africa as an "Open Society"?*,[209] the "open society" referred to in this section of the Constitution is clearly inspired by Karl Popper and his magnum opus *The Open Society and its Enemies*.[210] The essence of the open

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208 Mathews (footnote 49 above) 32. The reader will recall that the opposite is true for government – everything not expressly permitted is forbidden.

209 O'Dowd MC. *South Africa as an "Open Society"?* (1998). Johannesburg: Free Market Foundation.

210 Popper K. *The Open Society and its Enemies*. (1945). London: George Routledge and Sons.

society concept, wrote O'Dowd, "is that each individual should to the greatest extent possible be free to make his or her own decision on the basis of his or her own judgement".[211] Dr Alan Haworth appears to come to the same conclusion, writing that the open society "is a society characterised by institutions which make it possible to exercise the same virtues in the pragmatic pursuit of solutions to social and political problems". These 'virtues', which it must be possible to exercise, are "creativity and imagination in the formulation of theories and hypotheses, as well as in devising experiments with which to test them; critical rationality in the assessment of theories and other claims; the toleration required to recognise that other peoples' theories could be rivals to your own".[212]

Therefore, for a limitation to be justifiable in an open society, the limitation must still allow individuals to make their own decisions based on their own judgment as far as possible. In other words, they must have the freedom

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211 O'Dowd (footnote 209 above) 8.

212 Haworth A. "'The open society' revisited". (2002). 38 *Philosophy Now*. https://philosophynow.org/issues/38/The_Open_Society_Revisited/. Accessed: 21 July 2017.

to express themselves and manifest their own 'experiments' to arrive at certain conclusions.

O'Dowd noted that the open society has various other characteristics, which, by virtue of section 36, are now part of our constitutional order insofar as it relates to limiting individual rights.[213]

Among these characteristics are that the open society is individualistic, and that collectivism "is not altruism but 'collective selfishness'". The open society is also democratic in that society's "rulers can be dismissed by the ruled" and that "democracy is not based on the principle that the majority should rule". While the wishes of the majority should be respected, the principle of democracy means that dissidents "will feel free to combat it by democratic means, and to work for its revision".[214]

The open society is also *equalitarian*, as distinguished from egalitarian. This means that in an open society inequality is accepted and "in many respects highly desirable". However, in political and legal matters, all people must possess "equal rights and equal claims to equal treatment". O'Dowd thus noted that

213 O'Dowd (footnote 209 above) 8.
214 O'Dowd (footnote 209 above) 9.

'equalitarianism' is "not equality of outcome", which is incompatible with the open society, but rather it means that "the state should treat its citizens equally".

The open society, finally, also demands a limited State, with government being responsible for "the protection of that freedom which does not harm other citizens". Popper wrote that "the state must limit the freedom of the citizens as equally as possible, and not beyond what is necessary for achieving an equal limitation of freedom". This had a proviso, however, in that Popper did believe the State had some positive duties such as the provision of education and the provision of social welfare.[215]

The Constitution's limitation of rights provision could have stopped at "open and democratic society", but it goes further and says that it is referring to an open society "based on human dignity, equality and freedom". These values of dignity, equality, and freedom also appear in section 1 of the Constitution, meaning these are founding values for South Africa and not simply filler text.

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[215] O'Dowd (footnote 209 above) 10.

These three values are, like the 'Constitution and the Rule of Law', essentially one concept. No individual's dignity is truly being respected if he has no substantive freedom. A dignified existence implies enjoying the fruits of one's labour and being able to leave a proprietary legacy for one's descendants. In other words, one has no dignity without freedom, and no freedom without equality before the law.

The factors listed in section 36(1)(a) to 36(1)(e) further narrow the scope of the limitation of rights and allow the courts to take other, unlisted factors into account, to decide whether or not the limitation is justifiable in an open and democratic society which is committed to the values of human dignity, equality, and freedom.

As was mentioned above, section 1(c) of the Constitution, which provides for the supremacy of the Constitution and the Rule of Law, is not in the Bill of Rights, and may thus not be limited by section 36.

EXPROPRIATION OF MINERAL RIGHTS

According to Professor Richard A Epstein, "greater judicial sophistication has not brought forth higher

quality judgments, but rather the reverse".[216] Epstein contends that nineteenth century American judges gave better judgments because they were well aware of the limitations of their knowledge of economics and other issues outside the realm of law. Those judges tended, thus, to leave the people alone to determine the proper outcome of disputes themselves, through contract. As a consequence, those judges developed "a firm belief in the doctrine of freedom of contract".[217]

Modern judges, however, believe "they can know a great deal about specific transactions" and that "knowledge of economics is treated as a licence for intervention". This has led to a decline in respect for freedom of contract, where courts take various 'public policy' considerations into account in their determination of the outcome of disputes. According to Epstein, modern judges feel "justified in imposing a command and control system, with them in the role of commanders and controllers".[218] The problem, writes Epstein, is that today "we understand

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216 Epstein RA. *Economics and the Judges: The Case for Simple Rules and Boring Courts*. (1996). Wellington: New Zealand Business Roundtable. 8.

217 Epstein (footnote 216 above) 12

218 Epstein (footnote 216 above) 11.

concepts" but "fail to appreciate how difficult it is to use what we know".[219]

Epstein's wisdom resonated when I read the Constitutional Court's majority judgment, penned by Chief Justice Mogoeng, in the case of *Agri SA v Minister for Minerals and Energy*.[220]

This case is renowned in South Africa property law as it endorsed the controversial Mineral and Petroleum Resources Development Act (MPRDA) which expropriated all privately-owned minerals, to vest in 'the people' as the 'common heritage' of all South Africans, with the State as the 'custodian'.[221]

As we have seen above, the Constitution and the Rule of Law guarantee private property rights, and section 25 provides specifically that owners who have had their property expropriated in the public interest are entitled to compensation.

The judgment in *Agri SA*, unfortunately, breathed much confusion into the understanding of property rights and

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219 Epstein (footnote 216 above) 29.

220 See footnote 175 above.

221 Section 3 of the Mineral and Petroleum Resources Development Act (28 of 2002).

expropriation in South Africa, and, despite the Chief Justice saying that each case must be decided on its own merits, established a worrying precedent.

The majority bench erred substantially in this judgment in the following respects which will be discussed in more detail below:

- The Chief Justice engaged in ideology-laden economic and sociological commentary as the rationale for the judgment, which the Constitution does not endorse;
- The Chief Justice fell into the trap of giving more credence to the intention (form) rather than the reality (substance) of the MPRDA; and
- The Chief Justice relied on or created a dangerous understanding of the concept of 'expropriation'.

It is apt to take a cursory look at the MPRDA itself and why it is problematic when measured against the Constitution and the Rule of Law.

THE FLAWED PREMISE OF COMMON MINERAL OWNERSHIP

The entire Act, as well as the judgments which followed in its wake, originate in the very flawed premise that "South Africa's mineral and petroleum resources belong to the nation".

Section 3(1) of the Act provides:

> Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.

Section 2(a) provides that it is an "internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources" in South Africa. This is obviously fallacious in two ways.

Firstly, what is and what is not generally-accepted internationally is only of interpretive significance within South Africa's constitutional order and cannot form the basis of the intervention. South Africa is a sovereign state with the Constitution and the Rule of Law as its supreme law. The private property norms found in the Constitution and in the essence of the Rule of Law cannot be overruled simply because foreign actors have done so in their own jurisdictions.

Secondly, it is logically false, considering the nature of property and of property rights, to believe that South Africa's mineral and petroleum resources simply belong to all South Africans.

That which is owned by everybody is, after all, owned by nobody. The practical consequence of everyone owning something is that, inevitably, there will be tension and clashes of interest between them as to who is allowed to use it and in what way. This is a natural consequence of resource scarcity.

As Professor Hans-Hermann Hoppe writes, "… in order to avoid conflicts regarding scarce resources, we need rules of exclusive ownership of such scarce resources or, to say exactly the same, we need property rights to determine who is entitled to control what and who is not entitled to control what".[222] Elsewhere, Hoppe writes:

> "In the absence of a prestabilized harmony of all individual interests, only private property can help avoid otherwise – under conditions of scarcity – unavoidable conflict. And only the principle of property acquisition by means of original

[222] Hoppe H-H. "Hans-Hermann Hoppe: World Government vs. Freedom and Civilization". (2017). *The Ludwig von Mises Centre*. https://misesuk.org/2017/04/22/hans-hermann-hoppe-world-government-vs-freedom-and-civilization/. Accessed: 4 December 2017.

> appropriation or mutually beneficial transfer from an earlier to a later proprietor makes it possible that conflict can be avoided throughout – from the very beginning of mankind until the end. No other solution exists."[223]

Property rights, simply, exist to avoid conflict. And if everyone 'owns' everything, conflict cannot possibly be avoided, thus defeating the purpose of property rights. This notion is thus incompatible with the notion of property rights and, therefore, the Rule of Law.

The notion is, furthermore, convenient for government, as it inevitably always acts as the 'custodian' of the common property, and, in practice, as the true owner. In the context of the Act, regardless of whether it or the Constitutional Court attaches some special meaning to 'custodianship', it is government which is the *de facto* owner of the now-expropriated property, not the people.[224]

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223 Hoppe H-H. "Of private, common, and public property and the rationale for total privatization". (2011). 3 *Libertarian Papers*. http://austrianeconomics.org/sites/default/files/lp-3-1_3.pdf/. Accessed: 4 December 2017. 3.

224 Hoppe (footnote 223 above) 5.

THE STATE AS CUSTODIAN OF MINERAL RESOURCES

Assuming, however, that South Africa's mineral and petroleum resources truly belong to 'the people', it does *not* follow that the State is supposed to be the 'custodian' thereof. This is a *non sequitur* entrenched in the Act.

Indeed, if the people are the owners, then why do the people not own the minerals as private property? In fact, why did government not establish a 'Mineral Owners' Corporation', make all South Africans equal shareholders, and uninvolve itself? As true owners, South Africans could then have sold their ownership, if they so wished, or shared in the rent that mining companies would have had to pay for the ability to mine.

Opponents might argue that a monopolisation effect might occur, whereby mineral rights will consequently always end up in the hands of the wealthy, but this is another intellectual error. Indeed, the Coase theorem affirms that the resource, whatever it is, will always end up where it will be put to the best and most productive use. The wealth comes after that. In other words, the wealth does not precede the company's ability to be more productive with the minerals than ordinary people

and the State. The company is awarded for its efficiency and productivity with wealth.

Therefore, indeed, the mineral rights will usually end up in the hands of the wealthy, but the wealthy are wealthy because they tend to put the mineral rights to the best use.

Furthermore, 'the wealthy' would acquire these rights on an open market, whereby the true previous owners sell it to them on a completely voluntary basis. If a large proportion of mineral-owning South Africans decide to sell their rights to the minerals, they have identified that they will be better served by the money they will receive immediately from the transaction, rather than from the money they will receive in dividends in the future.

Indeed, there is *no* ownership without the ability to *alienate*. Thus, were the Act serious about making South Africans the owners of the mineral and petroleum resources of the country, it follows that, as owners, South Africans would be able to sell their property to other South Africans or even to foreigners. If this is not allowed, as it is not, there is no true ownership, but a legal fiction which amounts to little more than a lie that overwhelmingly benefits the government bureaucracy.

ARBITRARINESS ABOUNDS

The Act has various provisions sanctioning arbitrariness, mostly on the part of the Department of Mineral Resources. Only some of these provisions will be discussed below:

Section 3(2) provides that the State *may* "grant, issue, refuse, control, administer and manage" virtually anything and everything related to mining. It further provides that it may "determine and levy any fee or consideration payable". There are no criteria or conditions constraining this discretion, other than the similarly open-ended section 3(3) which says the Minister must, among other things, "ensure sustainable development" of resources. Knowing that no court – according to the dominant judicial philosophy of deference – will inquire into whether the actions of the Minister *actually* ensures sustainable development, this provision has no practical significance.

Section 5(4) provides that nobody may engage in mining or exploration for minerals without the State's permission. This flies in the face of the notion that South Africans 'own' the mineral wealth of this country. Owners do not require permission to exploit their own property.

Section 49 provides that the Minister may "prohibit or restrict" granting mining and prospecting permits in respect of land if the Minister feels it is in the national interest and in the promotion of sustainable development to do so. The restriction may be lifted or amended if the Minister is of the opinion that circumstances have changed.

It should be clear that this kind of provision opens the door to untoward and even corrupt conduct.

Without real criteria on what the Minister must take into account when making these determinations, or sufficiently-strict circumscription of this power, this provision can easily lead to cronyism and bribery on the part of opportunistic corporations and bullying of dissenting companies on the part of government.

Section 51(1) provides that the Minister may order holders of mining rights "to take corrective measures" if the Minerals and Mining Development Board believes "the minerals are not being mined optimally". If the holder does not comply, the Minister may "suspend or cancel" the mining right. As with the previous provision, this enables similar kinds of corruption since only the market can determine whether a resource is being used

in an optimal fashion, and as soon as bureaucrats get to decide, arbitrariness sets in.

It is important to remind the reader that I am not extending the scope of this text to the field of economics. The problem is that the Constitutional Court in *Agri SA* engaged in economic commentary when it was supposed to lay down the law as it stood and, if necessary, strike down the law which conflicts with the Constitution and the Rule of Law. It did not do so, as will be seen below.

The MPRDA does not adhere to the principles of the Rule of Law, as it is constitutionally required to do. The Act could have achieved its objectives *and* complied with the imperatives of the Rule of Law, but the noncompliant drafters likely knew that this would have made government's job far more inconvenient and difficult, which is, of course, partly the point of a constitutionalist legal order.

Inconvenience is no excuse to circumvent constitutional principles. It is for this reason that I do provide economic commentary to show that it is not a legal principle, but an opinion unrelated to law, being enunciated by the court.

AGRI SA V MINISTER FOR MINERALS AND ENERGY

The Mineral and Petroleum Resources Development Act was enacted in 2002, "freezing the ability to sell, lease, or cede [property rights in the minerals] until they were converted into prospecting or mining rights" under the new system.[225]

Before the Act, owners of the property on which the minerals were found could do with it as they pleased. The Act brought this to an end, causing "grave dissatisfaction, particularly among major landowners". The case before the court concerned Agri South Africa, a federation of agricultural organisations, which was representing the mining company Sebenza. Agri SA contended that the Act had "the immediate effect of expropriating mineral rights", and this required compensation (which they had not received) in terms of the Constitution.[226]

Government rejected Agri SA's claim for compensation,[227] as did the court.

In my view, this judgment represents one of the worst precedents set in contemporary South African legal

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225 At para 2.
226 At para 3.
227 At para 16.

history. This not only for the devastating consequences it had on the mining industry, but also because it represents a break in the integrity of the law, especially as it relates to the role of law as a protector of, and not an aggressor against, property. The most problematic aspects of the judgment will be discussed below.

THE CHIEF ECONOMIST

In the introduction to the majority judgment, Chief Justice Mogoeng comments that "about 87 percent of the land and the mineral resources" of South Africa belong to "13 percent of the population".[228] He continued, saying that there is "a high unemployment rate and a yawning gap between the rich and the poor which could be addressed partly through the optimal exploitation of [South Africa's] rich mineral and petroleum resources, to boost economic growth".[229]

According to the Chief Justice, if the MPRDA were not enacted, the majority of South Africans "would have no

[228] At para 1.
[229] At para 2.

properly structured access to the lucrative mineral and petroleum resources of this country".[230]

The Chief Justice continues, writing that the "MPRDA constitutes a break through the barriers of exclusivity to equal opportunity and to **the commanding heights** of wealth-generation, economic development and power. It seeks to address the injustices of the past in the economic sector of our country in a more balanced way, by treating individual property rights with the care, fairness and sensitivity they deserve".[231]

Most worryingly, "commanding heights of the economy" is a phrase taken from Vladimir Lenin, the communist revolutionary and co-founder of the Soviet Union. As Anatoly Chubais, a Soviet dissident economist, said in an American *PBS* interview:

> "… that was a Lenin phrase, 'commanding heights of the economy,' which meant to him main sectors like steel industry, coal industry, electricity industry, railways, transportation systems. That was the commanding heights for Lenin, and that was the commanding heights of that time. The idea was that the state should control everything. **But**

[230] At para 22.

[231] At para 73. My emphasis.

> **there are some things that should be controlled as soon as possible and made as strong as possible**".[232]

With this explanation in mind, the Chief Justice's inclusion of this concept of political economy in the majority judgment is perhaps the most ideology-laden reference in the *Agri SA* decision.

Such a judicial laudation of a particular piece of legislation, the MPRDA, is inappropriate. The judgment is in part written as if it were an official statement by the Department of Mineral Resources, rather than a judgment from South Africa's highest court.

The Chief Justice assumes, without providing any reasoning, that the legislation will practically achieve that which it *says* it will. It is true that courts cannot inquire into the efficiency of matters that are properly within the scope of the legislative branch. This, however, applies both ways. Just like the court is in no position to *question the inefficiency* of legislation, it *is not to assume efficiency*. The court, in this case, thus established the rationality of the MPRDA improperly by assuming there is a rational

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[232] "Commanding Heights: Anatoly Chubais". (2000). *PBS*. http://www.pbs.org/wgbh/commandingheights/shared/minitext/int_anatoliichubais.html#8/. Accessed: 4 December 2017. My emphasis.

relationship between the social ill the legislation seeks to cure, and the manner in which it proposes to do so.[233]

The Chief Justice further assumes that inequality in South Africa can be partly addressed "through the optimal exploitation" of mineral and petroleum resources. Many might justify this as an instance of judicial notice,[234] however, this is a contentious area of economics.

It may well be that even with the best exploitation of mineral and petroleum resources – which can only be under a system of private property and freely-operating market forces – that inequality will not be lessened at all, bearing in mind that inequality is a relative concept. The poor and rich might both become wealthier, but the *gap* (i.e. inequality) which separates their respective levels of wealth might remain constant or even grow.

It was irresponsible for the court to assume it as simply true that the legislation is, in reality, effective at 'addressing' inequality. The Rule of Law requires

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233 See pages 54-56 for a discussion on rationality.

234 Judicial notice is a rule in the law of evidence whereby the court takes 'notice' of a fact assumed to be true by virtue of common sense or because it is very widely-accepted. For instance, a party to a case need not prove that when the Sun shines in one's eyes, one might be temporarily blinded. The court simply takes notice and assumes that to be true.

legislation to be reasonable, which includes rationality and proportionality, meaning the court was bound to undertake a far deeper analysis of the statute to determine its efficiency.

SUBSTANCE OVER FORM

With the Chief Justice's deeply-flawed rationale in mind, it was assumed that the observations he had made warranted the court's endorsement of the Act. To put it another way, someone might *say* that throwing gasoline on a fire will put the fire out when, in fact, it will not. But surely the fire is a problem, and it needs to be put out! Ergo, the gasoline must be used to put out the fire. This is ridiculous, but effectively exactly what the court did: it assumed without evidence that the MPRDA is helping 'put out the fire' of poverty in South Africa.

But South African law adopts a *substance over form* approach, meaning that courts must look to the substance (the objective facts, the reality) of a matter, rather than its form (the façade). For instance, if employees accept payment in the form of 'donations' from their company in order to avoid paying income tax, the court will regard those 'donations' as wages, because,

in substance but not form, they are wages. The company and employees might then likely be guilty of some form of tax evasion even though the transaction was *said* to be of a different nature.

In the second *Harris v Minister of the Interior* case in 1952, the Appellate Division had to decide whether Parliament had validly created a 'court' – known as the High Court of Parliament – that would review the Appellate Division's judgments on constitutional questions. This was during the time of parliamentary sovereignty, so when the court *inter alia* held that the High Court of Parliament was not *in substance* a court, the Appellate Division was taking a risk. Indeed, this judgment took place during the infamous constitutional crisis briefly mentioned in CHAPTER 2 above.[235] The so-called High Court of Parliament, while purporting to be a "Court of Law", was, in fact, merely Parliament sitting *as if* it were a judicial body. The Chief Justice at the time, Albert van der Sandt Centlivres, held that the Appellate Division should look "at the substance and not merely the form of the [High

[235] The constitutional crisis was a complicated and multi-faceted affair. For more information, see footnote 28 above.

Court of Parliament Act[236]]", and, if it were "only to look at the form of legislation, constitutional guarantees might be of very little value".[237] Another Judge of Appeal, Oscar Hendrik Hoexter, reiterated Centlivres' view, saying that by simply *accepting* the Act's purpose (to be a court of law) because the Act itself *says* so, does not mean this is the reality of the situation as it begs "the very question in issue". Hoexter said it is the Appellate Division's "duty to penetrate the form of the Act in order to ascertain its substance".[238] By looking at the substance of the Act, the Appellate Division held the High Court of Parliament Act to be invalid.[239]

In *Agri SA,* Chief Justice Mogoeng, accepts, without further ado, for example, that the MPRDA in fact succeeds or indeed addresses South Africa's high unemployment rate, inequality between rich and poor, and poor economic growth, simply because the Act purports to do so. In reality, the MPRDA has done the opposite – it has contributed largely to the mining industry's demise.

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236 High Court of Parliament Act (35 of 1952).

237 *Harris v Minister of the Interior* 1952 (4) SA 769 (AD) at page 783.

238 At page 769.

239 Marshall (footnote 28 above) 220-223.

The Chief Justice was quite explicit about the court's preference for form over substance. He wrote that "the deprivation was not arbitrary, and this is correct considering both the objects of the MPRDA and the transitional arrangements".[240] In so doing the Chief Justice submitted that the Act could not possibly have had a consequence that is not contemplated in its objects. He has ascribed more value to the Act's form than to its substance. Regardless of the legislation's real consequences, the Chief Justice was in no position to assume that the Act is, in fact, doing what it says it said it was doing.

There are three things to consider, in this respect, when interpreting legislation:

- What the law *says* it intends to do (preamble, motivation, objects);
- What the law *actually* provides for (substantive provisions); and
- What the *consequences* of the law are in reality (practicability, economics, politics).

Take the following hypothetical example:

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[240] At para 53.

The Unicorns Act of 2017, in its preamble and long title, states that many South Africans do not have a mode of transportation to and from work. The State must therefore intervene. The *motivation* for the law has been established.[241]

In section 2, the Act provides that government must give every citizen earning less than R14,000 per month a free unicorn. Those same citizens must then receive a unicorn allowance every month for maintenance. This is what the Act *actually* provides.

But there are no unicorns, because they do not exist, and the unicorn allowance paid to citizens earning less than R14,000 per month is a clear waste. This is the *consequence* and the *reality* of the law.

Thus, in a substance over form analysis by a court, the court must not merely say that because the Act is motivated by an ostensibly just goal that it is lawful. That would be a purely formal analysis. The court must, of necessity, conclude that the law is irrational and thus in

[241] It must still be borne in mind, however, that everything the State does must be related to a *legitimate government purpose*. It is very unlikely that providing transportation would be a legitimate government purpose, in the same way much of the MPRDA's objectives fall outside what should be seen as legitimate.

conflict with the Rule of Law, because, in substance, there are no such things as unicorns, and, therefore, there exists no rational relationship between the ends the law seeks to achieve, and the means it seeks to employ to achieve that end. The Act must be declared unconstitutional.

In *Agri SA*, the majority of the Constitutional Court did not "penetrate the form of the Act in order to ascertain its substance". It submitted itself entirely to the form and façade of the Act, and not to its reality.

The minority judgment did not fare much better in this regard. Judges Johan Froneman and Johann van der Westhuizen, too, had more regard to the form over the substance of the MPRDA, by assuming its efficiency. Lamenting, correctly, South Africa's history of dispossession, Froneman argues, without reason, that the MPRDA has allowed South Africa "to transcend" our Apartheid past, by "giving concrete expression, in a particular way, to the use of" the constitutional requirement of ensuring equitable access to natural resources.[242]

[242] At para 82.

This is, of course, not true. The mere fact that the MPRDA asserts itself as healing the injustices of Apartheid does not mean that this is what, in fact, it does.

"If judges depart from the law on the basis of their personal moral and political views," writes Professor Denise Meyerson, "we risk judicial lawlessness". The object of the Rule of Law – "to control the exercise of power" – is then defeated.[243]

EXPROPRIATION

Expropriation occurs when property is taken by government for whatever reason, and for which the consent or cooperation of the owner is not necessary.

According to the late Professor AJ van der Walt, South Africa's common law knows no concept of expropriation,[244] although the likes of Hugo Grotius, a pioneer in the Roman-Dutch tradition, is credited with

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243 Meyerson D. "The Rule of Law and the Separation of Powers". (2004). 4 *Macquarie Law Journal*. http://www5.austlii.edu.au/au/journals/MqLJ/2004/1.html. Accessed: 30 November 2017.

244 Van der Walt AJ. *Property and Constitution*. (2012). Pretoria: Pretoria University Law Press. 21.

coining the notion of 'eminent domain'.[245] According to the ordinary principles of common law of property, ownership vests in a thing through original acquisition[246] or when it is voluntarily transferred to another; and is stolen when taken without the consent or cooperation of the owner. Expropriation can largely be regarded as a creature of statute and creates a fiction of legality that cloaks the stealing of property by the State.[247]

Section 25(2) of the Constitution does allow for expropriation, but only in limited circumstances. For an expropriation to be legal, it must take place:

- Within the framework of a **law of general application**;
- For a **public purpose** or in the **public interest**; and
- Subject to **compensation**.

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245 Peng C. *Rural Land Takings Law in Modern China: Origin and Evolution*. (2018). Cambridge: Cambridge University Press. 143

246 You are the first individual to appropriate the thing, i.e. it was not owned beforehand. There are other methods of original acquisition as well. See Van Schalkwyk (footnote 205 above) 112.

247 In other words, it is a concept that was introduced into the law by legislation as passed by Parliament. At the time of writing, the Expropriation Act (63 of 1975) governed expropriation in South Africa, but the new Expropriation Bill (2018) is expected to enter into law soon.

What has been confusing in our law, however, has been the distinction between *deprivation* and *expropriation*. It is outside the scope of this book to engage in the necessary criticism of this apparent distinction, the most flawed expression of which was in the case of *First National Bank v SARS*.[248] This critique will be done elsewhere. But to summarise: by allowing expropriation to occur under the guise of 'deprivation', the court effectively rendered sections 25(2) and (3), and the protection for property they include, redundant. It is imperative that no judicial interpretation of a constitutional provision renders that or other constitutional provisions redundant. Every section and clause of the Constitution must be regarded as substantive and consequential.

The Chief Justice's greatest violation of the substance over form rule, thus, is when he writes that it is apparently clear that "whatever 'custodian' means, it does not mean that the state has acquired and thus has become owner of the mineral rights concerned".[249] This means that compensation is not required for mineral rights lost to

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248 *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

249 At para 71.

the State – whether it is the 'custodian' or owner – and thereby in essence opening the door to government expropriation of any property it wishes under the façade of custodianship (as a *deprivation* of property), and absolving itself of the constitutional responsibility to pay compensation.

Froneman noted correctly in the minority judgment that the majority was incorrect by proposing that acquisition by the State "is an essential requirement for expropriation" and that there was in fact no acquisition in this case.[250] The Act, indeed, "abolished private ownership of minerals" and replaced it with a system where the State acts as "the custodian of mineral resources".

Even though Froneman considers it "just and equitable" for South Africa to have undergone the "institutional change" which the MPRDA heralded, it was unconvincing to him that "the power of disposition that private mineral ownership entailed was not acquired or does not now vest in the state".[251] "What private owners of minerals

[250] At para 79.
[251] At para 80.

previously had", writes Froneman, "the state now has".[252] Froneman observes astutely:

> "If private ownership of minerals can be abolished without just and equitable compensation – by the construction that when the state allocates the substance of old rights to others it does not do so as the holder of those rights – what prevents the abolition of private ownership of any, or all, property in the same way? This construction in effect immunises, by definition, any legislative transfer of property from existing property holders to others if it is done by the state as custodian of the country's resources, from being recognised as expropriation."[253]

In any event, the Chief Justice's errant conclusion relied in part on the flawed notion expressed in the Supreme Court of Appeal that the "right to mine" is "a gift from the state"[254] and partly on the flawed premise of custodianship as discussed above.

Whether the right to mine is a 'gift' from the State is a question of philosophy and ethics. It is not a legal question, and thus the Chief Justice should not have given the notion the force of law. The Constitution itself does not declare the State to be the custodian or owner

252 At para 81.
253 At para 105.
254 At para 20.

of minerals in South Africa, and thus the conclusion that it simply 'is' is false and horrendously dangerous.

The reader will recall that constitutionalism means, for the government, *that which is not allowed is prohibited*. It is section 3(1) of the MPRDA, an ordinary piece of legislation, that declares the State to be the custodian of mineral and petroleum resources. This declaration cannot be regarded as constitutionally authoritative, but that is what the judgment in *Agri SA* in essence does, making it a bad judgment as concerns property rights.

CHAPTER 9
AFFIRMATIVE ACTION

OVERVIEW

Affirmative action, understood to mean legalised discrimination based on group characteristics to achieve material equality, usually between gender or racial groups, has become widely accepted in South Africa in the years since the Constitution was enacted, to the extent that questioning it in public is now widely considered taboo. This does not mean that all South Africans favour the idea, with many indeed being vehemently opposed to it.

A strong argument can be made against affirmative action based on empirical data from the United States – and increasingly, South Africa itself – which shows the intended beneficiaries of affirmative action do not benefit as much as expected, or at all, and that it is indeed often detrimental to that very same group. There is also a strong case to be made for the fact that affirmative action is immoral, in that it has government interfering in private, voluntary affairs in order to further its own ideological agenda. The economics and ethics of

affirmative action, however, fall outside the scope of this book.

But there is something to be said about this practice within the context of the Constitution and the Rule of Law.

EQUALITY UNDER THE CONSTITUTION

The first provision of the Bill of Rights, section 7, provides that government must "respect, protect, promote and fulfil the rights in the Bill of Rights". This is clear and unambiguous: The government cannot create new fundamental rights from thin air, especially if they potentially conflict with existing rights in the Constitution. Indeed, section 39(2) provides that when legislation is interpreted, the spirit, purport, and objects of the Bill of Rights must be promoted. Thus, government has the constitutional obligation to protect and fulfil *those rights which appear in the text of the Bill of Rights as it stands*, which span sections 7 to 39.

Section 9 of the Constitution, which contains the right to equality, along the Equality Act, provide the basis upon which affirmative action, black economic empowerment,

and employment equity are apparently built in South Africa.

Section 9, in full, provides:

> Equality
>
> 9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 9(1) is the foundation of the provision, in the same way section 25(1), as discussed above, provides the foundation for the property rights provision, and section 1 provides the foundation for the entire Constitution. Section 9(1) provides the general principle: Legal equality between all people of whatever race and whatever sex.

Section 9(2) provides that the government must ensure that there is full and equal enjoyment of all rights and freedoms. The "rights" and "freedoms" this provision refers to are those rights which *already appear* in the Constitution, as the discussion on section 7 above indicates.

It is important to emphasise this point.

As discussed above in relation to public participation, the 2016 DTPS ICT Policy White Paper is again relevant. The policy provided in its introduction that it is premised on the government's "constitutional objective" of improving the quality of life of all citizens and freeing the

potential of each person. It references the Preamble to the Constitution.[255]

The Preamble to the Constitution was formulated in the particular post-Apartheid context of national healing and reconstruction, and was intended to orientate the reader who was gearing up to read the full text of the Constitution. It is like a preface (as opposed to an introduction) to a book, meaning that it *stands on the outside, looking in and making commentary*. The Preamble is a poetic statement of intent about the provisions which exist within the text of the Constitution; it is not itself an enforceable part of the highest law.

The Preamble is not, however, unimportant.

In the case of *S v Mhlungu*,[256] Judge Albie Sachs said that the Preamble "should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes".[257] The Preamble, however, is not

255 DTPS (footnote 146 above) 1.
256 *S v Mhlungu and Others* 1995 (3) SA 867 (CC).
257 At para 112.

directly enforceable, because the Constitution itself has many provisions which give effect to the Preamble's vision. To make the Preamble enforceable could render other provisions in the Constitution superfluous.

The DTPS, by premising the White Paper on a line in the Preamble, makes a legal mistake that permeates the whole policy document, as well as the Electronic Communications Amendment Bill that was based on it. Government read new law into the Constitution, which it cannot do. It took a line intended to be a preface to what is textually provided for in the Constitution and turned it into a provision in and of itself, which ostensibly places an obligation on the government. Government thus fabricated a constitutional mandate.

The White Paper also references section 9.

According to the policy document, section 9 says that there is a "right to 'full enjoyment' of all opportunities in South Africa".[258] This, however, is not the case. Government, once again, has read something into the Constitution which is not actually there.

[258] DTPS (footnote 146 above) 1.

Section 9(2), as quoted above, does not include the phrase "all opportunities in South Africa". Instead, it provides that government must ensure that there is full and equal enjoyment of all *rights* and *freedoms* contained in the Bill of Rights.

With reference to the earlier discussion on the judiciary, it is again important to remember that the Constitution does not always provide what one, especially government, wants it to provide. The ICT White Paper is based on fundamentally flawed premises resulting from a politically-charged reading of the Constitution. With this in mind, we can approach the issue of affirmative action more broadly.

Section 9(2) also provides that the government must enact "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination". This clause is the basis of affirmative action in South Africa, and this legalised discrimination is most often based on race and sex.

The following provision, section 9(3), provides that government may not discriminate unfairly against anyone based on race, sex, and various other grounds.

"National legislation must be enacted to prevent or prohibit unfair discrimination", according to section 9(4), and discrimination "is unfair unless it is established that the discrimination is fair", according to section 9(5).

Whether or not racial affirmative action is allowed comes down to one question: What is and what is not "unfair discrimination"?

This is where the Equality Act becomes relevant.

PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT

The Equality Act was enacted to give effect to section 9 of the Constitution. It is the "national legislation" required by section 9(4) and is the statute that defines what "unfair discrimination" means.

Section 14 of the Act provides that it "is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons".

Some of the factors which the Act lists in determining fairness or unfairness are:

- The context of the discrimination.
- Whether the discrimination reasonably and justifiability differentiates between people based on objectively-determinable criteria, intrinsic to the activity in question.
- Whether the discrimination impairs or is likely to impair the human dignity of the complainant.
- The impact of the discrimination on the complainant.
- The position of the complainant in society (whether they suffer from patterns of disadvantage).
- The nature and extent of the discrimination.
- Whether the discrimination is systemic in nature.
- Whether the discrimination has a legitimate purpose.
- Whether the discrimination achieves its purpose.
- Whether there are less disadvantageous means to achieve said purpose.

These factors, accumulatively, essentially mean that a court will need to consider the context of the activity in question, the persons – both complainant and

respondent – and the discrimination itself, to determine whether the discrimination is fair.

For example, if a film studio is making a movie about Nelson Mandela, a white woman auditioning to play the role of Mandela can be fairly discriminated against because the fact that the studio needs a black man to play the part is *intrinsic* to the activity. Rejecting this woman for the part would also not impair her human dignity in the context, given that she likely expected to be rejected, and that the discrimination was not an affront to her identity. Instead, the discrimination was simply logical and had nothing to do with her as a person.

The court interpreting the case of apparent discrimination will need to go down this list of factors in the Equality Act and exercise its discretion to determine whether or not unfair discrimination has taken place.

The Employment Equity Act[259] has a similar provision to that in the Equality Act. Section 6(2) of that Act provides *inter alia* that it "is not unfair discrimination to take

[259] Employment Equity Act (55 of 1998).

affirmative action measures consistent with the purpose of this Act".

AFFIRMATIVE ACTION IS SANCTIONED BY THE CONSTITUTION

Many people argue that affirmative action is unconstitutional because it violates the right to equality in section 9 of the Constitution.

This, however, amounts to reading the Constitution under the haze of confirmation or selection bias.

Section 9(2) of the Constitution unequivocally gives government the power, and indeed the obligation, to engage in positive intervention in society to achieve substantive – rather than merely formal – equality. I can write at length why this is unfortunate and why South Africans would have been better off had the Constitution not provided for this, but this is not within the scope of this book.

In the 2004 case of *Minister of Finance v Van Heerden*,[260] Judge Dikgang Moseneke said for the majority of the

[260] *Minister of Finance and Others v Van Heerden* 2004 (6) SA 121 (CC).

Constitutional Court that without such a positive obligation on government "to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow".[261]

If all affirmative action is regarded as unconstitutional, section 9(2) of the Constitution would become redundant. This would mean a misinterpretation of the Constitution and amount to the court or the reader of the document replacing what the Constitution provides with their own opinion. If this were allowed, it would amount to the rule of man rather than the Rule of Law.

THE RULE OF LAW

Where in this elaborate scheme, however, are the Founding Provisions – the Rule of Law and South Africa's commitment to non-racialism and non-sexism?

As Judge Madala implied, the Founding Provisions permeate the Constitution, including the section 9 right

[261] At para 31.

to equality. Non-racialism is *engrained within the fabric of section 9*, as it is within the rest of the Constitution. When the legislature set out to define what "unfair discrimination" means in the Equality Act and the Employment Equity Act, it should have understood that it cannot remove section 9 from the blanket of non-racialism within which it was wrapped by default.

The Constitutional Court has in various cases affirmed this principle.

In *SAPS v Solidarity*,[262] Judge Moseneke said that South Africa's "quest to achieve equality must occur within the discipline of our Constitution".[263] And in *Bel Porto v Premier of the Western Cape*[264] Judge Chaskalson said that the "process of transformation must be carried out in accordance with the provisions of the Constitution and its Bill of Rights".

The Constitutional Court has, however, often made logical leaps without further ado. The very next thing Chaskalson said was, that "in order to achieve the goals

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262 *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC).

263 At para 30.

264 *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* 2002 (3) SA 265 (CC).

set in the Constitution, what has to be done in the process of transformation will at times inevitably weigh more heavily on some members of the community than others".[265]

Nowhere does the Constitution provide or imply that the achievement of equality for some must necessarily or "inevitably" come at the expense of others. As in the discussion above about the judiciary, this is also an example of the phenomenon known as the zero-sum fallacy. It is clearly implicit in Chaskalson's statement that equality is a limited resource which must be distributed. To make the have-nots equal with the haves, the haves must in some way be disadvantaged.

This, of course, is not only jurisprudentially false, but conceptually false as well. The achievement of equality need not be at anyone's expense because wealth can be created anew. More importantly, however, the achievement of equality *may not be* at anyone's expense if it is to be achieved according to criteria based upon race or sex.

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[265] At para 7.

In the case of *Bato Star v Minister of Environmental Affairs*,[266] Judge Ngcobo also makes a logical jump, saying that South Africa's constitution, unlike other constitutions around the world, does not "assume that all are equal". Instead, it recognises the inequality which resulted from Apartheid and obliges "positive action" (by government) to achieve substantive equality.[267]

While it is true that the Constitution does oblige positive action, Ngcobo assumes, without further ado, that assuming "all are equal" automatically means existing inequalities will be entrenched. While a discussion on economics is outside the scope of this book, it does become relevant when judicial officers venture into the realm of economics and err, making fundamentally flawed assumptions about the principles and laws governing economics. Indeed, it does not follow that when the law treats materially-unequal persons equally, that the law is 'reinforcing' or 'supporting' that inequality. In fact, it does not even mean that the inequality will necessarily persist. This error is not a new notion, and, indeed, is a mantra often employed in

266 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC).

267 At para 74.

opposition to the free market. It is said that if the market is unregulated and government does not positively intervene, existing (racial, ethnic, sexual) patterns of ownership, employment, and wealth will 'simply' reproduce themselves into eternity.

This fallacy assumes that government has some grand ability to 'make equal', an ability not possessed by the forces of the market. It has, instead, been shown that 'the rich' in society is not a static group, with new people entering the Forbes 500 list routinely, and, more crucially, many falling out of it. Further, 'the poor' has never been a fixed group of particular people and South Africa's post-Apartheid experience brilliantly illustrates this. Many black South Africans have progressed in leaps and bounds out of absolute poverty. The mere fact that some of South Africa's richest individuals are black completely eviscerates the assumption embedded in Ngcobo's reasoning.

It suffices to say that Judge Ngcobo unduly placed himself in the position of an opinionated economist when writing this judgment, and thereby breathed his own economic opinions into South African affirmative action law. This is a violation of the Rule of Law principle

that society must be governed by law, and not by the whim of man.

If the Constitutional Court is essentially incorrect in this interpretation, then what does the Constitution *actually* provide in section 9(2), and does it prohibit affirmative action entirely?

As previously mentioned, the Constitution is not a completely classically-liberal constitution, unlike that of the United States. This is evident from the welfare entitlements provided for in the Bill of Rights. This fundamentally means that the Constitution does envision a role for government to try to uplift the poor and marginalised in society, whereas an absolutely classically-liberal constitution would leave that in the hands of the people themselves and market forces.

Section 9(2), furthermore, clearly allows government to positively intervene in society to achieve "full and equal enjoyment of all rights and freedoms" in the Bill of Rights. The Constitution, however, expressly provides, not once, not twice, but *repeatedly*, that such intervention cannot be of a racial or sexual character. It does not call for quotas and racial affirmative action

anywhere; in fact, it goes to great lengths to condemn racialism.

In section 1(b), the Constitution provides that South Africa is *founded* on the value of non-racialism. Section 1(c) provides for the supremacy of the Constitution and the Rule of Law, with the Rule of Law *inter alia* meaning the law must apply equally to those subject to it. Section 3(2) provides that *all* citizens are *equally* entitled and subject to the rights and duties of citizenship. Section 7(1) provides that the Bill of Rights *enshrines* the rights of *all* people and *affirms* the value of equality. Section 9(3) provides that unfair discrimination based on race is prohibited unless the discrimination is fair. And the determination of the fairness of discrimination *cannot* take place without due regard to the founding value of non-racialism. Finally, section 36 provides that a right in the Bill of Rights, such as the right to equality, can only be limited if the limitation is reasonable and justifiable in an open and democratic society based among other things on equality.

It must also be remembered that section 9(2) provides that equality means the equal enjoyment of those freedoms and rights in the Bill of Rights, and not any other so-called freedoms or rights. In this respect, it is

noteworthy that there is no right in the Bill of Rights to demographic 'representivity' (quotas) in private corporate structures.

CONCLUSION

Section 9(2), on this understanding, enables the State to engage in affirmative action according to criteria that are not premised on considerations of race or gender – in other words, affirmative action for *anyone* and *everyone* who has been prejudiced by unfair discrimination, but only in achieving equality of the rights contained in the Bill of Rights.

This will, at the end of the day, still be overwhelmingly beneficial for black South Africans, but it cannot exclude white South Africans or South Africans of whatever other race who have similarly been victims of unfair discrimination.

Furthermore, this quest for equality will ensure that it does not benefit some at the expense of others, as it would absolutely prohibit employment and ownership quotas and 'programmes' aimed only at benefiting a particular race group.

Racial affirmative action renders section 1(b) of the Constitution completely redundant. Including 'non-racialism' as a founding value in the Constitution is useless if government and the Constitutional Court can simply 'interpret' it as being compatible with government action that discriminates on the basis of race.

Racial affirmative action is precluded not only by the Rule of Law principle that all are bound equally by the law, but by the very text of the Constitution itself, despite the Constitutional Court having interpreted it otherwise.

CHAPTER 10
EDUCATION

THE CONSTITUTION

According to an article in *The Economist* on 7 January 2017, South Africa has one of the world's worst education systems, despite spending 6.4% of our gross domestic product on public education. *The Economist* claims "Few countries spend as much to so little effect".[268]

Section 29 of the Constitution provides for the right of South Africans to education.

There is both a *negative right* to education, meaning that the State must not interfere with South Africans' pursuit of education, and a *positive entitlement* to education, meaning the State must progressively make education available.

"Public educational institutions" are mandated, but independent, or private, institutions are also allowed. Section 29(3), in full, provides:

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[268] "South Africa has one of the world's worst education systems". (2017). *The Economist.* https://www.economist.com/news/middle-east-and-africa/21713858-why-it-bottom-class-south-africa-has-one-worlds-worst-education/. Accessed: 30 November 2017.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that –

(a) do not discriminate on the basis of race;

(b) are registered with the state; and

(c) maintain standards that are not inferior to standards at comparable public educational institutions.

This is an unequivocal negative right, meaning that the people have the freedom to establish independent schools, universities, and their associated curricula, subject to only three criteria.

Simply, these institutions must not be racially discriminatory, must be registered, and must be of the same or superior quality than the equivalent public institution.

This is a *numerus clausus* – a closed list – which means only these three items must be satisfied. Government cannot legally introduce other criteria or make it more onerous than what the Constitution provides for, to establish independent educational institutions – except if

government introduces a limitation of this right which adheres to the criteria in section 36 of the Constitution.[269]

SCHOOLS

In 2013, the Minister of Basic Education, Angie Motshekga, said that basic education policies "provide adequate space" for "individuals to exercise their constitutional right to establish and operate an independent school".[270] The Minister's rhetorical support for private schooling, however, is undermined by legislation.

Section 46(2) of the South African Schools Act[271] provides that provincial members of the executive council (MECs)

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269 A strong argument can be made that section 36 of the Constitution, which provides for the limitation of rights, will not come to government's assistance in this case. Section 29 already provides for limits to the right to independent education, meaning the applicability of section 36 should be construed narrowly by a court. To give section 36 its full application will render the closed-list nature of section 29(3)'s limitations redundant and easily circumventable. Section 36 is discussed in more detail in CHAPTER 8 above.

270 Motshekga A. "Written reply to question 2372." (2013) *National Assembly Internal Question Paper 31/2013*. http://www.education.gov.za/Portals/0/Media/Parliamentary%20Questions/NA%20Q%202372.pdf?ver=2015-02-01-105805-660/. Accessed: 27 July 2017.

271 South African Schools Act (84 of 1996).

for education must determine the grounds on which independent schools may be registered or have their registration withdrawn. In order words, it is the MEC, not section 29(3) of the Constitution, that determines the criteria according to which independent schooling may occur.

Section 46(3), further, provides that the respective MEC "must" register an independent school if they believe the school complies with the grounds which the MEC has determined in terms of section 46(2). In other words, the Act gives MECs virtually unbridled discretion in determining the criteria to which independent schools must adhere before they can be registered.

This means the drafters of the Schools Act interpreted section 29(3)(b) of the Constitution as meaning government can, by fiat, simply introduce extra criteria for the establishment of private educational institutions, at least as far as schools are concerned. This defeats the *closed list* which is envisioned in the Constitution.

What would be the point of the Constitution containing the criteria for when an independent institution may come into being if a provincial official may at will simply introduce additional criteria?

It cannot be contended that the Constitution provides for the 'minimum requirements' only. If this were the case, one could argue that government may introduce legislation extensively regulating speech and expression despite what the Constitution provides, because the constitutional safeguards are simply the 'minimum', with the maximum left to be determined by government. The reality is that the provisions of the Constitution provide a ceiling – government conduct and intervention must take place within the constitutional framework and may not be more onerous than the relevant constitutional provision. The right to establish and maintain independent educational institutions cannot be called a 'right' if this is not the case.

The Schools Act thus clearly violates the Constitution and the Rule of Law. By empowering MECs to introduce as many criteria as they wish, the Act ignores the fact that the Constitution requires only three criteria to be met for a private school to be established. This is a manifestation of the rule of man over the Rule of Law.

HIGHER EDUCATION

In 2016, the then-Minister of Higher Education and Training, Dr Blade Nzimande, said that government "is not keen on allowing private universities on a full-blown scale" and that "private universities posed a serious threat to the public education sector".[272]

The Minister was clearly under the impression that it is within government's discretion to decide the "scale" to which private universities are "allowed". Unfortunately, existing legislation does create this impression, quite evidently in contravention of the Constitution, and the Rule of Law more broadly.

The Higher Education Amendment Act[273] is one such Rule of Law-violating statute. It amends the Higher Education Act,[274] which itself already fell short of adherence to the Constitution and the Rule of Law.

Section 3(3) of the Act, for instance, empowers the Minister to determine "the scope and range of

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272 Mabena S. "Government not keen on allowing private universities: Nzimande". (2016). *HeraldLive*. http://www.heraldlive.co.za/news/2016/10/13/government-not-keen-allowing-private-universities-nzimande/. Accessed: 30 November 2017.

273 Higher Education Amendment Act (9 of 2016).

274 Higher Education Act (101 of 1997).

operations" of public universities and colleges, and private universities and colleges, "in the interest of the higher education system as a whole". The Constitution, on the other hand, requires independent educational institutions to only not be racially-discriminatory and to be of an equivalent or higher standard than public institutions. Apart from the fact that this provision contains no criteria for how the Minister must go about making these determinations, the Act thus vests the Minister with an unconstitutional power.

The Amendment Act changes section 3(1), empowering the Minister to "determine policy on higher education" for, among other things, "transformation goals" and "criteria for recognition as a university, university college, or higher education college". Amusingly, the provision states that the Minister must take the provisions of the Constitution into account when determining higher education policy – but the provisions of the Constitution prohibit essentially any policy they could make which does not relate to the prohibition of racial discrimination.

A new section 42 was also inserted by the Amendment Act.

It provides the Minister with the power to issue "directives" to the management of public universities if the university – according to the Minister – is, among other things, "unable to perform its functions effectively". Sections 42(2) and 42(3) do venture to provide for criteria with which the Minister's directive must comply, however, it is insufficient. While it does, rightly, provide that the directive must clearly and unambiguously state what the university apparently did wrong, it does not constrain at all the ambit of the directive. The making of the decision itself is thus unrestricted; there are merely criteria providing what must be done *after* the decision has *already* been made.

The Amendment Act was passed amidst the furore of the controversial #FeesMustFall movement, which began as a campaign against increased tuition and registration fees at universities but has since morphed into a movement for 'free' university education and 'decolonised' (or 'Afrocentric') university curricula. The Amendment Act was sold as a means to empower the Minister of Higher Education to intervene in noncompliant universities and ensure this

'transformation' is realised.[275] However, according to David Reiersgord of Stellenbosch University, the legislation "is ideologically oriented towards a populist interpretation of what a university […] is capable of". Reiersgord asks whether university management will be fired "if they do not fall into the ideological fold of" whatever political party happens to govern at the time. Further, will curricula "be changed at the whim of" that party?[276]

Public higher education institutions will always be ripe for this kind of controversy. The governing party of the time will always seek to ensure its ideological vision – be it Apartheid or Transformationism – is reflected in higher education. The Constitution intervened in this in two ways: It provides that the Rule of Law must permeate all government activity, including public universities, and it provides for the right of South Africans to have private

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275 Evans J. "Zuma signs Higher Education Amendment Act". (2017). *News24*. https://www.news24.com/SouthAfrica/News/zuma-signs-higher-education-amendment-act-20170118/. Accessed: 30 November 2017.

276 Reiersgord D. "Op-Ed: New amendment to Higher Education Act is an ideological pivot". (2017). *Daily Maverick*. https://www.dailymaverick.co.za/article/2017-01-26-op-ed-new-amendment-to-higher-education-act-is-an-ideological-pivot/. Accessed: 30 November 2017.

universities, free from undue interference from government.

At this time, neither of these constitutional imperatives are being respected in South Africa's higher education landscape, and our education suffers as a result.

CASE STUDY: ST JOHN'S COLLEGE

On 27 July 2017, a Johannesburg-based private preparatory school, St John's College, was hit by one of South Africa's now seemingly-obligatory racism rows.[277]

A geography teacher, Keith Arlow, allegedly told black learners, among other things, that getting good marks disappoints other black people, that they were getting good marks because they were sitting next to white learners, and that by getting better marks, they have "started thinking" like white learners.

St John's conducted an investigation and duly found Arlow guilty of misconduct. Arlow was dismissed from senior positions and had his salary and benefits reduced.

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277 Haffajee F. "Elite Johannesburg school engulfed in race crisis". *HuffPost*. http://www.huffingtonpost.co.za/2017/07/27/elite-johannesburg-school-engulfed-in-race-crisis_a_23050588/. Accessed: 30 November 2017.

He also received a final written warning. The school did not, however, terminate Arlow's employment.

This enraged parents and South African society at large.

Panyaza Lesufi, the Gauteng MEC for Education, quickly joined in the fray, and, after a meeting with the principal of St John's, Paul Edey, said that he was disappointed with how the school had handled the situation and demanded that Arlow be fired by 13:00 on the same day. Lesufi claimed that St John's wanted to "justify racism", and that he felt "undermined, irritated" because Arlow had not been dismissed outright.

According to *News24*, "Lesufi visited the school on Friday morning to give the school an opportunity to redeem itself".[278]

On 28 July, Arlow left St John's. It was later revealed that he had resigned before Lesufi's 13:00 deadline.[279]

The question here is not whether action should or should not have been taken against Arlow. Clearly, a school is

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278 Tandwa L. "St John's race row teacher leaves school – MEC". (2017). *News24*. http://www.news24.com/SouthAfrica/News/st-johns-race-row-teacher-leaves-school-mec-20170728/. Accessed: 30 November 2017.

279 Fengu M. "'But I was just joking'". (2017). *City Press*. https://www.news24.com/SouthAfrica/News/but-i-was-just-joking-20170730-2/. Accessed: 30 November 2017.

supposed to be an inviting and tolerant space for mainly two reasons. The first reason, which in my opinion is the most important, is that going or not going to school is not a choice. South Africa has a system of compulsory primary education, meaning the presence of learners in Arlow's classroom is an absolute guarantee, unlike in other sectors where customers can simply leave or omit to show up in the first place. The second reason is ordinary human decency, especially toward minors. Arlow's remarks were clearly inspired by racial prejudice, and were uncalled for, whatever the context might be.

Clearly, yes, action should have been taken against Arlow, and there is a strong case to be made that the least that could be done was to dismiss him from employment. The parents of St John's were clearly on the warpath with Arlow and the school, and rightfully so.

But that is not the issue.

The issue is that the Rule of Law was violated because a member of government, who is known as a crusader against private education, essentially demanded action from a civilian entity – the school – based on the outrage of the community, to which the school relented.

No law of general application was invoked to compel the school to dismiss Arlow, and no objective legal principles were used to justify Lesufi's behaviour, despite Lesufi's unsubstantiated appeal to the provisions of the Constitution.[280] This entire episode, whether one agrees with it emotionally or not, was absolutely arbitrary, yet effectively carried legal force. It *effectively*, not *officially*, carried legal force, because Lesufi clearly threatened some kind of action against the school if it did not meet his arbitrary deadline, and Lesufi himself has been known to have a particular distaste for private schools.[281] The staff at St John's likely believed that the very continued existence of the school depended on giving in to Lesufi's demands.

The Constitution clearly mandates that independent schools not discriminate based on race, and thus allows

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280 The Constitution prohibits independent schools from engaging in racial discrimination, and, in response, St John's took action against the perpetrator. The Constitution does not allow government to violate the independence of private schools if it is whimsically dissatisfied with how these schools deal with problems.

281 See for example: Magwedze H. "Gauteng MEC Lesufi wants private schools to review hair policies". (2017). *Eyewitness News*. http://ewn.co.za/2017/07/26/gauteng-mec-lesufi-wants-private-schools-to-review-hair-policies/; Mqadi S. "Independent body must regulate private school feels – Lesufi". (2016). *702*. http://www.702.co.za/articles/232805/independent-body-must-regulate-private-schools-fees-lesufi/. Accessed: 30 November 2017.

government to intervene. Any intervention, however, must itself adhere to the Rule of Law.

St John's held an internal disciplinary hearing and was summarily overruled by a regulator acting on the basis of political considerations. To other, especially private, schools, this episode has created much uncertainty. It has established the provincial MEC for Education as a kind of absolute monarch, with education as his kingdom.

With MECs for education having this kind of power, the Rule of Law is undermined in South Africa's primary and secondary education regimes, especially as it relates to private schools.

RELEVANCE OF THE RULE OF LAW

On 23 October 2017, the *Mail & Guardian* reported that the Gauteng Department of Education was "under immense financial pressure" and that the province's "schools are full". As a result, many pupils could not be placed for 2018.[282]

[282] Mitchley A. "Financial strains may mean some pupils won't find schools in 2018". (2017). *Mail & Guardian.* https://mg.co.za/article/2017-10-23-

South Africa's education system is in crisis, and private education could be one of the solutions.

Yet, independent educational institutions, which are constitutionally protected, are constantly undermined by government. The excessive discretionary power given to both the departments of basic and higher education and provincial education departments has made the private education sector an uncertain and unfriendly investment.

The arbitrary power of officials to dictate terms to public schools and universities from afar also undermines the public education space. This may not violate a constitutional provision directly, but certainly falls foul of the Rule of Law.

Simple adherence to the Constitution and the Rule of Law, by removing any extra-constitutional criteria for registration and forcing officials and politicians to only do what they are explicitly empowered to do under the Constitution, could see a vast increase in educational capacity, not to mention in quality of service for millions of South Africans.

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financial-strains-may-mean-some-pupils-wont-find-schools-in-2018/. Accessed: 30 November 2017.

CHAPTER 11
CONCLUSION

WHY THE RULE OF LAW?

The Rule of Law is a meta-legal doctrine that permeates all of South African law; indeed, perhaps all law *everywhere*. It has, however, not been respected by government, and has remained under-appreciated by the judiciary and by civil society.

The State-centric assumptions underlying modern-day discourse – that government is essentially a *good* institution that can be trusted with wide powers – should be abandoned in light of the reality: government, while necessary, is a magnet for abuse and corruption. It attracts those among us who seek, above all, *control*. It does not matter whether they wish to employ this control for the common good or in their own self-interest – intentions simply do not matter – the fact is that the essence of government is to control. To quote Bastiat at length:

> "For, today as in the past, each of us, more or less, would like to profit from the labor of others. One does not dare to proclaim this feeling publicly, one conceals it from oneself, and then what does one do? One imagines an intermediary; one addresses the

> state, and each class proceeds in turn to say to it: 'You, who can take fairly and honorably, take from the public and share with us.' Alas! The state is only too ready to follow such diabolical advice; for it is composed of cabinet ministers, of bureaucrats, of men, in short, who, like all men, carry in their hearts the desire, and always enthusiastically seize the opportunity, to see their wealth and influence grow. The state understands, then, very quickly the use it can make of the role the public entrusts to it. It will be the arbiter, the master, of all destinies. It will take a great deal; hence, a great deal will remain for itself. It will multiply the number of its agents; it will enlarge the scope of its prerogatives; it will end by acquiring overwhelming proportions."[283]

The Rule of Law, as a concept, evolved to curtail the extent of government's control.

Were the Rule of Law respected, officials and bureaucrats in the executive government would not have wide, almost dictatorial, discretionary powers. Consequently, they would be public servants, not rulers, and the community would be regarded as citizens, not subjects.

Strict adherence to the Rule of Law is certainly not all that is needed for prosperity to flourish – sound economic

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283 Bastiat C-F. *Selected Essays on Political Economy.* (1995 edition). Irvington-on-Hudson: Foundation for Economic Education. 144.

policy and a vigilant civil society are some of the others – but it is an essential ingredient.

In CHAPTER 2 the constitutional history of South Africa was briefly considered to provide the reader with a context and background to how we have arrived where we are today. There is no real history of constitutionalism in South Africa or its predecessor states, and the Constitution which we enacted in 1996 with its explicit commitment to the Rule of Law gave us the framework to change this state of affairs. It should have become clear for the reader in the ensuing chapters, however, that the Constitution and the Rule of Law have not been adhered to as desired, and that our prosperity has suffered as a result.

CHAPTER 3 asked a question that has been asked for hundreds of years: What is the Rule of Law? Various conceptions and definitions were discussed, the essence of which is an *aversion to arbitrariness*. This aversion comprehends various principles which can be deduced through ordinary common sense: For law (or policy or conduct) to not be arbitrary, it must be *reasonable*. No law can be considered reasonable if the law is not *known*, which means it must be *accessible* to those to whom it

applies and must be *clear* and *unambiguous* enough for them to appreciate *how* the law will apply.

In CHAPTER 4 I considered the greatest threat to the Rule of Law–currently faced in South Africa and around the world: discretionary power. The Rule of Law is a useless concept if officials or politicians simply have the power to set its principles aside and decide for themselves how the law will be applied, if at all. Discretionary power opens the door to corruption because it is the passions and prejudices of the official in question, rather than legal principles, which enjoy the sanction of law. For the Rule of Law to not simply be a 'feel-good', irrelevant concept, discretionary powers must, if they are to exist at all, be circumscribed and limited by the principles of the Rule of Law.

In CHAPTER 5 I considered a question that was bound to come up in any discussion about the Rule of Law: Can the Constitution *itself* violate the Rule of Law, or vice versa? While I did conclude that on the strength of the provisions alone, constitutional sections can contravene the Rule of Law, this can only be if those provisions are read in isolation. Section 1(c) of the Constitution, however, clearly provides and implies that the tenets of the Rule of Law *permeate all* of the Constitution, meaning

that those provisions which seemingly violate the Rule of Law must be read in such a way as to accord with the Rule of Law. If this is not always possible, section 1(c)'s language implies co-equal supremacy of the Constitution and the Rule of Law, meaning that neither is superior to the other and can therefore not 'violate' the other.

CHAPTER 6 addressed public participation, which I argue is an implication of the Rule of Law, but which is also explicitly required by the Constitution.

In CHAPTER 7 the courts, which are traditionally regarded as the guardians of the Rule of Law, were considered. I briefly set out the role of judiciaries and how they are explicitly meant not to give effect to public opinion. This in and of itself is an expression of the democratic will, because the Constitution is the highest expression of the consent of the governed, rather than the temporary 'will' expressed every five years by only a part of the eligible electorate. The focus of the chapter was chiefly on the principle of the *separation of powers* and how it is often confused with the cop-out notion of *deference*. I argue that it is constitutionally impermissible for the courts to shed themselves of the responsibility to ensure the other branches of government conduct themselves in line with the Constitution and the Rule of Law.

Property rights were considered in CHAPTER 8 as an inherent aspect of the Rule of Law. The Rule of Law, without property rights, would be a redundant concept as there would be nothing to protect *from* arbitrariness. Indeed, for people to be protected from arbitrariness there must be some type of interest that is to be protected.

In CHAPTER 9 I broadly considered the effect of a proper application of the Founding Provisions to affirmative action in South Africa and concluded that *racial* affirmative action is constitutionally impermissible. I expect that this is the chapter in the book that will draw the greatest ire due to the emotional reasons many people have for either supporting or opposing affirmative action. This is why I devote a somewhat extended discussion to it here.

The fact that I, as a white male, write that racial affirmative action is impermissible in our constitutional order will draw many condescending sighs and eye-rolls, does not escape me. I broached the issue on the strength of my legal training and what I consider to be an appropriate understanding of the Rule of Law, but, invariably, some will argue that my 'white privilege' influenced my understanding of the Rule of Law and 'guided' me to a

particular conclusion which would serve my own self-interest as a white male.

This assumption can be easily rebutted with reference to my untainted political perspective: I am an individualist libertarian who believes absolutely in the free market's 'discretion' in dealing with socio-economic 'problems'. However, as I wrote in CHAPTER 9, the Constitution *does* – clearly, I believe – endorse at least a quasi-welfare state in South Africa. The free marketeer in me opposes this as a matter of moral principle and also practical workability, but for the most part I did not wear my free marketeer hat while writing this book. I admit that the original Diceyan conception of the Rule of Law does have some latent free market-supporting features, which I readily embrace. But I do not at any point construe these features as overriding the welfarist provisions of the Constitution, despite the fact that those provisions, if interpreted in a specific and arguably correct way, could well mean that government must simply allow South Africans to pursue their own welfare.

Indeed, it is my sincere belief that racial policies, ostensibly created to assist those who suffered deprivation during Apartheid, have been, at best, bad at improving the lives of their intended beneficiaries, and, at

worst (but probably more likely), have made the lives of their intended beneficiaries far worse, by discouraging investment and disincentivising meritocracy. The large number of unemployed black South Africans bears witness to this failure.

But my argument against racial affirmative action is correct on a proper reading of *the Constitution*, rather than my understanding of economics. This, despite the fact that the superior courts have all but sanctioned some or other form of racialism in governance. I argue that because non-racialism is a Founding Provision of our constitutional order and, thus, with the Rule of Law, permeates all of the Constitution, means that racial affirmative action is prohibited absolutely. I invite critics to oppose me on this point, however, it would be intellectually weak of me to welcome and engage the argument that I am merely a white male arguing for his own self-interest. Such would be impossible to prove, and without such proof, such an argument should be and will be rejected out of hand.

In CHAPTER 10 I raised what has been described as South Africa's biggest handicap: A bad education system retarding our growth. Adherence to the Rule of Law would be a significant first step in fixing this system, by

allowing independent schools and universities the breadth they are granted under the Constitution and, where government is involved in the running of educational institutions, ensuring that it conducts itself impartially and objectively.

PRE-EMPTING THE CRITICS

I am aware that this book may be attacked on the grounds that it does not correspond to the contemporary academic understanding of the Rule of Law in South Africa, and that it merely represents my 'idealistic' conception of the term. There is a grain, but only a grain, of truth to this likely charge.

The Rule of Law concept I have outlined in this book *is the ideal*. However, lowering the standard simply because the ideal is difficult to achieve is no path to excellence. The ideal must be maintained, and we must constantly strive to reach that ideal standard. With that being said, any charge that the 'ideal' which I have outlined is somehow 'impossible' would be intellectually dishonest. The onus would be on the critics to demonstrate such legal impossibility, and I would argue that they would not be able to, in light of the obvious practicality of what the

Rule of Law requires – reasonableness, rationality, accessibility, transparency, etc.

The charge that the South African understanding of the Rule of Law does not correspond to that outlined in this book will be similarly incorrect. The Constitution provides, exclusively, that the Constitution and the Rule of Law are the supreme law of this country. It says no more. The 'South African understanding' would thus not be the true constitutional understanding but would be limited entirely to the jurisprudence of our superior courts.

As I indicated bluntly in the INTRODUCTION: I did not bend over backwards to accommodate the views of our courts or allow them to influence what I consider to be the correct conception of the Rule of Law. South Africans have, for too long, deferred to the expertise of the courts when we need not do so. While the Constitution, in section 167, does provide that the Constitutional Court is, in essence, the final arbiter on legal-constitutional interpretation, this should be seen only as the operational interpretation, rather than necessarily the correct one. The Constitutional Court may, and has, reversed its own decisions, meaning that it is aware – and the

constitutional drafters were aware – that the superior courts can and do make mistakes.

In light thereof, South Africans, be they academics or ordinary people, should feel free to disagree with our courts' interpretation of the Constitution and the principles which underlie it. In the United States, for instance, there is a continuous, and very healthy, debate about whether Supreme Court decisions are correct, with think tanks, publications, and ordinary people criticising and lauding certain decisions. While they accept the Supreme Court decision as binding – as we should with Constitutional Court decisions – they do not shy away from engaging the decision in the hope that that court may rectify its mistakes in the future.

INSTITUTIONS, NOT PERSONALITIES

During the last days of the presidency of Jacob Zuma, a national debate came about on the question of who would succeed him: Deputy President Cyril Ramaphosa or the former Chairperson of the African Union Commission, Nkosazana Dlamini-Zuma, who also happened to be the ex-wife of Jacob Zuma. This debate was not inspired by hope or excitement, but by concern.

Amid this, Transparency International published its 2016 *Corruption Perceptions Index*, which measured the levels of public trust in our political representatives' moral integrity.

Countries with very low perceptions of corruption were indicated as yellower, with bright yellow meaning the population perceives virtually no corruption, and those with high corruption were indicated as redder, with deep maroon meaning there is a perception of virtually-total corruption. Only Denmark and New Zealand scored in the highest bracket, with a score of 90 (100 indicating the cleanest perception). Somalia scored the lowest, with a score of 10, but was joined by 13 other countries in this lowest bracket, including North Korea and Venezuela. South Africa found itself a deep orange – ranking 64 out of 176 countries. Between 2015 and 2016, South Africa improved marginally, scoring 44/100 in 2015 and 45/100 in 2016. In 2017, however, South Africa scored 43, falling by two points. By scoring less than 50, Transparency International regards us as having a serious problem with corruption.

Given the controversy about changes in leadership and the less than ideal levels of public trust around the world, we often ask *how* we can break free from the shackles of

corruption that hinder any kind of socio-economic progress.

Unfortunately, the answers we usually provide for this question are incorrect.

Instead of seeking to strengthen our institutions – most of which exist for the explicit purpose of combating corruption – we are more concerned with the *intentions* and *personalities* of individual leaders or their political organisations. Indeed, panel discussions and newspaper editorials abound where civil society actors lament that we just need *a good leader*, or more worryingly, just *a different leader*, to progress.

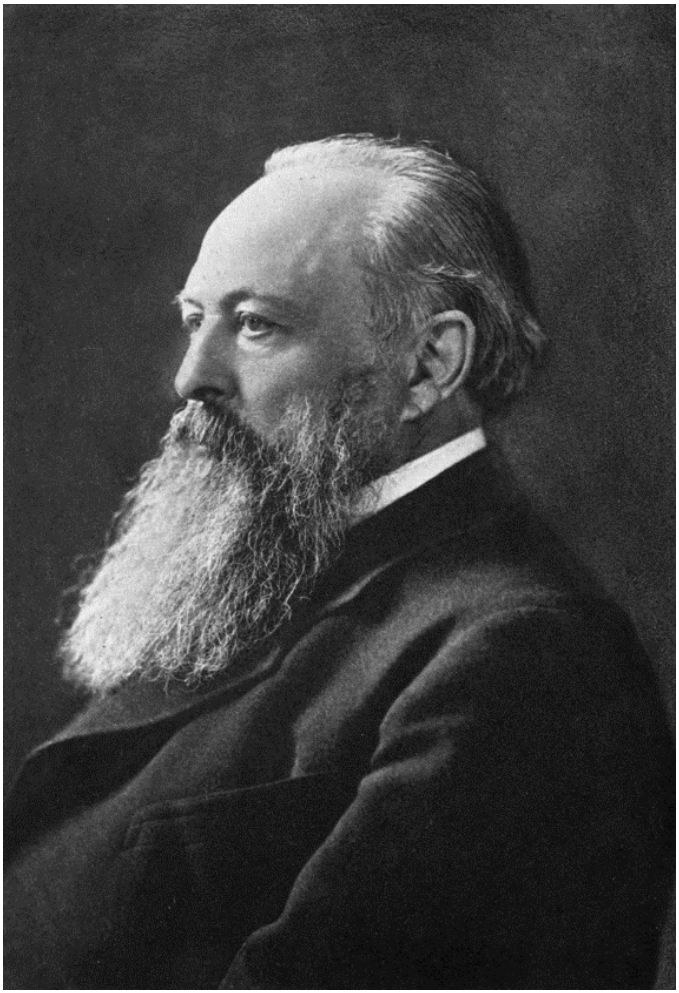
This makes a fundamental error in understanding human nature.

The State, more so than any other entity, is the greatest concentration of power in any society. Even the richest of the rich corporations need to, at some level, maintain the confidence and support of consumers; but the State can go without. Indeed, certain governments can be voted out of power, but the State *itself* is immune – unlike a company, it cannot be involuntarily liquidated and have its assets sold off. If this were the case, Greece would, in all likelihood, be a German province today.

Because the State is the greatest concentration of power in society, it inevitably has a higher likelihood of attracting those who seek control over others. The nature of the State is, after all, to control the behaviour of its subjects. There are various ways to mitigate this nature, through institutions like the Rule of Law or direct democracy, but the nature itself cannot be changed, as its absence would mean the abolition of the State. If the State exists, people must accept that the entity itself will always attract individuals who seek the power it provides. This is what Lord Acton meant when he said that power tends to corrupt, and absolute power corrupts absolutely.

Rather than focusing on *individuals*, therefore, who will inevitably be corrupted by the sheer power provided by the State, we must look to *institutions*.

An institution, in this context, is an entrenched way of doing things, and implies by its nature *regularity* and *rigidity*.



John Dalberg-Acton (1834-1902), popularly known as Lord Acton, is best known for remarking that, “Power tends to corrupt, and absolute power corrupts absolutely”. Picture by Elliott & Fry. Public domain.

Some things, by their nature, are institutions, like the law and particularly the Constitution, which have fixed characteristics that are difficult to change. The Constitution makes itself explicitly rigid by requiring more than a simple majority of Parliament to be amended. Other law, such as the common law and legislation, is easier to change in practice, but the Rule of Law, if respected, would significantly alter this ease. Law which constantly changes is unpredictable, defeating one of the law's core rules, being that for people to comply with the law, they must know the law and have time to structure their behaviour in accordance with it. To ensure predictability, certainty, and clarity of law, we have the Rule of Law, as an institution that has been constitutionalised in section 1(c) of the Constitution.

The Rule of Law – the bane of many a politician's existence – dictates that the law should not constantly change, and that the law must be general, regular, and predictable. This includes not only legislation, but the conduct of public officials and politicians. Crucially, it affirms that any discretionary power exercised by agents of the State must be significantly circumscribed.

We quote Lord Acton's immortal words that absolute power corrupts absolutely, but, apparently, we appreciate

only the poetic nature of the quote, rather than the public policy truths he conveyed with it: A government is only as good as far as it is constrained and limited.

No government, office or department within a government, when allowed to do as it pleases, has ever produced sustainable prosperity. Even the ostensible benevolent dictatorship of Thomas Sankara in Burkina Faso was cut short because that country did not have the institutions to guard against the kinds of corruption that led to Sankara's death.

The Constitution, if interpreted by a Rule of Law-conscious judiciary, amply limits the government to exercising its powers rationally and with due regard for the liberty and property of the people. Our judiciary, however, is not always Rule of Law-conscious, and, in what appears to be a residual mentality from the Apartheid period, the courts tend to defer to the executive or interpret legislation 'generously' so as to allow the government more room to act (and consequently more room to abuse its power).

The core principle of constitutionalism is *that which is not permitted, is forbidden* for the government, and *that which is not forbidden, is permitted* for the people. This

has been repeated various times throughout this book to emphasise its importance. But it is often forgotten by our courts.

Our institutions, the Constitution and the Rule of Law being the most important, but also including such entities as the Public Protector, the Judicial Service Commission, and, of course, civil society institutions, are crucial to a free society with an accountable government.

The cure to corruption is not the moral character or good intentions of the political class, but the safeguards and institutional framework which society erects around the political class. The Constitution and the Rule of Law is the foundation upon which all of this happens, and if South Africans do not develop an awareness or respect for this institution and its essential function to limit the tyranny of the State, we will suffer very severe consequences like our forebears did under Apartheid.

We are privileged for having the legwork – the enactment of a justiciable Constitution and sound limited government principles – already done; all we need to do is embrace it. The price for freedom – eternal vigilance – has not yet been paid in South Africa.

APPENDIX:
PREAMBLE AND CHAPTER 1 OF THE CONSTITUTION

PREAMBLE

We, the people of South Africa,

Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –

> *Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;*
>
> *Lay the foundations for a democratic and open society in which government is based on the will of*

the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.

Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.

God seën Suid-Afrika. God bless South Africa.

Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.

CHAPTER 1: FOUNDING PROVISIONS

Republic of South Africa

1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:

    (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

    (b) Non-racialism and non-sexism.

(c) Supremacy of the constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Supremacy of Constitution

2. This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

Citizenship

3. (1) There is a common South African citizenship.

(2) All citizens are –

(a) equally entitled to the rights, privileges and benefits of citizenship; and

(b) equally subject to the duties and responsibilities of citizenship.

(3) National legislation must provide for the acquisition, loss and restoration of citizenship.

National anthem

4. The national anthem of the Republic is determined by the President by proclamation.

National flag

5. The national flag of the Republic is black, gold, green, white, red and blue, as described and sketched in Schedule 1.

Languages

6. (1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

(2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.

(3) (a) The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the

population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.

(b) Municipalities must take into account the language usage and preferences of their residents.

(4) The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.

(5) A Pan South African Language Board established by national legislation must –

(a) promote, and create conditions for, the development and use of –

(i) all official languages;

(ii) the Khoi, Nama and San languages; and

(iii) sign language; and

(b) promote and ensure respect for –

(i) all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and

(ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.

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