SOUTH AFRICA'S FORWARD-LOOKING CONSTITUTIONAL REVOLUTION AND THE ROLE OF COURTS IN ACHIEVING SUBSTANTIVE CONSTITUTIONAL GOALS

*Jorge M. Farinacci-Fernós**

Abstract

South Africa's Constitution has been characterized as one of the most progressive and forward-looking in the world. Much has been written about how it was created and its substantive content. Much less attention has been given to *how* the South African Constitutional Court has actually interpreted and applied it from a methodological point of view. In particular, how that substantive content, and its historical background, becomes tangible law through judicial enforcement.

This Article explores how the South African Constitutional Court has taken into consideration the history of South Africa, its constitutional experience and the progressive substantive content of its constitutional text when engaging in adjudication. Also, it analyzes how this practice impacts the role of courts in similar constitutional systems where the constitutional text embodies social goals and is the direct result of important historical processes.

Resumen

La Constitución de Sur África ha sido caracterizada como una de las más progresistas y visionarias del mundo. Mucho se ha escrito sobre cómo fue creada y cuál es su contenido sustantivo. Poca atención se ha otorgado a *cómo* el Tribunal Constitucional Surafricano la ha interpretado y aplicado, desde una perspectiva metodológica. En particular, cómo ese contenido sustantivo, y su contexto histórico, se convierte en derecho tangible a través de la implementación judicial.

Este Artículo explora cómo el Tribunal Constitucional de Sur África ha tomado en consideración la historia de ese país, su experiencia constitucional

* B.A. and M.A. (Univ. of Puerto Rico); J.D. (University of Puerto Rico Law School); LL.M. (Harvard Law School); S.J.D. (Georgetown University Law Center). Assistant Professor of Law at the Interamerican University of Puerto Rico Law School.

y el contenido sustantivo progresista de su texto constitucional al llevar a cabo su ejercicio adjudicativo. De igual forma, analiza cómo esta práctica afecta el rol de los tribunales en sistemas constitucionales similares en los que el texto constitucional incorpora objetivos sociales y es el resultado directo de procesos históricos significativos.

I. Introduction

In this Article, I analyze the decisions of the South African Constitutional Court during the first years of its existence. In particular, I focus on the adjudicative and interpretive methodologies adopted by the Court, as well as on how it implemented the substantive provisions of the 1994 and 1996 Constitutions. As we will see, because of the substantive nature of the South African Constitution, which can be described as teleological and post-liberal, given its attention to socio-economic rights and other progressive policy provisions, the adjudication of constitutional cases in South Africa has been transformed. Since the Constitution takes a stance on many issues normally delegated to legislative discretion, the South African Constitutional Court has been *forced* by the constitutional legislator to intervene in policy matters. This requires abandoning more traditional notions on the judicial role and the so-called *proper* role of courts.

The South African Constitutional Court has been able to adequately implement many of the substantive provisions of the Constitution, disproving the notion that these types of constitutional commands are merely symbolic or aspirational, and that courts are ill-equipped to enforce them. On the contrary, the main lesson from the constitutional revolution that took place in South Africa during the 1990's is that courts can effectively put into practice these types of provisions, including socio-economic rights and other policy commands.

In terms of interpretive methodology, South Africa's Constitutional Court is not originalist nor intentionalist. *With a few, yet important, exceptions that will be discussed later on*, South Africa's top judicial body has mostly shied away from using an intent-based interpretive methodology, whether it is original intent, original public meaning, the subjective teleological model or the original explication approach.[1] In general terms, the main methodological model employed by the Court places is it closer to the objective teleological model.[2] But intent has *not* been

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[1] *See* Jorge M. Farinacci-Fernós, *When Social History Becomes a Constitution: the Bolivian Post-Liberal Experiment and the Central Role of History and Intent in Constitutional Adjudication*, 47 SW. L. REV. 137, 154 (2017), explaining that the subjective teleological model "searches for the original *purpose* that inspired the framers, the [original explication model] focuses on what the framers *said about what they were doing*, and the [original intent approach] searches for what the framers *wanted to do*."

[2] *See* Adriane Janet Hofmeyr, *Constitutional Interpretation Under the New South African Order*, LL.M. Dissertation, Faculty of Law, University of Witwatersrand, Johannesburg (1998) for a comprehensive analysis of the early jurisprudence of the South African Constitutional Court and its use of the objective teleological model. While Hofmeyr emphasizes a more *classic* and *framework*-oriented separation of powers approach to constitutional interpretation, I will focus on the *substantive* content of the South African Constitution as the result of popular constitutional politics. As such, instead of focusing on the legislature versus judiciary issue —particularly as it relates to the classic counter-majoritarian dilemma—, as Hofmeyr does, I focus on the *majoritarian* elements of the Constitution, and the courts as the enforces of constitutional judgments over ordinary political action. I also tackle the role of adoption history in constitutional interpretation in South Africa.

wholly absent. At the same time, *history* has played a central role in constitutional adjudication in South Africa.

In the end, the South African Constitutional Court seems to have embraced history, while focusing much less on intent. Two things should be said about this phenomenon. First, as a normative matter, this Article will argue that the South African Constitutional Court *should* pay more attention to issues of intent, although not necessarily embrace a wholly originalist approach. Second, *it should be noted that it makes perfect sense for the Court, given South Africa's constitutional history, to embrace history and ignore the intent of the framers as the main interpretive approach*.[3] Since, as we will see, South Africa's Constitution was the result of a *negotiation* between an ascendant liberation movement and an oppressive white minority government, it is reasonable and legitimate for the Constitutional Court to pay more attention to the *historical context* of South Africa's constitutional process and its past social struggles, while, at the same time, not give too much importance to the intent of the *framers* of the Constitution. Also, we must consider the fact that the Interim Constitution of 1994 was the result of negotiation while the Final Constitution of 1996 was the result of a combination of elements, including normative principles adopted during the negotiation process *and* a popularly elected Constitutional Assembly.

In the South African context, the fundamental aspects of its constitutional system are the *historical grievances and societal goals* of the South African People as a whole. Since South Africa's Constitution was the result of compromise and was created in a controlled environment with little room for high-energy democratic politics *in terms of the deliberation process*, *the Constitutional Assembly cannot be characterized as the center of gravity of the constitution-making process*.[4] As such, there seems to be a *direct* link between the popular view about the substantive nature of the society to be built by the Constitution and the Constitution itself. Here, the framers are somewhat less important. Yet, as will be argued here, they still have a significant role to play, *even if it is reminding us of the brokered nature of the constitution-making process*. But, in the end, the South African model holds: The Constitution has more to do with the *external* processes that developed before and during the constitution-making process than with the *internal deliberations of the Constitutional Assembly*. Because of the *sui generis* nature of the constitutional

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[3] This apparent contradiction fits in nicely with the notion that the process of *constitutional creation* is critical to the kind of interpretive methodology that is selected. *See* Jorge M. Farinacci-Fernós, *Post-Liberal Constitutionalism*, 54 TULSA L. REV. 101 (2018). There I discuss how constitutions that were the result of highly democratic, popular and participatory processes of creation have a stronger normative case in favor of an intent-based method of interpretation. As a result, when such a process is missing, the case for an intent-based model is weaker.

[4] This is different from the constitutional creation processes that occurred in Bolivia and Puerto Rico. Because of this, both jurisdictions have used intent-based methods of interpretation as the preferred model. *See* Farinacci-Fernós, *When Social History Becomes a Constitution*, *supra* note 1; Jorge M. Farinacci-Fernós, *Originalism in Puerto Rico: Original Explication and its Relation with Clear Text, Broad Purpose and Progressive Policy*, 85 REV. JUR. UPR 205 (2015).

drafting process in South Africa, content does not lie with the framers, but with the text and the history that gave it life.

But the lessons to be derived from the cases of the South African Constitutional Court have less to do with methodology and more to do with *the actual enforcement of the substantive content of the Constitution*, such as socio-economic rights and other policy-laden provisions. The South African Constitutional Court's emphasis on clear and expansive text, broad purpose and substantive content has a lot to offer us.

In that sense, two things emerge. First, in terms of *methodology*, the South African Constitutional Court has been *more* intentionalist than it thinks it has been,[5] but *less* that it should be, from a normative standpoint. Second, and more importantly, in terms of *judicial enforcement*, the South African Constitutional Court offers an effective model, particularly with respect to the more substantive provisions of the text, which are the centerpiece of post-liberal teleological constitutions.

In this Article, I will deal with the following issues: (1) the substantive nature of South Africa's Constitution, focusing on its over-arching teleological characteristic and some of the specific policy-laden provisions; (2) the interpretive models used by the Constitutional Court; (3) the role of history and intent in constitutional adjudication; (4) the conceptual challenges relating to the separation of powers, the role of courts and judicial enforcement of constitutional provisions; and (5) some final thoughts on the jurisprudence of the Constitutional Court.

This Article will combine cases decided by the Constitutional Court of South Africa, as well as secondary sources.[6]

II. South Africa's Post-Liberal Teleological Constitution

South Africa's Constitution is the crown-jewel of modern constitutionalism.[7] Many different ideological currents claim it as their own. Liberal democratic

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[5] It should be noted that one of the most interesting features of the early methodological debates within the South African Constitutional Court was the *lack of a consensus as to interpretive method*. This resulted in either fragmentation within the Court or punting the issue, leaving a normative vacuum. As Hofmeyr explained, "the Constitutional Court itself has to date failed to articulate a clearly comprehensive theory of constitutional interpretation." Hofmeyr, *supra* note 2, at 5.

[6] In particular, I will focus on the decisions handed down by the South African Constitutional Court from 1995 until 2002. This is so, because it was during this period that the normative debate as to method was most important and marked the initial developments as to judicial enforcement of the Constitution.

[7] Although, it should be noted, it is not the only one. On the one hand, we should give it due credit for protecting a whole array of socially-oriented rights and paving the way for a just and democratic society. It is the stuff of teleological constitutions. On the other hand, there does seem to be a bias among Western scholars that seem to see the South African Constitution as a sort of *sui generis* creature that sits alone in a world full of framework constitutions. It should be noted that countries like Portugal, Ecuador, Venezuela, India, Bolivia and Puerto Rico, as well as many U.S. states, have similar types of constitutions. South Africa's teleological constitution is not alone and not even the first one to be adopted in modern times. *But*, its significance should not be underestimated either. *No modern constitutional analysis can ignore the South African constitutional experience*.

scholars emphasize its democratic nature and its commitment to pluralism, openness and individual freedom. On the other hand, progressives and socialists argue that its commitment to social justice and re-distribution, as part of a longer march towards the creation of a just and democratic society, separates South Africa's Constitution from its German, Canadian and U.S. counterparts and places it in the post-liberal camp.[8]

In this section, I wish to focus on the following things: (1) the transformative and teleological characteristics of South Africa's Constitution; (2) the South African version of constitutionalism; (3) the inclusion of post-liberal ideological tenets; and (4) the larger role of ideology and popular social movements in the substantive content of the Constitution, including the interaction between constitutional law and policy.

A. South Africa's Teleological Constitution

There seems to be universal consensus that South Africa's Constitution does not fit into the classic framework model.[9] Also, there seems to be consensus on its characterization as transformative. In other words, that the Constitution adopts a substantive blueprint for society that looks ahead to the future.[10] This fits perfectly with the teleological constitutional type.[11]

According to Eric Christiansen, South Africa's constitutional system adopts as a goal the "substantial realization of a socially just society."[12] In that sense, "[t] ransformation is the primary theme of post-apartheid South Africa and affects virtually every sphere of life."[13] As Morné Olivier explains, "transformation lies at the heart of the constitutional enterprise and goes *beyond* the reform of state institutions *to the transformation of society more broadly* in order to remedy past

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[8] *See* Hofmeyr, *supra* note 2, at 31, noting that courts in South Africa were "expected to take into account the revolutionary political and legal changes which have occurred in this country and develop an appropriate theory of constitutional interpretation which is in keeping with the new role of the judiciary."

[9] *See* Farinacci-Fernós, *Post-Liberal Constitutionalism, supra* note 3. There I explain how *framework* constitutions mostly focus on structure and process, including individual political rights, leaving most policy decisions to ordinary politics. I should also note that although there are differences between the 1994 Interim Constitution and the 1996 Final Constitution –which I will discuss later on – I will analyze them jointly in the rest of the article.

[10] HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: A CONTEXTUAL ANALYSIS 2 (2010).

[11] For their part, *teleological* constitutions are designed to actively shape society by adopting substantive policy provisions.

[12] Eric C. Christiansen, *Using Constitutional Adjudication to Remedy Socio-Economic Injustice: Comparative Lessons from South Africa*, 13 UCLA J. INT'L L. & FOREIGN AFFAIRS 369, 390 (2008). *See also* SIRI GLOPPEN, SOUTH AFRICA: THE BATTLE OVER THE CONSTITUTION 33 (1997).

[13] Morné Olivier, *Competing Notions of the Judiciary's Place in the Post-apartheid Constitutional Dispensation*, *in* THE QUEST FOR CONSTITUTIONALISM: SOUTH AFRICA SINCE 1994 70 (Hugh Corder, Veronica Federico & Romano Orrù, eds., 2014). *See also* Heinz Klug, *South Africa: From Constitutional Promise to Social Transformation, in* INTERPRETING CONSTITUTIONAS: A COMPARATIVE STUDY 266 (Jeff Goldsworthy & Jeffrey Denys eds., 2006).

inequalities, discrimination and injustice."[14] In that same vein, Linda Stewart argues that "[t]he Constitution of South Africa of 1996 *differs* from *classic liberal constitutions* in other parts of the world and is perceived as a *progressive* and *transformative* document."[15] As she explains, the "Constitution is an engagement with a future that it will partly shape."[16] That's the quintessential characteristic of teleological constitutions. Here, the Constitution points the way and, though giving substantial leeway to institutional actors to choose how to get there, restricts its options so they don't veer off the constitutionally mandated course.[17] In summary, "[t]he goals of government activity in the areas of social policy, economic policy and environmental policy, as well as the direction of change, [are] laid down in the constitution itself."[18]

The teleological and transformative nature of the South African Constitution has not been lost on the Constitutional Court, which has noted the text's commitment to a collective social project.[19] This responds to a recognition that the Constitution "unlike its dictatorial predecessor, is value-based."[20] In that sense, the Constitution has "widely acclaimed and celebrated *objectives*."[21] This has led the Court to affirm that "[o]ur Constitution is different from the American constitution,"[22] which, in turn, requires a different method of enforcement. While the latter is still an outstanding question, the former is not: South Africa's constitutional system is different from the classic liberal framework model.

Concurrent with the Court's acknowledgment of the Constitution's teleological character is a recognition of its transformative nature, particularly in terms of its goal of breaking from the previous regime.[23] This includes achieving the goals of the Constitution, which comprises the establishment of "a society based on the

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[14] Morné Olivier, *supra* note 13, at 10-71 (emphasis added).

[15] *See* Linda Stewart, *Depoliticizing Socio-economic Rights*, *in* THE QUEST FOR CONSTITUTIONALISM: SOUTH AFRICA SINCE 1994 81 (Hugh Corder, Veronica Federico & Romano Orrù, eds.,2014) (emphasis added). As Stewart elaborates, the Constitution envisages change "of the county's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction through a long-term project of constitutional enactment, interpretation, and enforcement."

[16] *Id.* at 84. As such, the State is affirmatively empowered to carry out that transformation. *See* SIRI GLOPPEN, SOUTH AFRICA: THE BATTLE OVER THE CONSTITUTION 62 (1997); Dawood v. Minister, 2000 (8) BCLR 837 (CC), para. 35.

[17] Bertus de Villiers, *The Constitutional Principles: Content and Significance*, in BIRTH OF A CONSTITUTION 47 (Bertus De Villiers, ed., 1994).

[18] GLOPPEN, *supra* note 16, at 66.

[19] *See* S. v. Makwanyane, 1995 (6) BCLR 665 (CC), para. 262 (Mahomed, J., concurring).

[20] *Id*. at 313 (Mokgoro, J., concurring).

[21] S. v. Mhlungu, 1995 (7) BCLR 793 (CC), para. 8. (emphasis added); *See also Id*. at 46.

[22] S. v. Williams, 1995 (7) BCLR 861 (CC), para. 37.

[23] Du Plessis v. De Klerk, CCT 8-95, paras. 90, 145.

recognition of fundamental human rights."[24] In the end, the Court has consistently stated that the new Constitution is not just a new text, but also heralds a "new constitutional order."[25] And this new constitutional order is articulated in a "commitment to the attainment of social justice and the improvement of the quality of life for everyone."[26]

Crucial to this teleological design is the issue of *social* transformation which includes economic redistribution: "We live in a society in which there are great disparities of wealth…These conditions already existed when the Constitution was adopted and a commitment to address them, and to *transform our society* into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order."[27] This is inherently linked with the notion of the background "of constitutional and social transformation that is under way in South Africa."[28] This is not the typical western Constitution.

B. South Africa's Post-Liberal Constitution

South Africa's constitutional system is not merely teleological. It is also explicitly, even if partially, post-liberal. According to Linda Stewart, South Africa's "[t]ransformative constitutionalism furthermore demands critical approaches to law which calls for a *post-liberal reading* of the Constitution."[29] This has resulted in a critical view of classic liberal constitutionalism,[30] and it has allowed the Constitutional Court to take into account the egalitarian characteristics of the Constitution in the process of adjudication.[31] It would not seem outrageous to conclude that South Africa's Constitution is of the post-liberal persuasion.[32] Of course, the devil is in the

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[24] Minister of Justice v. Ntuli, 1997 (6) BCLR 677 (CC), para. 32. *See also* President of the Republic of South Africa v. Hugo, 197 (6) BCLR 708 (CC), para. 41.

[25] City Council of Pretoria v. Walker, 1998 (3) BCLR 257 (CC), para. 17.

[26] Government of the Republic of South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC), para. 1.

[27] Soobramoney v. Minister of Health (Kwazulu-Natal), CCT 32/97, para. 8 (emphasis added). *See also Grootboom* at 25; Bel Porto School Governing Body v. Premier of the Province, Western Cape, 2002 (9) BCLR 891 (CC), para. 6.

[28] Premier, Province of Mpumalanga v. Executive Committee, 1999 (2) BCLR 151 (CC), para. 7. *See also* Moseneke v. The Matter of the High Court, 2001 (2) BCLR 103 (CC) para. 1.

[29] Stewart, *supra* note 15, at 84 (emphasis added). *See also* Heinz Klug, *South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid, in* CONSTITUTIONAL COURTS: A COMPARATIVE STUDY 274 (Andrew Harding & Peter Leyland, eds., 2009.

[30] GLOPPEN, *supra* note 16, at 131.

[31] *See, for example,* President of the Republic of South Africa v. Hugo, 197 (6) BCLR 708 (CC), para. 41. In a separate opinion, Kriegler stated that the "South African Constitution is primarily and emphatically an egalitarian constitution." *Id.* at 74. (Kriegler, J., dissenting).

[32] Heinz Klug, *Constitutional Authority and Judicial Pragmatism: Politics and Law in the Evolution of South Africa's Constitutional Court*, *in* CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 101 (Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan, eds., 2013).

details, and I will return to this issue when analyzing socio-economic rights, as well as other substantive provisions that deal with economic, labor and property rights issues. For now, I propose we characterize South Africa's Constitution firmly in the teleological camp, with recognizable post-liberal elements and content.

C. Building a New Constitutionalism

From the previous discussion, we can summarize the South African constitutional experiment as one of "transformative constitutionalism."[33] It is a "new" constitutionalism that "entails the ideas of an open and democratic society and of social justice."[34] This includes an alternative vision as to new forms of constitutional self-government which encompasses substantive elements.[35] As Heinz Klug explains, "in South Africa, a domestic debate continues regarding the nature of constitutionalism in a post-apartheid society…This debate is reflected in different characteristics of the Constitution and the [Constitutional] Court's jurisprudence as being either a form of *liberalism or* as a potentially *transformative constitutionalism*."[36] It is worth noting, however, that the South African experience is hardly an isolated one; transformative post-liberal teleological constitutions can be found all over the globe.

Yet, the dispute about the ideological nature of South Africa's Constitution need not be resolved here. In fact, it need not be resolved at all.[37] First, post-liberal constitutionalism has a lot in common with its classical liberal antecessor. Much of the *substantive* content of teleological constitutions is merely an *extension* of the rationale underlying liberal democratic framework constitutions. In fact, we see this rationale first hand in the decisions of the South African Constitutional Court, when it links social rights with democratic self-government. Teleological constitutions are the offspring of liberal democratic constitutions, in that they *add* substantive provisions, not only as ends in themselves, but as part of the accessorial rationale which states that some rights are needed in order to make democracy work better.[38]

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[33] Klug, *Enabling Democracy and Promoting Law in the Transition from Apartheid, supra* note 29, at 274.

[34] Veronica Federico, Hugh Corder & Romano Orrù, *Introduction* to THE QUEST FOR CONSTITUTIONALISM: SOUTH AFRICA SINCE 1994 3 (Hugh Corder, Veronica Federico & Romano Orrù, eds., 2014). These authors also characterize the South African Constitution as a form of transformative constitutionalism. *See also* S. v. Makwanyane, 1995 (6) BCLR 665 (CC), para 357. (O'Regan, J., concurring).

[35] Klug, *South Africa: From Constitutional Promise to Social Transformation*, *supra*, note 13, at 261.

[36] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 293. *See also* Pierre Olivier, *Constitutionalism and the New South African Constitution, in* BIRTH OF A CONSTITUTION 55-57. (Bertus De Villiers, ed. 1994).

[37] *See* GLOPPEN, *supra* note 16, at 274.

[38] *See Id.* at 64. Describing the Constitution of South Africa as one "which, through providing for a fair and democratic political process, works to transform the social structure itself."

Second, mixed constitutional types can exist. In other words, a particular constitutional system can be both liberal and post-liberal at the same time. Hybrids are not anomalies. Actually, it would seem that *pure* systems are the exception. As such, South Africa's Constitution can serve as a bridge between the different constitutional types. Yet, it does seem that, within this hybrid character, the post-liberal and teleological aspects of the South African Constitution stand out. There is a strong case in favor of characterizing it as part of the post-liberal teleological family. The decisions of that country's Constitutional Court reinforce this conclusion.

This dual nature can be explained by South Africa's history. P*recisely because the Constitution was part of a democratic transition from authoritarian apartheid to a more progressive pluralist society*, political democratization and social justice were at the top of the constitutional agenda. Thus, we can expect to encounter both liberal democratic and post-liberal elements in the constitutional text. Because of the central role of history in South Africa's constitutional revolution, it is to history we turn first. But before we do that, we should reference, however briefly, other political and ideological elements that can be found in the South African Constitution outside its specific policy provisions.

As Linda Stewart argues, the Constitution "as a transformative text embodies a political character demanding positive action from all branches of government, including the judiciary, to achieve this transformative tension."[39] Although I will specifically tackle the issue of judicial enforcement and the role of courts in this constitutional model, this passage illustrates the political, yet enforceable, elements of the constitutional text.

This includes the issue as to what policy preferences should be entrenched in the constitutional text and which should be left up to ordinary politics.[40] In turn, this can blur the line between legal and political issues.[41] It is not unheard of that the Constitutional Court must tackle "complex and interrelated questions of law and policy."[42] For example, labor cases in South Africa are almost unavoidably a constitutional issue.[43] As the Constitutional Court has recognized in the context of a particular labor dispute, "[i]f the effect of this requirement is that this Court will have jurisdiction in all labor matters [,] that is a consequence of our constitutional democracy."[44]

A final element that must be addressed is the issue of popular ideology and its role in constitutional creation. Although in the next section I will focus on the

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[39] Stewart, *supra* note 15, at 84.

[40] GLOPPEN, *supra* note 16, at 66.

[41] De Villiers, *supra* note 17, at 48.

[42] Mistry v. Interim National Medical and Dental Council, CCT 13/97, para. 2.

[43] NEHAWU v. University of Cape Town, 2003 (2) BCLR 154 (CC), para. 16.

[44] *Id*. (quotation omitted)

actual process of constitutional creation in South Africa, it is worth mentioning here the important role that social forces had in that process, particularly popular organizations such as labor unions, women's groups, farmer organizations, among others.[45] In the end, particular mention must be made to the African National Congress (ANC) as the representative of the social majority in South Africa,[46] in particular its approach to rights,[47] as well its insistence of the eventual creation of a popularly elected Constitutional Assembly.[48] This also includes the use of mass actions *during* the constitution-making process, giving it a popular character.[49] We should also take note that "[t]he ideological underpinnings of the liberationist movement range from social democracy to democratic socialism, with the former probably predominating."[50] As the Constitutional Court has acknowledged, "[i]n a country of great disparities of wealth and power it declares that whoever we are whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destines are intertwined in a single interactive polity."[51]

III. South Africa's Constitutional Creation Process: A Multi-Stage History

South Africa's constitutional making process was characterized by violence and peace, liberation and moderation, majoritarian rule and accommodation, politics and compromise. It was a highly complex process constituted by separate yet integrated moving parts. As Willem De Klerk commented, "[t]he design of a constitution does not come out of the blue."[52]

If ever there was a case where the history of constitutional creation was relevant to constitutional adjudication, it's this one. But not, as we saw, because it was the most democratic and participatory process of constitutional framing; but because its transitional and negotiated nature highlights the process of creation. *How* the constitution was *created* influences *how* it is *implemented*.

The South African constitutional creation process was complex and, to some extent, simultaneously contradictory and complementary. As Heinz Klug explains,

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[45] GLOPPEN, *supra* note 16, at 65.

[46] *Id.* at 200.

[47] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 3.

[48] *Id.* at 14.

[49] Willem De Klerk, *the Process of Political Negotiation*, in BIRTH OF A CONSTITUTION 7. (Bertus De Villiers, ed. 1994).

[50] Lourens M. Du Plessis, *A Background to Drafting the Chapter on Fundamental Rights*, in BIRTH OF A CONSTITUTION 91-92. (Bertus De Villiers, ed. 1994).

[51] *August v. Electoral Commission*, 1999 (4) BCLR 363 (CC), para. 17.

[52] De Klerk, *supra* note 49, at 1.

the constitution-making process was composed of two stages.[53] Let's break them down.

The final Constitution of 1996 represented the "end of a six year long battle over the constitution where competing visions of the new South Africa, formed during decades of struggle, clashed through paragraph after paragraph."[54] In terms of process, we must turn to May of 1990 when the ANC and the National Party-led government started to have talks about talks.[55] This process included bumpy multi-party talks and negotiations.[56] Concurrent with this complex formal process was a period of "mass action and escalating political violence."[57]

The first landmark of the constitutional making process was the interim Constitution which "was adopted with 'sufficient consensus' on 18 November 1993."[58] As Siri Gloppen explains, "[t]he interim constitution is an intriguing document, marked by the bargaining that brought it about."[59] The first phase of the constitutional making process not only produced an interim Constitution; it also created a set of *Constitutional Principles* that would direct the work of the Constitutional Assembly when it addressed the adoption of a final constitutional text.[60] While the interim Constitution could not bind the options available to constitutional framers when drafting the final text, the Constitutional Principles would. Curiously enough, "[t]he interim constitution and the constitutional principles represent, however, significant *deviations* from the favored constitutional model of the ANC."[61]

The second phase of the constitution-making process was the calling of a Constitutional Assembly composed of 490 members, of which 312 were from the African National Congress, "just short of the two thirds majority required to single-handedly adopt a new constitution."[62] The work of the Assembly was not entirely smooth, and even included a boycott by the Inkatha Freedom Party.[63] As

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[53] Klug, *South Africa: From Constitutional Promise to Social Transformation*, *supra* note 13, at 266. For an in-depth description of the negotiation process. *See* KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10; Theuns Eloff, The Process of Giving Birth, in BIRTH OF A CONSTITUTION (Bertus De Villiers, ed. 1994).

[54] GLOPPEN, *supra* note 16, at 3.

[55] *Id.* at 201.

[56] *Id*.

[57] *Id*. *See also* KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 15 (in reference to how the ANC was "supported by street demonstrations and other forms of mass action").

[58] GLOPPEN, *supra* note 16, at 201.

[59] *Id.* at 202.

[60] *Id*.

[61] *Id.* at 204 (emphasis added).

[62] *Id.* at 205.

[63] *Id.* at 207.

Gloppen explains, "[t]he obvious problem with regard to the IFP boycott is, of course, the negative effect on the *legitimacy of the constitution*."[64] Because of these circumstances, even though the ANC dominated the Assembly, the final Constitution was also the result of compromise. Yet, the final text is much closer to the views of the ANC than the interim document: "Compared with the 1993 interim constitution, the text that was adopted on 8 May is less consociational and more in line with the justice model and the ANC's negotiating position."[65]

More importantly, the second phase was characterized by *public participation and monitoring of the constitution-making process.*[66] This strengthens constitutional legitimacy and aids in the process of consolidation behind the constitutional project. According to Gloppen, the issue of constitutional legitimacy "is also affected by the character of the *process* that brought it into being," including "an *impressive public participation programme [that] was implemented*."[67] This program included calls for "public submissions", in order to create a better product "in harmony with the concerns and normative conceptions of the South African people," promote understanding of the different proposals, stimulate development of a civil society and *take ownership of the final product*.[68] The program also included written submissions, oral statements, as well as uses of the internet and phone talk lines which resulted in "more than two million submissions and petitions."[69] Other examples of the public and participatory nature of the constitution-making process abound.[70] In the end, "the public participation succeeded in *creating a sense of ownership in the product*."[71] This is the stuff of teleological constitutions.[72] As one very influential member of the Constitutional Court has observed: "The Constitution was the first public document of legal force in South African history to *emerge* from an *inclusive process* which the overwhelming majority were represented."[73]

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[64] *Id.* at 208 (emphasis added).

[65] *Id.* at 210.

[66] In contrast, the IFP demanded that "a new Constitution be produced by an 'independent' panel of experts and adopted by a simple majority in a national referendum." KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 14.

[67] GLOPPEN, *supra* note 16, at 247.

[68] *Id.* at 257.

[69] *Id*.

[70] *Id.* at 258. In reference to the "popularized newsletter" *Constitutional Talk* and the face-to-face outreach program, which included over a thousand workshops, briefings and meetings.

[71] *Id.* at 264 (emphasis added).

[72] *See* Farinacci-Fernós, *Post-Liberal Constitutionalism, supra* note 3.

[73] S. v. Makwanyane, 1995 (6) BCLR 665 (CC), para 362. (Sachs J., concurring) (emphasis added); *see also* S. v. Mhlungu, 1995 (7) BCLR 793 (CC), para. 127 (Sachs J., concurring) (in reference to the need of acknowledging the way in which the Constitution "came into being").

In the end, while many legal experts aided in the actual drafting process, the constitutional venture "took place in *full view of the public.*"[74] As a result, the "members of the Constitutional Assembly found themselves *subject to greater pressures from their constituencies*."[75] This would indicate that there is *some* basis for a more intent-based mode of interpretation.[76] In the end, Klug suggests that "[t]he degree of public exposure to the Constitution-drafting process was probably without historical precedent anywhere in the world."[77]

The constitution making process in South Africa ended with a particular twist: The Constitutional Court *created by the interim Constitution* would certify that the *final* Constitution was compatible with the Constitutional Principles adopted during the first phase.[78] I will deal with this issue separately later on. For now, it is worth mentioning that the Constitutional Court is very aware of the Constitution's particular *creation* process: "Our Constitution was the product of negotiations conducted at the multi-party negotiating process," which was "advised by the technical committees."[79] I now turn to the role of adoption history and intent in constitutional adjudication.

IV. Legislative History and Intent: More than Useful, Less than Determinative

Here I deal with the issue of the uses of legislative history and intent jointly. As we are about to see, both of these sources play a role in constitutional adjudication in South Africa; but it is a limited one. I start with legislative or "adoption" history.

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[74] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 52 (emphasis added).

[75] *Id*. (Emphasis added).

[76] Hofmeyr, *supra* note 2, at 125 noting that the Constitutional Assembly not only carried "tremendous popular support, but the entire process of drafting the final Constitution was an immensely publicised affair".

[77] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10. At 54. Klug goes on to explain that "[t]he genesis of the Constitution from the first draft to the final product could be followed on a daily basis on the Internet site of the Constitutional Assembly." *Id*. This is reminiscent of the daily media reports and radio broadcasts in the Puerto Rican constitutional making experience.

However, as we have seen, the South African experience has not been unique. A similar process happened in Puerto Rico in 1952 and in Bolivia in 2009. There are other similar experiences in other countries and U.S. states.

[78] Klug, *Enabling Democracy and Promoting Law in the Transition from Apartheid*, *supra* note 29, at 263.

[79] S. v. Makwanyane, 1995 (6) BCLR 665 (CC), para. 17. *See also* Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), para. 13. In this case, the Court also made reference to the fact that the constitution was drafted concurrently with an "intensive country-wide information campaign." *Id*. at16.

The cases of the Constitutional Court of South Africa rarely mention adoption history in order to adjudicate a particular controversy, whether it is to find the semantic meaning of a word or set of words, or to discern the intent of the framers. Yet, it is not wholly absent.[80] Curiously enough, it is worth mentioning the fact that some early members of the Constitutional Court were members of the Constitutional Assembly.[81] As an empirical matter, it is interesting when drafters are still around when their text is being interpreted and applied. According to Lourens du Plessis, "[p]roximity in time to a major constitution-making process has made South African constitutional scholars privy to how original writers of a constitutional text cultivate their own confident (though by no means unanimous) understandings of what their 'creation' says –and will say, according to them, in time to come."[82]

Adoption history has been used sparingly in South African constitutional adjudication. This is part of a tradition of only using legislative history in order to find evidence "on the *purpose and background* of the legislation."[83] This is reminiscent of the objective and subjective teleological models. This includes reference to the reports and debates that formed part of the legislative process.[84] In particular, the relevant statements of the drafters are those that are made *during the formal legislative process*.[85]

The problem here is that this historical resistance to using legislative history *is different in the constitutional sphere, particularly when the constitution-making process, unlike ordinary legislation, is the result of a transcendental social process*.[86] Yet, the resistance endures: "any attempt to ascertain [the framers'] intent…is confounded by the Constitution-making process itself."[87] As such, purposivism is becoming a "substitute for clear language (and authorial intent)."[88]

However, constitutional adoption history has made it into the decisions of the South African Constitutional Court. One of the leading examples is *S. v.*

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[80] *See* Du Plessis v. De Klerk, CCT 8-95, paras. 32-41. ("In quite a number of South African Constitutional Court cases reference has been made to what the framers of both the Interim and Final Constitutions would (or would not) have thought or foreseen or 'intented'"). *See also* Hefmeyr, *supra* note 2, at 130.

[81] Klug, *South Africa: From Constitutional Promise to Social Transformation*, *supra* note 13, at 286.

[82] Lourens du Plessis, INTERPRETATION, CONSTITUTIONAL LAW OF SOUTH AFRICA, 2 ed., sec. 32-25, V. 2 (2002).

[83] Klug, *South Africa: From Constitutional Promise to Social Transformation*, *supra* note 13, at 286. *See also* KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 74 ("Historically, South African courts refused to give much weigh to legislative history").

[84] Klug, *South Africa: From Constitutional Promise to Social Transformation*, *supra* note 13, at 286.

[85] *Id*. This is very similar to the original explication model used in Puerto Rico and Bolivia. *See* Farinacci-Fernós, *When Social History Becomes a Constitution, supra* note 1; Farinacci-Fernós, *Originalism in Puerto Rico, supra* note 4.

[86] *See* du Plessis, *supra* note 82, at sec.32.28.

[87] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 75.

[88] du Plessis, *supra* note 82, at sec 32-37.

Makwanyane.[89] The question in that case was whether the death penalty was compatible with the interim Constitution. The problem was that the text made no explicit reference to this issue: "It would no doubt have been better if the framers of the Constitution had stated specifically, wither that the death sentence is not a competent penalty, or that it is permissible in circumstances sanctioned by law."[90] In the absence of a specific textual rule, the Court embarked on a process of interpretation; in particular, a contextual analysis of the Constitution "which includes the *history* and *background to the adoption* of the Constitution."[91] As such, the Court dove into the "debate which took place in regard to the death penalty *before* the commencement of the constitutional negotiations."[92] That it, it did not limit itself to the internal adoption history of the Constitution. And even then, the Court was careful with its characterization of the role of adoption history in constitutional adjudication: "It was argued that this background information forms part of the context within which the Constitution should be interpreted."[93]

The Court fell back on its practice as to *statutory* interpretation: "Our courts have held that it is permissible in interpreting a statute to have regard to the purpose and background of the legislation in question."[94] In other words, the question is not whether adoption history is authoritative or determinative, but whether it is even permissible to use it at all. Yet, the Court does not offer a normative justification for this, but instead references its prior practice as to statutory interpretation. This fails to take into account the democratic and participatory nature of the constitution-making process, which may require a different approach as opposed to the adoption of ordinary legislation.

In its comparative analysis, the Court referenced that "[i]n other countries in which the Constitution is similarly the supreme law, it is not unusual for the Courts to have regard to the circumstances existing at the time the Constitution was adopted, including the debates and writings which formed part of the process."[95] There may yet be hope for the original explication model, keeping in mind that this case was handed down *before the final Constitution was adopted in 1996, which was not just the result of negotiations but a more popular based process of constitutional creation*. As to the negotiation process itself that gave birth to the interim Constitution, the Court stated that the "reports of [the technical committees which advised the parties] on the drafts are the equivalent of the *travaux préparatoires*, relied upon by the

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[89] 1995 (6) BCLR 665 (CC).

[90] *Id*. at 5.

[91] *Id*. at 10. (Emphasis added).

[92] *Id*. at 12. (Emphasis added).

[93] *Id*.

[94] *Id*. at 13.

[95] *Id*. at 16.

international tribunals."[96] The Court further explained: "Such background material can provide a context for the interpretation of the Constitution, and, where it serves that purpose, [we] can see no reason why such evidence should be excluded."[97] In the end, "[t]he precise nature of the evidence, and the purpose for which it may be tendered, will determine the weight to be given to it."[98] Adoption history is linked with the identification of the purpose of a particular provision.[99]

But the Court held back, leaving for the future the actual role of legislative history in constitutional adjudication: "It is neither necessary nor desirable at this stage in the development of our constitutional law to express any opinion on whether it might also be relevant for other purposes, nor to attempt to lay down general principles governing the admissibility of such evidence."[100] However, the Court did give legislative history some breathing space: "It is sufficient to say that where the background material is *clear*, is *not in dispute*, and is *relevant* to showing *why* particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution."[101] Original explication may live to fight another day. In fact, one member of the Court stated that "[i]n the absence of the clearest indications that the framers of the Constitution intended [giving a particular provision a different reading]…section 9 [of the interim Constitution] should be read to mean exactly what it says: every person shall have the right to life."[102] Note that there seems to be an admission there that, in fact, the existence of such clear indication *would trump the ordinary meaning of the text*.

As to the particular issue of the death penalty, the Court noted that "it is clear that the failure to deal specifically in the Constitution with this issue was not accidental."[103] As most relevant here, *the Constitutional Court was able to use adoption history in order to conclude that the drafters of the interim Constitution actually intended the Court itself to answer the question as to the legality of the death penalty*.[104] This "is apparent from the reports of the Technical Committee on Fundamental Rights, and, in particular, the Fourth and Seventh reports."[105] In the end, the Court struck down the death penalty.

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[96] *Id*. at 17.
[97] *Id*.
[98] *Id*.
[99] *Id*. at 19. ("Background evidence may, however, be useful to show why particular provisions were or were not included in the Constitution").
[100] *Id*.
[101] *Id*. (Emphasis added).
[102] *Id*. at 357 (Sachs, J., concurring).
[103] *Id*. at 20.
[104] *Id*. at 324 (O'Regan, J., concurring).
[105] Klug, *Enabling Democracy and Promoting Law in the Transition from Apartheid*, *supra* note 29, at 274.

But legislative history has remained in the backburner in constitutional adjudication in South Africa. Examples are rare.[106] My main objection to that practice is that *no direct normative justification is given, particularly as to the 1996 Constitution which was partially the result of a popular, democratic and participatory process of creation*. For now, legislative history is either missing or limited to a confirmatory role.[107] Other times it has even been given that secondary role grudgingly.[108]

Yet, there seems to be *some* daylight between formal legislative history and the intent of the framers in general. References to the latter have been relatively more prevalent, allowing for potential future development of that interpretive tool.

The drafters have been present in the decisions of the South African Constitutional Court. This presence links the constitutional product with the social forces behind it. As Christiansen explains, "[i]t is true that historical and popular expectations applied substantial pressure on the drafters of the Constitution."[109] As a result, when courts apply the teleological constitution they are "[r]einforcing the founding generation's constitutional values."[110] Another of the many interesting features of this issue is the fact that some of the constitutional designers would later be appointed to the Constitutional Court.[111] Finally, we should also remember here the considerable paper trail that the constitution making process left available.[112] Yet, because of the different viewpoints that were present in the entire

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[106] *See, for example*, S. v. Mhlungu, 1995 (7) BCLR 793 (CC), para. 128 (Sachs, J., concurring).

[107] *See* Ferreira v. Levin, CCT 5/95, para. 46. ("The legislative history of the section would seem to confirm this," in reference to the Sixth Report of the Technical Committee on Fundamental Rights during the multi-party talks); Du Plessis v. De Klerk, CCT 8/95, para. 84 (Mahomed, DP) ("[I]t is, I think, permissible to have some regard to that history, *although this cannot in itself ever operate decisively*") (Emphasis added); Case and Another v. Ministry of Safety and Security, CCT 20/95.

[108] *Du Plessis*, at 56. ("I have arrived at the conclusions set above without any references to the drafting history of Chapter 3, and in particular of Section 7…We heard no argument on that history, but it is referred to frequently in the literature which I have cited. It is perhaps sufficient to say that there is nothing in the legislative history referred to in that literature which requires the adoption of the [proposed] interpretation"). Curiously enough, this statement is followed by homage to the framers: "I do not believe that such a state of affairs could ever have been *intended by the framers of the Constitution*." *Id*. at 57.

[109] Christiansen, *supra* note 12, at 387. The author goes on to say: "However, that is the nature of constitutional drafting processes generally, not just in South Africa." *Id*. This is particularly true in the case of teleological constitutions, where the link between text and adoption history seems stronger.

[110] *Id*. at 403. As a result, when the Constitutional Court applies a policy-laden provision, it is not substituting the legislator' will with their own, but with the will of the constitutional drafter. Klug, *Enabling Democracy and Promoting Law in the Transition from Apartheid, supra* note 29, at 275.

[111] *See, for example*, GLOPPEN, *supra* note 16, at 59.

[112] Theuns Eloff, *The Process of Giving Birth*, in BIRTH OF A CONSTITUTION 16-17 (Bertus De Villiers, ed. 1994).

constitutional making process, ascertaining on-point intent from those sources may be tricky.[113] Other times it is much easier.[114]

As we already saw, the Constitutional Court's most intentionalist decision is *S. v. Makwanyane*, particularly as to the actions and mindset of the drafters.[115] But there are other decisions that, although not wholly intentionalist, do make sufficient reference to the framers so as to assign them a role in constitutional adjudication. Some of those references are in negative terms: "It would be extremely distressed to accept that is what the Constitution intended."[116] And if the framers made a judgment, that judgment stands: "Rightly or wrongly the framers of the Constitution chose the latter option and we are required to give effect to that choice."[117] In that sense, a policy-heavy decision that overturns the legislature's judgment is not an exercise in judicial usurpation: "But that is beside the point, This Court did not draft the Constitution;"[118] "[t]his is not the case of making the Constitution mean what we like, but of making it mean what the framers wanted it to mean; we can gather their intention not from our subjective wishes, but from looking at the document as a whole."[119] Yet, this last statement seems to blur the lines between an intentionalist approach and the objective teleological model.[120]

But the idea that what the framers did and *intended* are determinative has not been lost on the Court: "In my view there is no argument for such an approach, for at least two reasons. First, *it would constitute an unjustified 'second-guessing' of the framers' intention*. They must have been only too well aware that at least some of the section 11(1) rights were residual freedoms."[121] Yet, some problems remain, such as the collective intent issue: "One also knows that the Constitution did not spring pristine from the collective mind of its drafters."[122] But that has not been an

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[113] De Villiers, *supra* note 17, at 46-47.

[114] Certification of the Constitution of the Republic of South Africa*, 1996*, 1996 (10) BCLR 1253 (CC), fn. 47; Du Lange v. Smuths *NO*, 1998 (7) BCLR 779 (CC), para. 16.

[115] *See, for example,* S. v. Makwanyane, 1995 (6) BCLR 665 (CC), para. 388 (Sachs, J., concurring).

[116] S. v. Mhlungu, 1995 (7) BCLR 793 (CC), para. 8. "If the intention of the section was…" *Id*. at 12; Du Plessis v. De Klerk, CCT 8/95, para. 57; Ynvico Limited v. Minister of Trade and Industry, CCT 47/95, para. 7; Ex Parte the President of the Republic of South Africa; in re Constitutionality of Liquor Bill, 2000 (1) BCLR 1 (CC), para. 57.

[117] *Mhlungu*, at 72 (Kentridge, A.J., dissenting). *See also Id*. at 102 (Sachs, J., concurring) ("My disagreement with Kentridge AJ's judgment is that even if it bases itself on the most natural and spontaneous reading of the section, it gives too little weight to the overall design and purpose of the Constitution, producing results which the framers could have never intended." *Id*. at 105; Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), para. 104.

[118] *Du Plessis,* at 123 (Kriegler, J.).

[119] *Mhulungu*, at 112.

[120] *See Du Plessis*, at 44; Premier of Kwazulu-Natal v. President of the Republic of South Africa, 1995 (12) BCLR 1561, para. 12.

[121] Ferreira v. Levin, CCT 5/95, para. 58 (emphasis added).

[122] *Du Plessis,* at 123 (Kriegler, J.).

absolute impediment to using intent. In fact, sometimes this intent can actually be used to expand on the text: "The manifest intention of the drafters of the subsection was to *expand* its scope to the *widest* limit that *their language could express*."[123] Sometimes that intent as to important substantive policy issues is evident.[124]

V. When Looking Back Helps to Go Forward: The Uses of History in South African Constitutional Adjudication

It would be an understatement to say that history plays a crucial role in the jurisprudence of the South African Constitutional Court. The 1996 Constitution *is an intentional product of history*.[125] As a teleological document, it addresses the past and looks to the future. As such, "in the light of our own particular history, and our vision for the future, [the] constitution was written with equality at its center."[126]

The past is present in the decisions of the Constitutional Court.[127] References to history permeates them. This requires analyzing "both the constitution-making process and the process of implementation of the Constitution, against the background of the heavy legacy of apartheid, the reality of everyday life, and finally against the hope and enthusiasm and civil, political and academic interest stimulated by the transition two decades ago."[128] In particular, South African constitutional law takes into account historical grievances that interrelate race and class,[129] as well as others form of social injustice.[130] It also includes the

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[123] *Id*. at 130 (emphasis added).

[124] President of the Republic of South Africa v. Hugo, 1997 (6) BCLR 708 (CC), para. 73 (Kriegler, J., concurring) ("Discrimination founded on gender or sex was manifestly a serious concern of the drafters of the Constitution"); Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), para. 51.

[125] *See* KLUG THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 1.

[126] *Hugo,* at 74 (Kriegler, J., concurring).

[127] Du Plessis v. De Klerk, CCT 8/95 para. 125 (Kriegler, J.).

[128] Federico, et al., *supra* note 34.

[129] *See* Nic Olivier, Nico Olivier & Clara Williams, *Land Reform and Constitutional Rights*, *in* THE QUEST FOR CONSTITUTIONALISM 207 (1994); Case and Another v. Ministry of Safety and Security, CCT 20/95, para. 80; Dawood v. Minister, 2000 (8) BCLR 837 (CC), para. 35.

[130] Fraser v. Children's Court, 1997 (2) BCLR 153 (CC), para. 44; S. v. Lawrence; S. v. Negal; S. v. Solberg, 1997 (10) BCLR 1348 (CC), para. 31 ("In light of our history in job reservation, influx control and monopolies it is understandable that there should be such a provision in the bill of rights"); Government of the Republic of South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC), para. 6 ("The cause of the acute housing shortage lies in apartheid"); Moseneke v. The Master of the High Court, 2001 (2) BCLR 103 (CC), para. 20 ("The Act systematized and enforced a colonial form of relationship between a dominant white minority who were to have the rights of citizenship and a subordinate black majority who were to be administered"); Bel Porto School Governing Body v. Premier of the Province, Western Cape, 2002 (9) BCLR (891 (CC), para. 8 (in reference to the history of racially-segregated education); NUMSA v. Bader Bop (Pty) Ltd, 2003 (2) BCLR 182 (CC), para. 13 (indicating that the right of workers to strike "is both of historical and contemporaneous significance").

history of the main political actor behind the constitutional project: the African National Congress.[131]

The South African Constitutional Court has consistently recognized that its constitutional structure must be analyzed in the context of its particular legal history, traditions and usages.[132] As such, the provisions of the Constitution must not be read in isolation but in context, "which includes the history and background to the adoption of the Constitution."[133] In that sense, even the purposive approach to constitutional interpretation –which I will address later on- has to take into account history: "In seeking the purpose of the particular rights, it is important to place them in the context of South African society;"[134] "[i]t is essential, in my view, to consider our constitutional history prior to the introduction of the interim and 1996 Constitutions in the process of determining what the purpose of the 1996 Constitution is."[135] That historical context can even affect the semantic meaning of words and their legal effect: "Given the specific meaning that the phrase 'detention without trial' has acquired in South Africa, however, I prefer not to apply these words literally to the situation under discussion."[136]

In *Anzanian Peoples Organization v. President*, the Constitutional Court started its analysis with a direct reference to history: "For decades South African history has been dominated by a deep conflict between a minority which reserved for itself a central role over the political instruments of the state and a majority who sought to end that domination."[137] The Court goes on:

> The result was a debilitating war of internal political dissension and conflict, massive experience of labour militancy, perennial student unrest,

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[131] *See* GLOPPEN, *supra* note 16, at 69.

[132] S. v. Zuma*,* 1995(4) BCLR 401 SA (CC), para. 15; S. v. Makwanyane, 1995 (6) BCLR 665 (CC), para. 361 (Sachs, J., concurring); Fedsure Life Assurance LTD v. Greater Johannesburg Transnational Metropolitan Council, 1998 (12) BCLR 1458 (CC), para. 2.

[133] *Makwanyane,* at 10. *See also* S. v. Mhlungu, 1995 (7) BCLR 793 (CC), para. 28 ("Whatever be the exact phraseology used, however, the basic idea of legitimizing the authority of the old to continue with that authority under a new regime has a long and very well established constitutional history"); Du Plessis v. De Klerk, CCT 8/95, para. 119 (Kriegler, J.) ("The legal issues involved are inherently complex. The conundrum is compounded by percepts of its social, political and economic implications, as also by inarticulated premises, culturally and historically ingrained"); Certification of the Constitution of the Republic of South Africa*,* 1996, 1996 (10) BCLR 1253 (CC), para. 1; ANC v. Minister, 1998 (4) BCLR 399 (CC), para. 4 ("It is necessary to set the provisions of section 182 in their historical context").

[134] S. v. Williams, 1995 (7) BCLR 861 (CC), para. 51; Dispute Concerning the Constitutionality of Certain Provisions of the School Education Bill of 1995, CCT 39/95, paras. 8 and 19; Prinsloo v. Van Der Linde, 1997 (6) BCLR 759 (CC), para. 20.

[135] De Lange v. Smuths NO, 1998 (7) BCLR 779, para. 43.

[136] Coetzee v. Government; Matiso v. Commanding Officer, 1995 (10) BCLR 1382 (CC), para. 43 (Sachs, J., concurring).

[137] 1996 (8) BCLR 1015 (CC), para. 1.

> punishing international economic isolation, widespread dislocation in crucial areas of national endeavor, accelerated levels of armed conflict and a dangerous combination of anxiety, frustration and anger among expanding portions of the populace. The legitimacy of law itself was deeply wounded as the country hemorrhaged dangerously in the face of this tragic conflict which had begun to traumatize the entire nation.[138]

Such historical experiences cannot be ignored when engaging in constitutional adjudication.[139]

VI. Because the Constitution Says So: The Enforcement of Socio-Economic Rights and a Broad Reading of Rights in General

Constitutional scholars constantly mention South Africa's catalogue of justiciable socio-economic rights as a distinctive characteristic of that country's constitutional model.[140] This has led scholars to state that "[t]he Constitution of South Africa of 1996 differs from classical liberal constitutions in other parts of the world and is perceived as a progressive and transformative document."[141] This is the result of the view that "[t]he goals of government activity in the areas of social policy, economic policy and environmental policy, as well as the direction of change, should be laid down in the constitution itself."[142]

Of course, as we have seen, that feature is not unique to South Africa. While the *existence* of a broad array of constitutionalized socio-economic rights is not exclusive to South Africa, its approach to their *enforcement* has much to offer other teleological constitutional systems. In this section, I will focus on the treatment of socio-economic rights in particular and of rights in general in the South African constitutional experience, beginning with a descriptive account of the *content* of the constitutional text and finishing with an account of their actual *enforcement*.

A. Socio-Economic Rights

It should be mentioned that South Africa's catalogue of justiciable socio-economic rights is not merely an abstract list of generic aspirations; some see it as

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[138] *Id*.

[139] *See* Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), paras. 3-6; August v. Electoral Commission, 1999 (4) BCLR 363 (CC), para. 17.

[140] Klug, *South Africa: From Constitutional Promise to Social Transformation*, *supra* note 13, at 267 (stating that the Constitution's list of socio-economic rights "mark the unique character of this Constitution as the crowning achievement of South Africa's democratic transition").

[141] Stewart, *supra* note 15, at 81.

[142] GLOPPEN, *supra* note 16, at 66.

a tool that "can advance the case of social justice."[143] In other words, it is part of a specific policy view. As Heinz Klug explains, the African National Congress pushed "for the expansion of rights to include a range of socio-economic rights that were central to its constituencies' demands."[144] Unfortunately, much of the debate about South Africa's justiciable socio-economic rights focuses on its positive and vertical application.[145] Much less attention has been paid to the issue of horizontality, which I will discuss separately later on.

Taking into account the applicable distinctions as to the nature, effect and scope of rights, we have to differentiate positive and vertical rights from those that are negative and horizontal.[146] South Africa's 1996 Constitution includes *both*; from socio-economic rights that create a positive obligation on the state, such as education rights,[147] housing,[148] healthcare, sufficient food and water, social security,[149] to socio-economic rights that are opposable to private parties, such as employers.[150]

But the South African Constitution does not merely incorporate socio-economic rights; it also *broadens* the scope of rights in general, including civil and political rights.[151] While the content of the right may be similar, its scope and effect are enhanced. As the Constitutional Court has observed: "It should be emphasized that in general the Bill of Rights drafted by the [Constitutional Assembly] is as extensive as any found in any national constitution."[152] Other decisions of the Constitutional Court reflect this approach.[153]

B. Judicial Enforcement of Socio-Economic Rights

The *enforcement* of constitutionalized socio-economic rights constitutes a revolution in the conceptualization of the judicial role. As Linda Stewart explains, "socio-economic rights interpretation and adjudication is by its very nature political

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[143] Christiansen, *supra* note 12, at 371.

[144] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 4.

[145] Christiansen, *supra* note 12, at 374.

[146] *See* Jorge M. Farinacci-Fernós, *Looking Beyond the Negative-Positive Rights Distinction: Analyzing Constitutional Rights According to their Nature, Effect and Reach*, 41 HASTINGS INT'L & COMP. L. Rev. 31 (2017).

[147] *See* Dispute Concerning the Constitutionality of Certain Provisions of the School Education Bill of 1995, CCT 39/95, para. 5.

[148] Soobramoney v. Minister of Health (Kwazulu-Natal), CCT 32/97, paras. 9-10.

[149] Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), para. 76.

[150] South African National Defence Union v. Minister of Defense, 1999 (6) BCLR 615 (CC), para. 20.

[151] *See* S. v. Zuma, 1995(4) BCLR 401 SA (CC), para. 16.

[152] *Certification of the Constitution of the Republic of South Africa, 1996*, at 52.

[153] August v. Electoral Commission, 1999 (4) BCLR 363 (CC), paras. 1-5 (on the voting rights of convicted persons).

and the judiciary plays a significant role in shaping the political discourse on needs and poverty not only in the language they use, but also the conceptual structures and rhetorical remedies they employ and rely on when adjudicating socio-economic rights."[154]

While many countries do, in fact, incorporate socio-economic rights in their texts, these "are infrequently enforced by courts" and are deemed to be non-justiciable by scholars.[155] South Africa has challenged that common wisdom and serves as a "counter-example."[156] According to Eric Christiansen, "South Africa is the first nation that has adjudicated a sufficient number of cases to evidence a comprehensive jurisprudence,"[157] as it relates to socio-economic rights. However, *this does not mean that there aren't problems of under-enforcement in South Africa*: "[T]he Court has been criticized far more for the excessive *restraint* it has shown than for *judicial over-reaching*."[158]

Before diving in to the specific examples of the enforcement of socio-economic rights in South Africa, it is worth mentioning how the Constitutional Court has adopted self-imposed limitations as to this issue. Among these are: (1) an avoidance of individual remedies, (2) an unwillingness to recognize unqualified textual rights, (3) a rejection of a 'minimum core' standard for social welfare entitlements which would guarantee a minimum level of sustenance, (4) the application of a reasonableness standard that allows for great deference for legislative judgment, and (5) a rejection of any form of unrestrained enforcement of these rights.[159] And, in terms of the actual analysis of these provisions, we should be aware as to how the Court takes into account (1) text, (2) its approach to rights adjudication in general, (3) separation of powers issues, (4) federalism issues, (5) the country's legal culture, (6) the capabilities and credibility of the judiciary itself, (7) procedural issues that impact the court's capacity to solicit information, and (8) the scope of the court's remedial powers.[160] I will analyze many of these factors later on in the Article. But, as can be appreciated from this list, the Constitutional Court has been reluctant "to provide normative content to socio-economic rights and resorted to a procedural and formalistic approach to measure the reasonableness of the measure taken by the State."[161] Under-enforcement remains an issue. While it is true that courts in South Africa can do a lot more than has been done until now, they have done much more

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[154] Stewart, *supra* note 15, at 81-82.

[155] Christiansen, *supra* note 12, at 373.

[156] *Id*. at 376.

[157] *Id*. at 377.

[158] *Id*. (emphasis added).

[159] *Id*. at 385-386.

[160] *Id*. at 388-389.

[161] Stewart, *supra* note 15, at 84.

than they think, particularly as opposed to courts in other constitutional systems. But, as Heinz Klug points out, "the inherent positivism of South African lawyers may restrict or serve as a drag on the interpretive project so central to the transformative potential of the Constitution."[162] That's the stuff of under-enforcement by clinging to outdated views on constitutionalism or the judicial role.

According to Eric Christiansen, "South Africa evidences that courts can adjudicate [positive and vertical] socio-economic rights without destroying the rule of law or the fiscal security of the country."[163] This requires more careful analysis, as even the author recognizes that "[t]he general conclusion, required by the limited role of courts and the uncertain interaction of popular processes and adjudication, is that court enforcement can *support* social change within institutional constraints."[164] In that sense, even the comprehensive enforcement of these rights, as well as other substantive provisions, is not a *permanent* substitute for effective use of the legislative process and ordinary politics. This dissertation has now argued for such replacement; judicial enforcement merely works as a temporary tool until ordinary politics and constitutional politics line up again.

The enforcement of socio-economic rights in South Africa, and its impact on the judicial role, has not been lost on scholars: "To the extent that these rights are justiciable –which at least some of them are formulated to be- they confer great powers on the courts in matter of social and economic policy."[165] Let's break this down.

First, we should distinguish between judicial usurpation and constitutional delegation. There is a critical difference between a court that makes up the law along the way unconstrained by constitutional commands and a court that intervenes in a policy issue *because the constitutional legislator orders it to by adopting enforceable policy provisions, such as a socio-economic right*. Second, *negative* socio-economic rights, whether vertical or horizontal in their reach, limit the role of the Court to that of negative legislator –although, as we saw, in teleological contexts this can have substantial policy implications-. Third, it is in the *positive* manifestation of socio-economic rights that courts are more likely to carry out policy analysis and reach independent conclusions.[166] But, in any event, there is no denying the impact of justiciable and enforceable socio-economic rights as to the nature of courts. I will return to this latter issue later on.

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[162] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 73.

[163] Christiansen, *supra* note 12, at 400.

[164] *Id*. (emphasis added).

[165] GLOPPEN, *supra* note 16, at 232.

[166] *See Id.* ("Social and economic rights leave even greater potential for disagreement on what 'justice' requires, than do other aspects of the Bill of Rights").

Negative socio-economic rights have been easier to enforce.[167] This is simply an extension of the classic negative legislator role. Positive rights are trickier.[168] This is true whether we are addressing socio-economic rights or even civil and political ones; it applies to all positive rights. In the South African context, positive socio-economic rights that are also vertical –that is, opposable to the state-, are analyzed under a standard of *reasonableness*. In other words, if the action –or lack thereof- on the part of the state is reasonable as to the enforcement of the particular constitutional right. Let's dive a little deeper.

All rights in South Africa are subject to limitations.[169] The Constitution offers two types of limits. First, some rights have *specific limitations written into the right itself*. Socio-economic rights are among these. Second, there is a *general* limitations clause contained in the Constitution that applies to all constitutional rights. I will now discuss both.

The reasonableness standard used to enforce *positive* socio-economic rights stems from the constitutional text itself.[170] This is so, because the text (1) conditions the enforcement of the rights to the existence of available resources and (2) requires the state to take reasonable legislative and other measures to achieve the progressive realization of socio-economic rights.[171] In other words, the text itself rejects an unqualified enforcement of socio-economic rights, conditioning it to the existence of resources and the taking of reasonable steps towards their gradual realization. This language has led to the reasonableness standard. This brings us to *Grootboom*.[172]

In *Grootboom*, a suit was brought demanding the state to comply with its constitutional duty to provide adequate housing. This required judicial evaluation of the government's housing program.[173] The text of the constitutional provision limited the existence of the right, "imposing an obligation upon the state to take reasonable legislative and other measures to ensure the progressive realisation of this right within its available resources."[174]

The Constitutional Court first dealt with the justiciability issue as it relates to socio-economic rights in general, particularly of the positive sort. Its conclusion was forceful, *as required by the constitutional text itself*: "While the justiciability of socio-economic rights has been the subject of considerable and political debate, the issue of whether socio-economic rights are justiciable at all in South Africa

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[167] Klug, *South Africa: From Constitutional Promise to Social Transformation*, *supra* note 13, at 307.

[168] *See* Farinacci-Fernós, *Looking Beyond, supra* note 146.

[169] The standard we are about to see is very similar to Canada's rights structure.

[170] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 143.

[171] Soobramoney v. Minister of Health (Kwazulu-Natal), CCT 32/97, para 10.

[172] Government of the Republic of South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC).

[173] *Id*. at 12.

[174] *Id*. at 13.

has been put beyond question by the text of the Constitution as construed in the *Certification* judgment."[175] In other words, "[s]ocio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist in paper alone."[176]

As a result, "courts are constitutionally bound to ensure that they are protected and fulfilled."[177] According to the Court, "[t]he question is therefore not whether socio-economic rights are justiciable under our Constitution, but *how* to enforce them in a given case."[178] Once the general justiciability issue was resolved, the Court turned its attention to the actual enforcement of positive socio-economic rights that have vertical reach and positive articulation. For that analysis, the Court used both textual and socio-historical factors and considerations, in particular, the socio-economic rights as an extension of political rights rationale.[179]

Once the existence of a socio-economic right and its justiciability are recognized, "[t]he state is obliged to take positive action to" enforce the specific socio-economic right, and the Court must determine, using a reasonableness standard, whether the state "has met its obligation."[180] As such, legislative or executive *inaction* is constitutionally impermissible. Also, these *positive* rights have *negative, and even horizontal, effects*: "Although the subsection does not expressly say so, there is, at the very least, a negative obligation upon the state and all other entities and persons to desist from preventing or impairing the right."[181]

The reasonableness standard offers great room for maneuver for the legislature and the executive: "The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive."[182] These, however, must be reasonable, which is a matter for judicial review. Within the realm of what is reasonable, the elected branches get to choose. This is not a toothless tiger type of standard; in *Grootboom*, the Constitutional Court held the government's housing program to be insufficient and, thus, unconstitutional. The reasonableness standard announcer in *Grootboom* has been used in other cases.[183]

Another critical case that aids in the analysis of the enforcement of positive and vertical socio-economic rights is *Minister of Health v. Treatment Action Campaign*.[184] This case involved the government's duty to provide health care to

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[175] *Id*. at 20 (emphasis added).
[176] *Id*.
[177] *Id*.
[178] *Id*. (emphasis added).
[179] *Id*. at 22.
[180] *Id*. at 24.
[181] *Id*. at 34.
[182] *Id*. at 41.
[183] *See, for example*, Minister of Public Works v. Kyalami Ridge Environmental Association, 2001 (7) BCLR 652 (CC), para. 38.
[184] 2002 (10) BCLR 1033 (CC).

HIV/AIDS patients. There, the Constitutional Court stressed *both* the existence and justiciability of positive socio-economic rights *and* their textual limitations.[185] Also, the Court emphasized that these rights are to be "interpreted in their social and historical context."[186] It's not just all about the text.

Once justiciability was reaffirmed, the Constitutional Court framed the issue thusly: "The question is whether the applicants have shown that the measures adopted by the government to provide access to health care services for HIV-positive mothers and their newborn babies fall short of its obligations under the Constitution."[187] This statements reaffirms the reasonableness test, as well as make clear that the initial burden of proof falls on the plaintiff.

But the Court in *Treatment Action Campaign* hit the brakes a bit, particularly as to the issue of the so-called 'minimum core': "The minimum core might not be easy to define, but includes at least the minimum decencies of life constant with human dignity. No one should be condemned to a life below the basic level of dignified human existence. The very notion of individual rights presupposes that anyone in that position should be able to obtain relief from a court."[188] In the end, though, the Court rejected an out-right right to a minimum core approach to socio-economic rights, *but*, it did hold that if a particular situation falls below that threshold, that fact will be most relevant to the reasonableness analysis itself. In other words, it is part of the analysis instead on a self-standing right.[189]

In the end, the doctrine stands as follows: when it comes to *positive* and *vertical* socio-economic rights, the Court will apply a deferential standard of reasonableness.[190] This standard takes into account available resources. And while it does give some leeway to legislative and executive judgment, in the end, courts have to decide whether a particular action, or lack thereof, is sufficient to comply with the constitutional command.

Once we address the specific limitations textually built-in as to socio-economic right, we still must face the general limitations provision, which requires courts to analyze: (1) the nature of the right involved, (2) the purpose of the limitation, (3) the nature and extent of the limitation, (4) the relation between the limitation and its purpose, and (5) the existence of less restrictive means to achieve such ends.[191] In

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[185] *Id*. at 25 ("The question in the present case, therefore, is not whether socio-economic rights are justiciable. Clearly they are").
[186] *Id*. at 23.
[187] *Id*. at 25.
[188] *Id*. at 28.
[189] *Id*. at 34.
[190] The reasonableness test has not been without its critics, as it "transforms poverty and needs issues into technical and administrative issues which can only be addressed by formal political and governmental structures (Based on a liberal-capitalist economic system)". Morné Olivier, *supra* note 13, at 82.
[191] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 117.

addition, limitations will only be upheld if they are reasonable and justifiable in an open and democratic society based on dignity, equality and freedom.[192] This is the South African version of the proportionality test.

This limitation provision should be seen jointly with the fact that, as a threshold matter, rights are given a *generous and purposive* interpretation in South Africa. As such, courts will almost always find a violation of the right and turn immediately to the limitation analysis. This brings us to the issue of the relation between generous and purposive interpretation, since these are not always in-tuned with each other. They are, after all, different concepts.[193] The South African Constitutional Court has recognized this. A generous interpretation can actually run contrary to the purpose of a right.[194]

This brings us to *Coetzee v. Government*; *Matiso v. Commanding Officer*, where a generous interpretation actually *defeated* the purpose of the right, which was to protect poor people who couldn't pay instead of rich people who refused to pay their debts. The South African Constitutional Court actually gave preference to *purpose over generosity*.[195]

In that sense, generous interpretation broadens the scope of a right, while purposive interpretation requires "identifying the core values that underlie the inclusion of a particular right in the Bill of Rights and adopting an interpretation of the right that 'best supports and protects these values'."[196]

C. Horizontality

Rights can be either vertical or horizontal, independent of their nature –that is, political and civil or socio-economic- or their scope –that is, negative or positive-. Some socio-economic rights are clearly horizontal in their reach; labor rights are a good example of this. Here I wish to focus on the horizontality of rights that are mainly designed as vertical. More to the point, I will address the *general horizontal effect of rights that are not explicitly horizontal*.

Anti-discrimination provisions are at the heart of this analysis. As Gloppen suggests, "[h]orizontal application of constitutional rights is controversial."[197]

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[192] S. AFR. CONST., 1996. § 36.

[193] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 121 ("In addition to a generous interpretation, the Constitutional Court has repeatedly referred to the necessity of adopting a purposive approach to the interpretation of rights").

[194] *Id.* at 122; Coetzee v. Government; Matiso v. Commanding Officer, 1995 (10) BCLR 1382 (CC), para. 13 ("The sanction of imprisonment is ostensibly aimed at the debtor who will not pay. But in is unreasonable in that it also strikes at those who cannot pay").

[195] Coetzee v. Government; Matiso v. Commanding Officer, 1995 (10) BCLR 1382 (CC), para. 13 ("The sanction of imprisonment is ostensibly aimed at the debtor who will not pay. But in is unreasonable in that it also strikes at those who cannot pay").

[196] *Id.* at 121.

[197] GLOPPEN, *supra* note 16, at 233.

The horizontal effect of constitutional rights "enables rather than restraints the state,"[198] as part of the post-liberal, teleological view of using state power to generate social transformation, particularly in the private sphere. In terms of labor rights, "[t]he horizontal rights provisions add to the workload of courts in general, and the Constitutional Court in particular."[199] These "add to the Court's potential 'legislative' powers."[200]

In *Du Plessis v. De Klerk*, the Constitutional Court faced the question of whether the anti-discrimination provisions of the constitution had "only 'vertical' application or ha[ve] in addition 'horizontal' application."[201] After noting that the horizontal-vertical dichotomy may be misleading, the Court focuses on the German and Canadian experiences of giving *indirect* horizontal effect to this type of constitutional provision.[202]

This indirect horizontal effect requires courts to develop private law and other statutory provisions *in accordance* with constitutional requirements. Statutory interpretation becomes the tool for the indirect constitutionalization of private law. While not giving constitutional provisions full horizontal effect, the importance of such *indirect* horizontality should not be underestimated. As one member of the Court put it, in reference to the "egregious caricature" given by the detractors of horizontality: "That this so-called direct horizontality will result in an Orwellian society in which the all-powerful state will control all private relationships…is nonsense...[I]t is malicious nonsense preying on the fears of privileged whites, cosseted in the past by *laissez faire* capitalism thriving in an environment where the black underclass had limited opportunity to share in the bounty…Direct horizontality is a boogeyman."[203]

Curiously enough, the Constitutional Court used *text* and *intent* to justify not giving the Constitution full and direct horizontal effect: "Had the *intention* been to give [the Bill of Rights] a more external application that could have been readily expressed."[204] In terms of using *legislative history* to arrive at this conclusion, the Court's statement are ambiguous, yet revealing:

I have arrived at the conclusions set out above *without* any reference to the *drafting history* of Chapter 3, and in particular Section 7. We heard no argument on that history, but it is referred to frequently in the literature which I have cited. It is

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[198] *Id*.

[199] *Id*.

[200] *Id*.

[201] Du Plessis v. De Klerk, CCT 8-95, para. 8.

[202] *Id*. at 36.

[203] *Id*. at 120 (Kriegler, J., dissenting).

[204] *Id*. 45 (emphasis added) ("It would be surprising if as important a matter as direct horizontal application were to be left implied").

perhaps sufficient to say that *there is nothing in the legislative history* referred to in the literature which *requires* the adoption of the horizontal interpretation.[205]

It would seem that, although there was some resistance as to the use of legislative history to ascertain the scope and reach of the constitutional provisions under review, the Constitutional Court did admit that there *could have been* some sort of legislative history that could *require* a particular outcome. In the end, the Court recognizes: "I do not believe that such a state of affairs could have been *intended by the framers of the Constitution*."[206]

The issue of horizontality would come up again when the Constitutional Court certified the *final* Constitution of 1996. In the *Certification* case, the Court addressed horizontality. According to the new Article 8, Section 2, "[a] provision of the Bill of Rights binds natural and juristic persons, if, and to the extent that it is applicable, taking into account the nature of the right and duty imposed by the right."[207] In other words, the *direct* horizontal effect of a particular right would be analyzed using this constitutionally-prescribed standard. Once again, labor rights are a good example of the sort of constitutional provision that, by its nature, requires horizontal effect. As to the objections made against this provision, the Constitutional Court simply *rejected* them, deferring to the judgment of the constitutional legislators.

In summary, while the Bill of Rights applies directly to the organs of state and some particular rights have direct horizontal effect, the Bill of Rights "indirectly applies to persons other than organs of state," mostly by way of the development of the common law in a manner consistent with the Constitution.[208] Still, some gray areas remain.[209]

D. Constitutionalized Statutory Interpretation

The issue of indirect horizontality through the constitutionally-compatible development of private law brings us to the general issue of constitutionally-sensitive statutory interpretation. This combination has not been lost on the Constitutional Court.[210] This includes making older statutes, which were adopted before the

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[205] *Id*. at 56.

[206] *Id*. at 57. (Emphasis added). *See also*, *Id*. at 111. (Ackermann, J., concurring).

[207] Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), para. 52.

[208] Fedsure Life Assurance LTD v. Greater Johannesburg Transnational Metropolitan Council, 1998 (12) BCLR 1458 (CC), para. 104.

[209] *See* Carmichele v. Minister of Safety and Security, 2001 (10) BCLR 995 (CC), para. 57 ("[I]t is by no means clear how these constitutional provisions on the state translate into private law duties towards individuals").

[210] Klug, *Enabling Democracy and Promoting Law in the Transition from Apartheid*, *supra* note 29, at 283; Du Plessis v. De Klerk, CCT 8-95, para. 60.

adoption of the new Constitution, compatible with the "new constitutional order."[211] The same thing happens with the common law.[212] Labor laws are a good example of the constitutionalization of statutes.[213]

E. Dealing with Discrimination

The South African Constitution's anti-discrimination provisions are considerably strong. This should come as no surprise given the recent history of that country, yet, these constitutional provisions are by no means limited to issues of race. But, it is sensitive to the historical fact that "[i]t is the majority, and not the minority, which has suffered."[214]

South Africa's constitutional anti-discrimination regime has several layers. All of them protect against direct and indirect discrimination.[215] At the bottom of the scale is "mere differentiation" which is distinguished from discrimination or illegitimate differentiation. When addressing mere differentiation, the court will uphold it as long as it is *rational*.[216] This constitutes a general requirement of the equal protection of the law.[217]

Besides mere differentiation, the Constitution distinguishes between two forms of illegal discrimination.[218]The first was discrimination as to specifically enumerated classifications, such as race, gender, sex, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, language and sexual orientation. Quite the list.[219] If there was discrimination as to these classifications, these are "presumed unfair until the contrary is established."[220] It is not an easy hurdle to meet.[221] Unlike the general limitations clause which requires some

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[211] Case and Another v. Ministry of Safety and Security, CCT 20/95 para. 17. *See also* Prinsloo v. Van Der Linde, 1997 (6) BCLR 759 (CC), para. 13; Fredericks v. MEC*,* 2002 (2) BCLR 113 (CC), para. 10.

[212] Carmichele v. Minister of Safety and Security, 2001 (10) BCLR 995 (CC), para. 33.

[213] NEHAWU v. University of Cape Town, 2003 (2) BCLR 154 (CC), para. 14.

[214] *Prinsloo,* at 20.

[215] City Council of Pretoria v. Walker, 1998 (3) BCLR 257 (CC), para. 30. Indirect discrimination refers to disparate impact.

[216] *Prinsloo,* at 25.

[217] Larbi-Odam v. Member of the Executive Council for Education, 1997 (12) BCLR 1655 (CC), para. 15.

[218] This is equally applicable to the interim and final Constitutions.

[219] *Prinsloo,* at 27.

[220] President of the Republic of South Africa v. Hugo, 197 (6) BCLR 708 (CC), para. 75 (Kriegler, J., dissenting).

[221] *Id*. at 76 ("The drafters of the Constitution could hardly have established a presumption of unfairness in [Section] 8(4) only to have the burden of rebuttal under the section discharged with relative ease.").

sort of justification, the discrimination provisions require that the reasons for the classification are fair. This combination can be quite powerful, as the classification must overcome both analyses.[222]

The second form of unconstitutional discrimination is called "unfair discrimination, on grounds which are *not specified* in the subsection. In regard to this second form there is not presumption in favour of unfairness."[223] The question remains *which* un-enumerated classifications fall under this category, as opposed to mere differentiation. The Constitutional Court resorted to history: "Given the history of our country [discrimination] has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them."[224] Among the factors that will be used in determining which groups and classifications fall under this second level are: (1) the position of the group in society, including past suffering and patterns of disadvantage; (2) the nature and purpose of the provision and how it affects vulnerable groups; and (3) the level of impairment of fundamental human dignity.[225] The more vulnerable the group is, the more likely the discrimination will be deemed unfair.[226] All of this allows the text to update itself by including a *specific list of prohibited discrimination* mixed with *broad language* that allows for expansion of the protection.

Finally, it should be noted that the Constitution does not envisage "a passive or purely negative concept of equality; quite the contrary."[227] In other words, the Constitution allows for affirmative action to redress past discrimination and inequality.

VII. Economic Policy, Property Rights, Personal Autonomy and Labor Relations

At the heart of the post-liberal teleological constitution are substantive provisions that address the actual organization of society. Economic policy, property and labor are central among these. This includes a non-private property-based notion of personal autonomy.[228] In particular, a protection of the private sphere while facilitating state regulation and intervention in the economy."[229] This is so

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[222] *See* Larbi-Odam v. Member of the Executive Council for Education, 1997 (12) BCLR 1655 (CC), para. 26; Harken v. Lane, 1997 (11) BCLR 1489 (CC), para. 52.

[223] *Prinsloo,* at 28 (emphasis added).

[224] *Id*. at 31.

[225] *Harken*, at 51.

[226] City Council of Pretoria v. Walker, 1998 (3) BCLR 257 (CC), para. 45.

[227] National Coalition for Gay and Lesbian Equality v. Minister of Justice, 1998 (12) BCLR 1517 (CC), para. 16.

[228] Federico, et al., *supra* note 34, at 3.

[229] GLOPPEN, *supra* note 16, at 64.

because, as the Constitutional Court recognized when analyzing the validity of the 1996 Constitution, if one were to take a survey of different national constitutions and other international covenants, "one is immediately struck by the wide variety of formulations adopted to protect the right to property, as well as by the fact that significant conventions and constitutions *contain no protection of property at all*."[230] The Court goes on: "Several recognized democracies provide no express protection of property in their constitutions or bills of rights."[231]

Although not forcefully,[232] the Constitution of South Africa has redistributive goals.[233] This is linked to the policy views of the ANC. However, it must be stressed that the property rights provisions were some of the most heatedly debated and negotiated elements of the interim Constitution. It was, according to Gloppen, "among the most difficult issues on which to reach an agreement."[234] The text that was produced at the negotiations "is carefully worded to appease local as well as foreign investors, but without barring social reform."[235] Yet, as the Constitutional Court has recognized, "[c]onstitutional property clauses are notoriously difficult to interpret."[236]

During the negotiations, there was a strong split between the ANC and the NP-supported white government. While the ANC "was willing to protect the undisturbed enjoyment of personal possessions, it wanted legislation to determine property entitlements and provisions for the restoration of land to people disempowered under apartheid."[237] In fact, the ANC "suggested that no property clause was necessary."[238] On the other hand, the National Party was in favor of "protecting all property rights and would only allow expropriation for public purposes, subject to cash compensation, determined by a court of law according to the market value of the property."[239]

While property clause of the interim Constitution reflected a compromise between *the ANC and the NP, "[t]he final property clause reflects the *democratic origins of the Constitutional Assembly*."[240] In the end, the Constitution creates a

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[230] Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), para 71 (emphasis added).

[231] *Id*.

[232] *See* GLOPPEN, *supra* note 16, at 236. ("But there are elements in the 'final' Constitution that hamper radical change; the Constitution protects property rights (although not unconditionally) as well as other prerequisites of a market economy").

[233] *Id*. at 171.

[234] *Id.* at 231.

[235] *Id*.

[236] First National Bank v. Commissioner, 2002 (7) BCLR 702 (CC), para. 47.

[237] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 54.

[238] *Id*.

[239] *Id*.

[240] *Id.* 57 (emphasis added).

positive duty on the state to restore dispossessed land, guarantee access to land and eliminate past discriminatory practices related to this issue.[241] In terms of general economic policy, particularly of the interventionist bent, the Constitutional Court has butt out.[242] The open question is if it is because of an institutional impediment or because the current ordinary politics sufficiently reflect the constitutional preferences so as to make judicial intervention unnecessary.[243]

In particular, the current property rights regime prohibits *arbitrary* deprivation of property.[244] And as to compensation when property is expropriated in the public interest, the value will depend on (1) the current use of the property, (2) its history of acquisition and use, (3) its market value, (4) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property, and (5) the purpose of the expropriation.[245] This allows for great leeway in favor of the state, and is quite similar to the Bolivian structure we saw in the last chapter. It should also be noted that the concept of the public interest in the expropriation context "includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources."[246] When an expropriation has occurred, then it must be for a public purpose or in the public interest and be accompanied by compensation. If merely a depravation has occurred, then only due process requirements apply.[247]

The South African Constitutional Court has held that the Constitution "embodies a negative protection of property and does not expressly guarantee the right to acquire, hold and dispose of property."[248] Hardly a liberal approach to property. The reason for this is historic. According to the Court, property rights provisions should be interpreted in "their historical context,"[249] particularly given apartheid's legacy of "grossly unequal distribution of land in South Africa."[250]

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[241] Olivier, et al., *supra* note 129, at 207.

[242] *See* S. v. Lawrence; S. v. Negal; S. v. Solberg, 1997 (10) BCLR 1348 (CC), para. 42.

[243] *See, for example, Id*. at 44 ("Section 26 should not be constructed as empowering a court to set aside legislation expressing social or economic policy as infringing 'economic freedom' simply because it may consider the legislation to be ineffective or is of the opinion that there are other and better ways of dealing with the problems"). In this case, the Constitutional Court refused to use the right to economic freedom to invalidate progressive regulatory legislation.

[244] Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), para. 70.

[245] *Id*.

[246] *Id*.

[247] Harken v. Lane, 1997 (11) BCLR 1489 (CC), para. 31.

[248] First National Bank v. Commissioner, 2002 (7) BCLR 702 (CC), para. 48.

[249] *Id*. at 49.

[250] *Id*.

Constitutionalized worker rights was also a particular victory for labor unions.[251] This includes a constitutional policy that recognizes the interests of workers.[252] All of this is the result of the post-liberal Constitution where, according to the Constitutional Court, "the interventionist state is no longer seen, in broad terms, as being limited to protecting its citizens against brute physical force and intimidation from other only, but is seen as extending to the economic and social realm as well."[253] For example, such is the strength of constitutionalized labor rights that, with important qualifications, the Constitutional Court allowed for labor organization within the armed forces.[254]

VIII. Other Substantive Elements

South Africa's Constitution is expressly teleological and value-laden. The main substantive feature is the defense of human dignity as the main guiding value. As a result, the concept of dignity has had a central place in South African constitutional jurisprudence,[255] alongside equality and freedom.[256] According to the Constitutional Court, "[r]espect for the dignity of all human beings is particularly important in South Africa."[257] History compels it, as "apartheid was a denial of a common humanity."[258]

Another important substantive value that was embedded in the constitutional text was the concept of *ubuntu*, which "carries in it the ideas of humaneness, social justice and fairness."[259] Other key constitutional values are "group solidarity, compassion [and] respect."[260] Another important source of substantive content is the Preamble. We should not forget that "[t]he preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretative value."[261] On the contrary, [i]t connects up, reinforces and underlies all of the text that follows."[262]

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[251] Du Plessis, *A Background to Drafting the Chapter on Fundamental Rights*, *supra* note 50, at 96-97.

[252] Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), para. 66.

[253] Ferreira v. Levin, CCT 5/95, para. 66.

[254] South African Defence Union v. Minister of Defence, 1999 (2) BCLR 615 (CC).

[255] Edwin Cameron, *Dignity and Disgrace – Moral Citizenship and Constitutional Protection in* THE QUEST FOR CONSTITUTIONALISM: SOUTH AFRICA SINCE 1994 95.

[256] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 4.

[257] S. v. Makwanyane, 1995 (6) BCLR 665 (CC), para. 329 (O'Regan, J., concurring).

[258] Ferreira v. Levin, CCT 5/95, para. 51.

[259] *Makwaynane,* at 237 (Madala, J., concurring).

[260] *Id*. at 307 (O'Regan, J., concurring).

[261] S. v. Mhlungu, 1995 (7) BCLR 793 (CC), para. 112 (Sachs, J., concurring).

[262] *Id*.

IX. Between Text and Purpose: The Search for Meaning

A. General Issues Regarding Text and Interpretation

When addressing issues of interpretation, we must take into consideration that the South African Constitution is an "extremely detailed document containing a comprehensive catalogue of citizen's rights as well as a clear map of government structures and duties."[263] We already saw how the text itself, in many instances, spells out specific interpretive tools, including, for example, limitations on rights. Finally, the South African Constitution includes a combination of specific text and broad language.[264] This allows for great dynamism in the process of interpretation.

Clear text makes it difficult for interpreters to simply ignore language when engaging in constitutional adjudication. Text will almost always have a central role to play. In the end, text constrains courts.[265] But, many questions are left open, such as the use of plain meaning or adopting a purely textualist approach,[266] which seems to have been rejected in South Africa.[267]

Yet, there also seems to be a tendency to "assert the importance of the ordinary or plain meaning of the text as the primary source of constitutional rules."[268] For example, plain meaning was central in the death penalty case.[269] And, although purposivism is central to interpretation in South Africa, it is nevertheless superseded by text: "While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written document."[270] But, as we are about to see, great effort is made to make purpose and text co-exist, particularly with the practice of using purpose in order to ascertain meaning.

B. The Interpretation-Construction Distinction: South African Style

Even the extremely detailed South African Constitution has problems of ambiguity, vagueness and under-determinacy.[271] Sometimes, the Constitution expressly gives courts the power to insert meaning to its provisions.[272] As a result,

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[263] Klug, *South Africa: From Constitutional Promise to Social Transformation*, *supra* note 13, at 284.
[264] *Id.* at 284-285.
[265] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 72.
[266] Klug, *South Africa: From Constitutional Promise to Social Transformation*, *supra* note 13, at 285.
[267] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10. 73.
[268] *Id*.
[269] *See* S. v. Makwanyane, 1995 (6) BCLR 665 (CC), para. 26.
[270] S. v. Zuma, 1995(4) BCLR 401 SA (CC), para. 17.
[271] *See Id*. at 12.
[272] *See Makwanyane,* at 8. ("There is no definition of that is to be regarded as 'cruel, inhuman or degrading' and we therefore have to give meaning to those words ourselves"); Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), para. 42.

the Constitutional Court starts its analysis with a search for communicative meaning, which fits into the interpretation-construction distinction.[273] And the Court does it this while *rejecting* a literalist approach.[274]

This search for meaning can split the Court, as sometimes plain meaning is not so plain at all.[275] Dictionary usage in order to find communicative meaning is commonplace,[276] as well as paying attention to the nuances of translations.[277] Also, due recognition is given to the fact that some words have *acquired particular meaning in the South African political and historical context*.[278] In that sense, context helps give words meaning. For example, when addressing constitutional rights, "[i] nterpreting a right in its context requires consideration of two types of context."[279] This requires, first, that "rights must be understood in their textual setting."[280] And, second, "rights must also be understood in their social and historical context."[281]

But the interpretation-construction distinction can sometimes be blurred, especially *when purpose is part of the communicative content of the words*: "This Court has given its approval to an interpretive approach which, whilst paying due regard to the *language* that has been used, is 'generous' and 'purposive' and gives expression to the underlying values of the Constitution."[282] When this happens, purpose will be given full communicative effect as long as the language bears it. As such, giving purposive meaning to the text "is appropriate only where the language of the provision will fairly beat the restricted reading. Otherwise, it amounts to naked judicial law-making."[283] But, an effort will be made to make text and

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[273] Makwanyane, at 132; Harken v. Lane, 1997 (11) BCLR 1489 (CC), para. 31; Sanderson v. Attorney General, Eastern Cape, 1197 (12) BCLR 1675 (CC), paras. 18-20. ("The word 'charge' is ordinarily used in South African criminal procedure as a generic noun to signify the formulated allegation against an accused"); S. v. Lawrence; S. v. Negal; S. v. Solberg, 1997 (10) BCLR 1348 (CC), para. 32; Du Lange v. Smuths NO, 1998 (7) BCLR 779 (CC), para. 12; Soobramoney v. Minister of Health (Kwazulu-Natal), CCT 32/97, para. 13. For a description of the interpretation-construction distinction, *see* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010). According to this distinction, interpretation is the process of ascertaining the semantic and communicative meaning of words, while construction is the process of giving that meaning legal effect.

[274] S. v. Mhlungu, 1995 (7) BCLR 793 (CC), para. 3.

[275] *Id*. at 77 (Kentridge, A.J., dissenting) ("I cannot accept that the words 'dealt with' are words of uncertain meaning").

[276] *Id.*; S. v. Williams, 1995 (7) BCLR 861 (CC), para. 24; Du Lange v. Smuths NO, 1998 (7) BCLR 779 (CC), fn. 31; National Coalition for Gay and Lesbian Equality v. Minister of Justice, 1998 (12) BCLR 1517 (CC), para. 18.

[277] Du Plessis v. De Klerk, CCT 8-95, para. 44.

[278] De Lange v. Smuths NO, 1998 (7) BCLR 779, para. 127(Mokgoro, J., dissenting).

[279] Government of the Republic of South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC), para. 22.

[280] *Id*.

[281] *Id*.

[282] Ferreira v. Levin, CCT 5/95, para. 46 (emphasis added).

[283] Case and Another v. Ministry of Safety and Security, CCT 20/95, paras. 76-78.

purpose work together, *using purpose to give meaning to the text*: "In giving meaning to Section 9, we must seek the purpose for which it was included in the Constitution."[284]

C. Teleological Interpretation

We already saw how the Constitutional Court has used intent and history in adjudication. Now we turn to the relation between text and purpose. While it would seem that the Court's main interpretive approach is the *objective teleological model*,[285] it is not the only one. Yet, there is a strong emphasis as to this model, *which is seen as a control on courts so that they do not substitute the Constitution's commands with their own*: "This is not the case of making the Constitution mean *what we like*, but of making it mean what the *framers wanted it to mean*; we gather their intention not from *our* subjective wishes, *but from looking at the document as a whole*."[286] This is one of the strongest statements in favor of the objective teleological model,[287] and it is interesting to see how this model *is mentioned as a counterweight to judicial creativity*, which once again questions the mainstream view that purposivism is *carte blanche* for courts to engage in judicial legislation.

Previously, I mentioned the relationship between a generous and a purposive approach to rights. While these two models sometimes overlap, they sometimes contradict each other. When this clash is clear, purpose seems to trump generosity.[288] As such, the Constitution must be interpreted to give clear expression to the values it seeks to nurture for the future society.[289] But, as a general matter, a teleological approach to interpretation will be attempted to yield generous results in terms of constitutional rights.[290] While history and intent have made some headway, *text is still the main source of purpose*. And because of the *teleological character of the text*, even a somewhat textualist approach will reveal purpose. This is the crux of the objective teleological model.

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[284] S. v. Makwanyane, 1995 (6) BCLR 665 (CC), para. 325 (O'Regan, J.., concurring).

[285] Du Plessis v. De Klerk, CCT 8-95, para. 89. (Ackermann, J., concurring); *Case and Another,* at 19; Anzanian Peoples Organization v. President1996 (8) BCLR 1015 (CC), para. 27; ANC v. Minister, 1998 (4) BCLR 399 (CC), para. 19; Du Lange v. Smuths NO, 1998 (7) BCLR 779 (CC), paras. 17-21; Western Cape Provincial Government v. North West Provincial Government, 2000 (4) BCLR 347 (CC), para. 17.

[286] S. v. Mhlungu, 1995 (7) BCLR 793 (CC), para. 112 (emphasis added).

[287] Other times, a more general reference to purposivism is made, without specifying whether it refers to the subjective or objective articulation. *See* S. v. Williams, 1995 (7) BCLR 861 (CC), para. 51.

[288] Klug, *South Africa: From Constitutional Promise to Social Transformation*, *supra* note 13, at 293.

[289] S. v. Zuma, 1995(4) BCLR 401 SA (CC), para. 17; *Makwanyane*, at 9.

[290] Ferreira v. Levin, CCT 5/95, para. 51 ("A teleological approach also requires that the right to freedom be construed generously and extensively.").

X. South Africa's Separation of Powers: Empowering Courts to Apply Constitutional Policy

A. A Different Model of the Separation of Powers

There are hardly categorical answers to questions about constitutional design and theory. It all depends. In particular, some teleological constitutions, particularly those that were the result of a highly democratic and participatory process of creation, have *transformed* mainstream views about constitutionalism and the role of courts. As a result, these teleological systems require judicial intervention into policy matters, changing how we perceive the notion of the separation of powers.

The South African constitutional experience is most helpful in giving content to those assertions. As the Constitutional Court has observed: "There is, however, *no universal mode of separation of powers*."[291] According to the Court, "[t]he practical application of the doctrine of separation of powers is influenced by the history, conventions and circumstances of the different countries in which it is applied."[292]

Many have noted how the inclusion of justiciable positive socio-economic rights has affected the traditional model of the separation of powers in South Africa.[293] As Linda Stewart observes, the interpretation and adjudication of these rights are "[p]ossibly the most difficult area, under the Constitution requiring a balance in the separation of powers."[294] But that phenomenon is not limited to socio-economic rights; it is a byproduct of the teleological constitution itself: "Given the character of the 'final' Constitution, and of the Bill of Rights in particular, *the Constitutional Court could end up with what amounts to significant legislative powers.*"[295]

The Constitutional Court has recognized how the Constitution reshaped the traditional notion of the separation of powers:

The Constitution makes provision for a separation of powers between the legislature, the executive and the judiciary. This separation ordinarily implies that the legislature makes the laws, the executive implements them and the judiciary determines whether in the light of the Constitution and the law, conduct is lawful or unlawful. Though the separation prescribed by the Constitution is not absolute, and on occasion *some overlapping of functions is permissible*, action that is inconsistent with the separation demanded is invalid.[296]

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[291] Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), para. 108 (emphasis added).

[292] South African Association of Personal Injury Lawyers v. Heath, 2001 (1) BCLR 77 (CC), para. 24.

[293] Morné Olivier, *supra* note 13, at 69.

[294] Stewart, *supra* note 15, at 83.

[295] GLOPPEN, *supra* note 16, at 227 (emphasis added).

[296] Minister of Public Works v. Kyalami Ridge Environmental Association, 2001 (7) BCLR 652 (CC), para. 37 (emphasis added).

In the end, if the Court "should hold in any given case that the State has failed to do [its duty], it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, this is an intrusion *mandated by the Constitution itself*."[297]

Some scholars point to the dangers of this re-balancing, which "could erode the separation of legislative[,] executive and judicial powers as significant and inherently controversial legislation in effect would be 'delegated' to judges who are neither elected, nor accountable."[298] But, there is a difference between naked judicial usurpation of a power that was not delegated or judicial substitution of the policy preferences of the framers, and *courts enforcing the policy preferences of the constitutional legislator over the ordinary legislator or even using power by the constitutional framers to legislate*. But, in the end, it is the duty of the Constitutional Court to make sure that the other branches comply with the policy provisions of the teleological constitution, for when legislatures veer off the constitutionally-prescribed path, it is *they* who are usurping power away from the sovereign people that exercised constitutional politics.[299]

As a result, the South African Constitutional Court has often opted for engagement with the other branches, all the while maintaining constitutional supremacy. As Morré Olivier explains, "[i]n basic terms, constitutional dialogue occurs whenever a decision by the court prompts a formal response of some kind from the legislature or executive, such as the enactment of legislation or a change of policies."[300] Dialogue has been favored over confrontation.[301] I will return to this issue when discussing the approach of the Constitutional Court to the issue of remedies, particularly when there is a nullification of a legislative act.

B. The Role of the Constitutional Court in Enforcing the Teleological Constitution

According to Morné Olivier, "[i]n democracies around the globe, the role of the judiciary is contested and controversial. South Africa is no exception."[302] This is closely linked with the issue of the separation of powers we just discussed and requires more careful analysis: what is the role of the Constitutional Court of South Africa in the enforcement of the teleological constitution.

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[297] Minister of Health v. Treatment Action Campaign, 2002 (10) BCLR 1033 (CC), para. 99 (emphasis added).

[298] *Id.* 232.

[299] *See* Anzanian Peoples Organization v. President, 1996 (8) BCLR 1015 (CC), para. 14.

[300] Morné Olivier, *supra* note 13, at 76.

[301] Dawood v. Minister, 2000 (8) BCLR 837 (CC), para. 65.

[302] Morné Olivier, *supra* note 13, at 69.

As we saw earlier, the Constitutional Court has been mostly criticized for doing less instead of more. Until now, *compared to the potential that the constitutional text holds*, the Court has played a modest role in governance.[303] This, even though South Africa has adopted a very far reaching constitutional jurisdiction for the Constitutional Court.[304]

The issue of what is the specific role for the Court as to democratic self-government in South Africa is still an elusive issue.[305] As we've seen, "[t]he role of the judiciary in any legal system is never neutral."[306] Nor are teleological constitutions. As a result, "the Constitution as a transformative text embodies a political character demanding positive actions from all branches of government, *including the judiciary*, to achieve this transformative vision."[307] As such, while the scope of judicial intervention broadens, it is still the preferences of the constitutional legislators which are being enforced.[308]

In the end, "courts cannot inaugurate a socially just society on their own."[309] But they still have a crucial role to play, particularly in teleological systems: "The general conclusion, required by the limited role of courts and the uncertain interaction of popular processes and adjudication, is that court enforcement can *support* social change within institutional constraints."[310]

Teleological systems transform the role for courts: "[I]t must be admitted that the potential impact of courts in the area of social welfare sounds unlike the role traditionally ascribed to the judiciary."[311] In these cases, it is the *Constitution itself* which reorients the judicial role. As Christiansen explains, what the Court actually does is "judicial enforcement of express constitutional values, enumerated in the official text by the constituent authority body with an expectation of realization."[312] As such, "in the 'final' Constitution the judiciary has the double role of a 'neutral' watchdog keeping the majority within the bounds of the Constitution, and a

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[303] Christiansen, *supra* note 12, at 389.

[304] Klug, *South Africa: From Constitutional Promise to Social Transformation*, *supra* note 13, at 283. At the same time, "[t]he Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these means to evaluation." Minister of Health v. Treatment Action Campaign, 2002 (10) BCLR 1033 (CC), para. 38 (emphasis added).

[305] Christiansen, *supra* note 12, at 393; KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 5.

[306] Federico, et al., *supra* note 34, at 8.

[307] Morné Olivier, *supra* note 13, at 84. (emphasis added).

[308] Klug, *Enabling Democracy and Promoting Law in the Transition from Apartheid*, *supra* note 29, at 275.

[309] Morné Olivier, *supra* note 13, at 85; Christiansen, *supra* note 12, at 397.

[310] Christiansen, *supra* note 12, at 400 (emphasis added).

[311] *Id*. at 404.

[312] *Id*.

'progressive' agent of social change."[313] As Heinz Klug explains, this has led to an "increasing turn to the law and courts as a means and venue to both resolve political and social conflicts."[314] But, unlike framework constitutional systems, this turn is wholly compatible with the teleological model where courts are called upon to enforce the substantive policy preferences of the Constitution.

The South African Constitutional Court "has always been concerned about its own role in the new political order."[315] This has led, in part, to the relatively modest role it has carved out for itself. This leads us into an analysis of how the Court has articulated its own role, considering the teleological nature of the constitutional structure: "Courts do have a role to play in the promotion and development of a new culture 'founded on the recognition of human rights'."[316]

There is a difference between a Court that substitutes the legislature's judgments with its own and a Court that substitutes the legislature's judgments for those of the constitutional legislators. As to the former, the members of the Constitutional Court have "always been careful to define their own interventions as merely upholding the law and have declined claims that they might be substituting their own political decisions for those of elected officials in their roles as interpreters of the Constitution."[317] This dissertation argues that original explication, as will be better developed in Chapter 10, can aid the Court in its duty to enforce the will of the constitutional legislators and the social forces that legitimized them.

The difference between these two types of substitutions of legislative judgment has not been lost on the Court: "But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean."[318] This includes a rejection of popular opinion as a measurement of what the Constitution says: "The question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence;"[319] "[b]ut that is beside the point. This Court did not draft the Constitution."[320]

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[313] GLOPPEN, *supra* note 16, at 234. The author adds: "It is a question to what extent these roles are compatible." This dissertation argues that they are.

[314] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, 223.

[315] *Id.* at 242.

[316] S. v. Williams, 1995 (7) BCLR 861 (CC), para. 8.

[317] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 242.

[318] S. v. Zuma, 1995(4) BCLR 401 SA (CC), para. 17. *See also* Mistry v. Interim National Medical and Dental Council, CCT 13/97, para. 3 ("Whilst it may not be easy to 'avoid the influence of one's personal intellectual and moral perception'. . .This Court has from its very inception stressed the fact that 'the Constitution does not mean whatever me might wish it to mean'").

[319] S. v. Makwanyane, 1995 (6) BCLR 665 (CC), para. 87.

[320] Du Plessis v. De Klerk, CCT 8-95, para. 123.

As a result, the South African Constitutional Court has been able to avoid the pejorative 'activist' label, given the clarity of the constitutional text and its evident policy orientation. If anything, as we saw, *the charges of activism has been made because of its passivity and restraint,*[321] which is reminiscent of the trichotomy created by teleological constitutions. This trichotomy distinguishes between (1) active and passive courts, (2) constrained and unconstrained courts, and (3) courts that intervene or abstain. The first distinction is based on the times a court is willing to strike own legislation. The second distinction measures if the court's actions are required by the Constitution or if the court is acting on its own. The third distinction measures if the court is involving itself into policy matters. These elements can interact in many different combinations, including one where a court is very active and interventionist, yet wholly constrained because its involvement in such areas is not the product of judicial usurpation but the requirement of constitutional command.

All of this requires a balancing act. On the one hand, "[w]e have said previously that our role as Justices of this Court is not to 'second guess' the executive or legislative branches of government or interfere with affairs that are properly their concern."[322] On the other hand, "[w]e have also said that we will not look at the Constitution narrowly."[323] As we already saw, if the Court "should hold in a given case that the State has failed to do [its constitutional duty], it is obliged by the Constitution to say so. In so far that constitutes an intrusion into the domain of the executive, that is an intrusion *mandated by the Constitution itself*."[324] In the end, it is the Constitution that reigns supreme, not the Court.

As previewed, the Constitutional Court has threaded carefully:

> We are a new Court, established in a new way, to deal with a new Constitution. We should not rush to lay down sweeping and inflexible rules governing our mode of analysis. We need to develop an appropriately South African way of dealing with our Constitution, one that starts with the Constitution itself, *acknowledgement of the way it came into being, its language, spirit, style and inner logic, the interests it protects and the painful experiences it guards against*…[325]

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[321] Christiansen, *supra* note 12, at 377.

[322] Executive Council of the Western Cape Legislature v. President of the Republic of South Africa, CCT 27/95, para. 99.

[323] *Id*.

[324] Minister of Health v. Treatment Action Campaign, 2002 (10) BCLR 1033 (CC), para. 99. (emphasis added).

[325] S. v. Mhlungu, 1995 (7) BCLR 793 (CC), para. 127 (emphasis added).

C. Legitimacy and Institutional Capability

One of the main objections against too much judicial intervention in policy matters are issues relating to democratic legitimacy and institutional capacity. Teleological constitutions have addressed the democratic issue by using courts as a tool for the enforcement of a constitution that was the result of a highly democratic process which, in several respects, is superior to ordinary politics.[326] In particular, I wish to focus on how the South African Constitutional Court has addressed this issue and, more importantly, the institutional capacity problem.[327] This includes issues of procedural limitations, fact-finding capabilities and possible remedies.[328]

As Eric Christiansen explains, "[a]t a practical level the courts need the bureaucracy of the state to implement any significant change."[329] For example, "[l] itigation is a resource –and labor- intensive undertaking and its capacity for social transformation is weakest when the court acts at odds with popular opinion."[330]

One of the main challenges that teleological courts have is shedding off the framework rationale that adopts a more classic view of the judicial role: "Courts are ill equipped to [sit in judgment on legislative policies on economic issues] and in a democratic society it is not their role to do so."[331] But teleological constitutions have questioned this common wisdom, enlisting courts to enforce the constitutional legislator's policy preferences, including as to economic matters, over those of the legislature. Teleological constitutions settle the conceptual objection. We still have the practical ones.

As the Constitutional Court has recognized: "This Court does not have the information of expertise to enable it to decide what those arrangements should be or how they should be effected."[332] But this could refer more to *details* and specific measures, as opposed to ensuring that these actions are compatible with the constitutionally-entrenched policy preferences, as part of the negative legislator role of courts. Courts don't choose *which* measures are adopted; they merely analyze if these are constitutionally compatible.[333] In teleological systems, the options available to legislatures are reduced, but they are not obliterated.

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[326] *See* Farinacci-Fernós, *Post-Liberal Constitutionalism, supra* note 3.
[327] *See, for example*, Christiansen, *supra* note 12, at 373.
[328] *Id.* at 374.
[329] *Id*. at 390.
[330] *Id*. at 391.
[331] S. v. Lawrence; S. v. Negal; S. v. Solberg, 1997 (10) BCLR 1348 (CC), para. 42.
[332] August v. Electoral Commission, 1999 (4) BCLR 363 (CC), para. 39.
[333] *See* Minister of Health v. Treatment Action Campaign, 2002 (10) BCLR 1033 (CC), para. 37. (emphasis added). ("It should be borne in mind that in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political inquires necessary for determining what the minimum-core standards…should be, nor for deciding how public revenues should be most effectively spent").

D. Constitutional Supremacy and the Effects of Entrenchment

The South African Constitutional Court is able to wield enormous power because the Constitution adopts many policy preferences and is universally acknowledged to reign supreme.[334] The constitutionalization of policy preferences has a great impact on how the Court goes about its judicial undertakings.

Constitutional Supremacy is universally accepted in South Africa.[335] In particular, the teleological constitution results in a "voluntary foreclosure of issues,"[336] including individual right, but also important substantive policy matters. As a result, the South African structure can be described as a "system of democratic constitutionalism in which the democratic will is enveloped within and construed by the national pre-commitments outlined in the Constitution."[337] This is characterized as the new constitutional order.[338] As a result, *constitutional politics are given clear supremacy over ordinary political acts,* in accordance with the teleological model. According to the Constitutional Court, this supremacy preempts the "political agendas of ordinary majorities in the National Parliament."[339]

Finally, it should be noted that the decisions of the Constitutional Court are binding on lower courts and "[i]t is a fundamental principle that a Court adheres to its previous decisions,"[340] including the Constitutional Court.

XI. Procedure and Remedies: How the Constitutional Court Enforces the Constitution

A. Process

Cases can only be referred to the Constitutional Court by lower ones when there is a pending case that includes a decisive constitutional issue that falls within the exclusive jurisdiction of the Court.[341] Also, the lower court must consider it to be in the interests of justice.[342] Only a small number of cases have direct to the

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[334] *See* Parbhoo and Others v. Getz No and Another, 1997 (10) BCLR 1337 (CC), para. 2.

[335] Morné Olivier, *supra* note 13, at 77.

[336] GLOPPEN, *supra* note 16, at 47; Pharmaceutical Manufacturers Association of SA; in re: ex parte Application of President of the RSA, 2000 (3) BCLR 24 (CC), paras. 19-20.

[337] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 5.

[338] Executive Council of the Western Cape Legislature v. President of the Republic of South Africa, CCT 27/95, para. 61.

[339] Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1253 (CC), para. 149.

[340] In re: Constitutionality of the Mpumalanga Petitions Bill*,* 2001 (11) BCLR 1126 (CC), para. 7.

[341] Ferreira v. Levin, CCT 5/95, para. 6.

[342] State v. Bequinot*,* CCT 24/95, para. 7.

Constitutional Court.[343] Direct access occurs "in exceptional circumstances only, which will ordinarily exist only where the matter is of such energy, or otherwise of such public importance, that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government."[344] The Constitutional Court has not allowed for free-for-all access.[345] Finally, the Constitution "confers on the Constitutional Court the inherent power to protect and regulate its own process."[346]

Aside from individual or rights-based litigation, the Constitutional Court can also receive cases referred by other branches, such as 1/3 of the National Assembly or by the President. In *Ex Parte the President of the Republic of South Africa; In re: Constitutionality of the Liquor Bill*,[347] the Parliament passed a Bill and sent it to the President. Before signing it, the President referred the Bill to the Constitutional Court. The procedural question before the Court was if it could only review the matters that were raised in the referral, could it review the entire Act under consideration or reserve some matters for future adjudication. The Court held, first, that it could hear later challenges to the statute, but not as to the specific matter before it. Second, it held that it would only review what the President raised in his referral.[348]

As to matters of justiciability, the Constitutional Court avoids categorical rules. For example, moot cases do not "necessarily constitute an absolute ban to its justiciability."[349] In those circumstances, the Court "has a discretion to decide issues on appeal even if they are no longer present existing or live circumstances. That discretion must be exercised according to what the interests of justice require."[350]

B. Standards and Remedies

The issue of remedy is crucial for courts charged with enforcing teleological constitutions. The experience of the South African Constitutional Court has a lot to

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[343] Executive Council of the Western Cape Legislature v. President of the Republic of South Africa, CCT 27/95, para 15.

[344] Transvaal Agricultural Union v. Minister of Land Affairs, 1996 (12) BCLR 1573 (CC), para. 2.

[345] *See* Christian Education SA v. Minister of Education, 1998 (12) BCLR 1449 (CC); Fraser v. Naude, 1998 (11) BCLR 1357 (CC).

[346] Parbhoo and Others v. Getz No and Another, 1997 (10) BCLR 1337 (CC), para. 4.

[347] Ex Parte the President of the Republic of South Africa; in re Constitutionality of Liquor Bill, 2000 (1) BCLR 1 (CC), para. 57

[348] *See also* In re: Constitutionality of the Mpumalanga Petitions Bill, 200, 2001 (11) BCLR 1126 (CC), para. 9.

[349] Independent Electoral Commission v. Langeberg Municipality, 2001 (9) BCLR 883 (CC), para. 9.

[350] *Id*. at 11. This, in turn hinges on (1) the need for "some practical effect either on the parties or on others;" (2) "the nature and extent of the practical effect that any possible order might have;" and (3) "the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced."

teach us. The devil is in the details. Here, I analyze this issue jointly with the matter of standards of review.

As we saw, the reasonableness test links the negative legislator role to the enforcement of *positive* rights. It also allows for *temporary* measures in situations of legislative inaction.[351] This allows for the limited exercise of some sort of legislative power,[352] and the exercise of judicial discretion.[353] Yet, it should be stressed that these powers are given, not usurped. Also, "[t]he power to grant mandatory relief includes the power where it is appropriate to exercise some form of supervisory jurisdiction to ensure that the order is implemented."[354]

We also saw how the Court applies the general limitation clause in cases dealing with constitutional rights. That is, how limitations of rights must be justifiable in an open and democratic society based on dignity, equality and freedom. The burden of proof as to the issue of the infringement of a right rests with the plaintiff.[355] Once that is established, the burden of proof as to the general limitation clause shifts the defendant.[356] We must not forget that the content of the limitation clause "is not merely aspirational or decorative, it is *normative*, furnishing the matrix of ideas within which we work, the source from which we derive the principles and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conducts."[357] This approach to enforcement is linked to the proportionality test that is generally applied by the Constitutional Court.[358]

As a negative legislator, the Constitutional Court will normally strike down unconstitutional legislation, avoiding corrective surgery: "For this Court to attempt that textual surgery would entail it departing fundamentally from its assigned role under our Constitution. It is trite but true that our role is to review, rather than re-edit, legislation."[359] But, in limited circumstances, "it is permissible and appropriate" to read-in provisions into a particular statute to preserve its

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[351] Government of the Republic of South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC), para. 96.

[352] GLOPPEN, *supra* note 16, at 227.

[353] Dawood v. Minister, 2000 (8) BCLR 837 (CC), para. 53.

[354] Minister of Health v. Treatment Action Campaign.2002 (10) BCLR 1033 (CC) para. 104.

[355] Ferreira v. Levin, CCT 5/95, para. 44.

[356] *Id.*; Moise v. Transitional Local Council of Greater Germiston, 2001 (8) BCLR 765 (CC), para. 19 ("Once a limitation has been found to exist, the burden of justification under section 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of this section.").

[357] Coetzee v. Government; Matiso v. Commanding Officer, 1995 (10) BCLR 1382 (CC), para. 46 (Sachs, J., concurring).

[358] S. v. Makwanyane, 1995 (6) BCLR 665 (CC), para. 94. This is related to a balancing analysis, where the Court will take into account the need to address the wrong, deter future violations, issue an order that can be complied with and ensure fairness to all who might be affected by the relief. Hoffman v. South African Airways, 2000 (11) BCLR 1211 (CC), para. 45.

[359] Case and Another v. Ministry of Safety and Security, CCT 20/95, para. 73.

constitutionality.[360] This is accompanied by the power to *declare a statute unconstitutional, but suspend that declaration and give the legislature sufficient time to correct the defect*.[361] In particular words, the Constitution states that:

> When deciding a constitutional matter within its power, the Constitutional Court must decide that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency, and (a) may make an order that is just and equitable, including (i) limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the deficit.[362]

This is reminiscent of the dialogue approach, in which the Constitutional Court announces standards which aid the legislature in its attempt to fix the constitutional defect.[363]

In the end, it is up to the Constitutional Court to give the Constitution full effect:

> Given the *historical context* in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it.[364]

Under-enforcement is contrary to the teleological constitution and it undermines the legitimacy of the constitution itself.[365]

XII. Constitutional Fidelity: Entrenching the Constitution in Society

The teleological constitution entrenches substantive policy preferences. However, this entrenchment is meaningless if the Constitution itself does not

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[360] S. v. Niemad, 2001 (11) BCLR 1181 (CC), para. 32. *See also* Du Toit v. Minister for Welfare, CCt 40/01, para. 39 ("This Court has recognized the remedy f reading into legislation wording that cures the constitutional defect as an appropriate form of relief"). This remedy is temporary while the legislature adopts a more permanent fix. *Id*. para. 41.

[361] Case and Another v. Ministry of Safety and Security, CCT 20/95, paras. 82-83; Executive Council of the Western Cape Legislature v. President of the Republic of South Africa, CCT 27/95, para. 103; Minister of Justice v. Ntuli, 1997 (6) BCLR 677 (CC), para. 2.

[362] *Ntuli*, at 24.

[363] Minister of Health v. Treatment Action Campaign, 2002 (10) BCLR 1033 (CC), para. 125.

[364] Ntandazeli Fose v. Minister of Safety and Security, 1997 (7) BCLR 851 (CC), para. 69 (emphasis added).

[365] Klug, *Enabling Democracy and Promoting Law in the Transition from Apartheid*, *supra* note 29, at 266.

entrench itself into society. Judicial enforcement of the teleological constitution in opposition to the preferences of the current legislature is only sustainable if the original constitutional project still commands popular support. The South African Constitutional Court is aware of this reality, and it seems that, in fact, the post-liberal teleological Constitution of South Africa has been wholly adopted by the social majority. Its judicial enforcement can still be characterized as a majoritarian action.

This state of affairs is reflected in the decisions of the Constitutional Court "[i] n order to have a factual legitimacy, and permanence, the Constitution must be perceived as a *permanent element of social life*."[366] According to Heinz Klug, the Constitution has succeeded in that regard and "has become a central pillar of South Africa."[367] In fact, *"[e]ven the opposition parties…claim the Constitution*."[368]

Adequate enforcement of the Constitution allows for the achievement of this social acceptance which, in turn, strengthens the Constitution and actually facilitates further enforcement of its provisions. This constitutes a virtuous cycle. The Constitution first garners legitimacy "by the character of the process that brought it into being."[369] Furthermore, it sustains that legitimacy by way of "normative acceptability."[370]

This issue goes to the heart to the distinction between ordinary and constitutional politics and the need for some sort of continued acceptance of the original constitutional project, which need not extend to each constitutional provision: "The validity of the normative principles underlying the Constitution is not important for day to day politics. *But a general belief that the Constitution has a legitimacy beyond the fact that historically it was enacted, is an important element of the authority of the Constitution, which is[,] in turn, crucial for constitutional stability*."[371] Once this is achieved, the teleological constitution endures and adequate judicial enforcement becomes imperative.

XIII. Some Final Thoughts

The early jurisprudence of the South African Constitutional Court is very illustrative, be it because it sheds light on the use of history as an interpretive tool, how the role of intent in constitutional adjudication is closely related to the process of constitutional creation and the potential uses of transformative text. But more

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366 GLOPPEN, *supra* note 16, at 38-39 (emphasis added).

367 KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 6.

368 *Id.* at 7 (emphasis added).

369 GLOPPEN, *supra* note 16, at 247.

370 *Id.*

371 *Id.* at 39 (emphasis added).

importantly, it signals a break from mainstream views of how courts should go about enforcing their particular constitutions. The South Africa Constitutional Court has managed to develop adjudicative tools that allow it to successfully implement the substantive commands of the Constitution, while allowing the legislative and executive branches to carry out their functions effectively.

This experience should lead us to conclude that substantive constitutional provisions, such as socio-economic rights, are not aspirational or symbolic. On the contrary, they are wholly enforceable and operative. Hopefully, this will lead other courts that are tasked with implementing similar constitutions to put life back in to those text and articulate methods that allow them to fully realize the democratic will of constitutional framer.