

# THE AMAZING, VANISHING BILL OF RIGHTS

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‘I think I should understand that better, if I had it written  
down: but I can’t quite follow it as you say it.’

Lewis Carroll, *Alice in Wonderland*

## INTRODUCTION: BAD THINGS COME IN THREES

If you had taken a poll a year ago, a demographically representative cohort of educated Constitutional Court watchers would have told you that no more than a clutch of cases were *both* badly reasoned and wrongly decided. The troika of *Prince*, *Jordan* and *Volks* would occupy the top three spots on that very short hit-list: and they would, again, be viewed as aberrations in a twelve-year span of good — if very sometimes thinly reasoned — judgments.

It was a good run while it lasted. For in the span of three months this year, the Constitutional Court has handed down at least three decisions that have the chattering classes chattering: *Barkhuizen*,<sup>1</sup> *Masiya*<sup>2</sup> and *NM*.<sup>3</sup> All three majority decisions reach troubling conclusions through murky, if not tendentious, lines of reasoning.

My assessment, for what its worth, is that a penchant for outcome-based decision-making, and a concomitant lack of analytical rigour, has finally caught up with the Constitutional Court. The purpose of this article is to demonstrate that the court’s current process of (public) reasoning — its preferred mode of analysis — has genuinely deleterious consequences. Of

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<sup>1</sup> *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) (‘*Barkhuizen*’).

<sup>2</sup> *Masiya v Director of Public Prosecutions* 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC) (‘*Masiya*’).

<sup>3</sup> *NM v Smith* 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC) (‘*NM*’).

particular import is the court's persistent refusal to engage in the direct application of the Bill of Rights. Flaccid analysis in terms of three vaguely defined values — dignity, equality and freedom — almost invariably substitutes for more rigorous interrogation of constitutional challenges in terms of the specific substantive rights found in Chapter 2 of the Constitution. If the drafters of the Constitution had intended such a substitution, the structure and the language of the Bill of Rights would have reflected that intention. It doesn't. Moreover, this strategy — of speaking in values — has freed the court almost entirely from the text, and thereby grants the court the licence to decide each case as it pleases, unmoored from its own precedent. Our Constitutional Court sits as a court of equity: That, again, cannot be what the drafters of the Constitution intended.

Another consequence of this strategy is that the court has unwittingly undermined the Bill of Rights. By continually relying on s 39(2) of the Constitution to decide challenges both to rules of common law and to provisions of statutes, the court obviates the need to give the specific substantive rights in Chapter 2 the content necessary to determine the actual validity of the rule being challenged in the instant matter and of similar rules challenged in subsequent matters. This strategy also enables the court to skirt the nuanced process of justification that s 36 of the Constitution or some other express limitations clause in a specific substantive right might require. The persistent refusal to give rights identifiable content, by avoiding direct application, results in a Bill of Rights increasingly denuded of meaning.

The over-reliance on s 39(2) also has the unintended consequence of undermining the rule of law. The two-step interpretative process engineered by the drafters of the Bill of Rights ought to produce black-letter constitutional law. Clear delineation of the ambit of a right articulates one type of rule; similarly crisp limitations analysis articulates another type of rule. The articulation of such express rules of law enables the citizenry and the government to ensure that their behaviour conforms to our Constitution. In a domain to which rules are even more germane, the judicial system itself, rules of black-letter constitutional law ensure that lower courts and lawyers can identify the law and thereby settle, litigate and adjudicate, with some confidence, fundamental rights cases. The use of s 39(2) may be a convenient way to secure agreement amongst eleven judges regarding the appropriate outcome of a case at the same time as they finesse (or suppress) the logic behind the outcome. However, this strategy — while useful in cobbling together majorities on the Constitutional Court — often leaves readers of a judgment at a loss as to how the Bill of Rights might operate in some future matter. An approach to constitutional adjudication that makes it difficult for lower court judges, lawyers, government officials and citizens to discern, with some degree of certainty, how the basic law is going to be applied, and to know, with some degree of certainty, that the basic law is going to be applied equally, constitutes a paradigmatic violation of the rule of law.

We have gone beyond the point where we can explain (descriptively) the court's jurisprudence in terms of (the often misunderstood notion of) 'incompletely theorized agreements'.<sup>4</sup> Incompletely theorized agreements

<sup>4</sup> Cass Sunstein *One Case at a Time* (1996). The incompletely theorized agreements that are the mainstay of judicial minimalism are explained by Sunstein as follows (at ix-x): 'A minimalist court settles the case before it, but leaves many things undecided. It is alert to the existence of reasonable agreement in a heterogeneous society. It knows that there is much that it does not know; it is intensely aware of its own limitations. It seeks to decide cases on narrow grounds. . . . Alert to the problem of unanticipated consequences, it sees itself as part of a system of democratic deliberation; it attempts to promote the democratic ideals of participation, deliberation and responsiveness. It allows for continued space for democratic reflection from Congress and the states. It wants to accommodate new judgments about facts and values.' However, Sunstein's minimalism only secures traction because it is parasitic upon a deep, and widely shared, set of constitutional doctrines and (tacit) assumptions amongst judges, lawyers and citizens. Sunstein recognizes the necessity of a solid core (at x): 'Anyone who seeks to leave things undecided is likely to accept a wide range of things, and these constitute a 'core' of agreement about constitutional essentials. In American constitutional law at the turn of the century, a distinctive set of substantive ideals now form that core.' See also Cass Sunstein 'Leaving things undecided' (1996) 110 *Harvard LR* 4; Cass Sunstein 'Incompletely theorized agreements in constitutional law' *John M Olin Law & Economics Working Paper* no 322 (January 2007), available at [https://www.law.uchicago.edu/Lawecon/wkngPprs\\_301-350/322.pdf](https://www.law.uchicago.edu/Lawecon/wkngPprs_301-350/322.pdf) (last accessed 11 October 2007). More recently, Sunstein has turned his attention to social phenomena that produce more accurate assessments and better solutions to problems on substantially larger scales than courts of law. See Cass Sunstein *Infotopia: How Many Minds Produce Knowledge* (2006). Markets, though often imperfect, rely upon limited 'shared' information (sometimes no more than price) and generate optimal, or at least substantially more efficient, and *thicker* outcomes. Some open-source software, like Linux, produces incredibly rich results without any central planning. The web itself — the environment for Linux — produces both optimal and suboptimal outcomes, depending on how information is solicited and how further cooperative endeavors are organized. Thinness is, therefore, not a virtue in itself (even for Sunstein). It may be a virtue within systems with information deficits or significant distortions in the manner in which decision-makers use the information they possess. A growing contingent of constitutional law scholars have recognized that problems of information deficit, lack of cross-cultural understanding and limited institutional competence can be 'solved' by a subtle recasting of existing constitutional doctrines and judicial remedies that extract better information and thereby achieve *more mindful* results. See, e.g. Michael Dorf & Charles Sabel 'A constitution of democratic experimentalism' (1998) 98 *Columbia LR* 267; Michael Dorf & Barry Friedman 'Shared constitutional interpretation' (2000) *Supreme Court Review* 61; Charles Sabel & William Simon 'Destabilization rights: How public law litigation succeeds' (2004) 117 *Harvard LR* 1015. For the application of experimental constitutionalism to South African jurisprudence, see Stu Woolman 'Application' in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (OS March 2005) ch 31; Stu Woolman & Henk Botha 'Limitations' in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (OS July 2006) ch 34; Stu Woolman *The Selfless Constitution: Experimentation and Flourishing as the Foundations of South Africa's Basic Law* (forthcoming 2008).

Professor Currie is, to my mind, the only South African constitutional law scholar to have articulated a full-blown theory of judicial review, and it tracks, at a very high degree of abstraction, Sunstein's views on incompletely theorized agreements and

presuppose that the current information deficit in deciding a matter — and the concomitant limits placed upon doctrinal development — will at least partially be ameliorated as time and experience throw up new opportunities to expand our understanding of how given rights ought to function in given environments. The court's ongoing failure to develop coherent doctrines in many areas of fundamental rights jurisprudence does not only undermine the Bill of Rights and the rule of law. It places the court's very authority at risk.<sup>5</sup>

In the pages that follow, I analyse the three aforementioned judgments: *Masiya*, *Barkhuizen*, and *NM*. Each in its own way demonstrates the more

judicial minimalism. See Iain Currie 'Judicious avoidance' (1999) 15 *SAJHR* 138. However, although the conclusion of my article engages some of the more pronounced problems with 'judicious avoidance', two problems with Professor Currie's account warrant mention at the outset. Professor Currie may have been correct, as a descriptive matter, to ascribe (some notion of) judicial minimalism to the Constitutional Court in its first few years of existence. The shallowness of the Chaskalson court's judgments and the unanimity that the Chaskalson court imposed on its potentially fractious bench are noteworthy features of its first four years. However, Professor Currie has, over time, elevated an accurate description of a small cohort of cases to a highly questionable normative account. His more recent work shows no signs of backing away. See Iain Currie & Johan de Waal (eds) *The Bill of Rights Handbook* 5 ed (2005). Currie's difficulty is that South Africa, circa 1995 to 1999, possessed *no core* of fully or reasonably theorized agreements about constitutional norms that would allow for meaningful incompletely theorized agreements. As of 2007, the Constitutional Court continues to offer incompletely theorized judgments in the (general) absence of theorized cores. Minimalism of the kind espoused by Professor Currie only works against a background of shared understandings. It is the absence of shared understandings — in the court and in the society at large — that make it impossible to accept judicial minimalism as either an accurate description of or a desirable prescription for our Bill of Rights jurisprudence. (In liberal societies, this distinction between the shared assumptions necessary for society to work (and to work fairly) and more general assumptions about the correct way to live tracks the philosophical distinction between the right (justice) and the good (morality).) A liberal democratic society requires a significant number of shared assumptions about the right in order to operate: it consciously leaves space for disagreement about comprehensive visions of the good life. See John Rawls *Political Liberalism* (1993).

These comments about the dangers of an unreflective understanding of judicial minimalism are not the abstract musings of an armchair sociologist. At least one sitting justice on the Constitutional Court has stated — in a public forum — that 'judicial minimalism' was and remains attractive for members of the Constitutional Court exactly because it does not require the eleven justices to possess a core of shared understandings. Albie Sachs 'Democracy, dignity and deliberation' paper, delivered at the Conference on Dignity and the Jurisprudence of Laurie Ackermann (University of Cape Town, 27 July 2007). (Notes of conference on file with author.)

<sup>5</sup> See Theunis Roux 'Principles and pragmatism on the Constitutional Court of South Africa', paper presented to the International Association of Constitutional Lawyers: Conference on Reading and Writing Constitutions (Yokohama, 24 November 2007) (available at <http://www.sajfac.org.za>). Professor Roux explains the thinness of the court's jurisprudence primarily in terms of the need to secure institutional *legitimacy*. That institutional legitimacy was deemed necessary not just so the court could survive, but so that it could survive in order to pursue such intrinsic goods as the entrenchment of the rule of law and the Bill of Rights.

general points made above. Perhaps these judgments are aberrations. Perhaps these cases will come to be viewed as another small cohort of bad decisions in the otherwise impressive oeuvre of our highest court. However, when read against the background of a Constitutional Court with twelve years of experience and over three hundred decisions to its credit, *Masiya*, *Barkhuizen* and *NM* augur ill.<sup>6</sup>

## MASIYA

### *Facts and findings*

The facts and the outcome of *Masiya* are clear enough. Mr Masiya had been convicted in a regional magistrate's court of the anal rape of a nine-year-old girl. However, as the law stood prior to conviction, the anal rape satisfied only the desiderata for a conviction of indecent assault. The magistrate developed the common-law definition of rape to include non-consensual penetration of the penis into the vagina or anus of a person and made the common-law definition of rape gender-neutral. On appeal, the High Court both agreed with the magistrate's reasons for developing the definition and confirmed Masiya's conviction on the charge of rape.

The Constitutional Court was asked to confirm the High Court's judgments — and, in particular, its development of the common-law definition of rape and the attendant alterations of the Criminal Procedure Act 51 of 1977 ('CPA') and the Criminal Law Amendment Act 105 of 1997 ('CLAA'). Nkabinde J, writing for the majority, held that the *current* definition of rape remained consistent with the Bill of Rights. (That is, the common law had 'correctly' characterized coerced anal penetration as mere indecent assault.) However, the *Masiya* court then found that the pre-*Masiya* definition still fell short of the spirit, purport and objects of the Bill of Rights. The majority held that the definition of rape must be extended to include non-consensual anal penetration of the anus of females. The same majority refused to extend the definition of rape to non-consensual anal penetration of males on the grounds that the court's remedial powers were limited to the parties before the court and the facts of the instant matter. On this point, Langa CJ, joined by Sachs J, dissented. Both justices contended that the definition of rape should embrace non-consensual anal penetration of men. The Chief Justice reasoned that once the court accepted that rape was predominantly about the impairment of dignity, it made no sense for the law to distinguish between men and women.

<sup>6</sup> With respect to the strong charges that I have laid, fellow realists such as Iain Currie or Frank Michelman would argue that a muscular version of s 39(2) of the Constitution could generate the kinds of decisions and constitutional rules that I contend are absent in these three judgments — and in many other judgments as well. The first part of that proposition might, hypothetically speaking, be true. Section 39(2) *could* generate such outcomes. But that contention remains entirely hypothetical. The fact is that the court has not deployed s 39(2) in the muscular fashion that would be necessary to rebut my primary arguments. Only seven of the twenty-three decisions handed down to October 2007 employ the direct application of a specific provision of the Bill of Rights.

*Analysis*

As a matter of logic and experience, the Chief Justice draws the unassailable conclusion that when it comes to anal rape it makes no sense to distinguish between men and women: it is an unconstitutional affront to the dignity of both. As a matter of institutional comity, the Chief Justice is correct in noting that the recognition of anal rape of men as rape does not require any legislative intervention. Coerced anal intercourse is anal rape: whether the victim happens to possess a penis or a vagina. In these circumstances, the Chief Justice recognizes that it is ludicrous to suggest, as the majority does, that the court should not make new constitutional common law 'on the basis of what the facts might be'.<sup>7</sup> Men, absent vaginas, are raped all the time. The common law, the province of the courts, is more than adequate to the task of righting/rewriting the law as it stands. But these incontrovertible conclusions are not my quarry here. They simply lighten my analytical load.

My aim is to demonstrate that the Constitutional Court's Bill of Rights analysis in this case gets things back to front. Let us begin with the High Court's approach. The High Court recognized that, in determining whether the common-law definition of rape had to be altered, it would have to take cognizance of the actual ambit of specific substantive rights that the current definition ostensibly violated: dignity, equality, freedom and security of the person, and children's rights. Quite right. The Constitutional Court, on the other hand, framed the issues as follows: (a) whether the current definition of rape is inconsistent with the Constitution and whether the definition needs to be developed; (b) whether Mr Masiya is liable to be convicted in terms of the developed definition; (c) whether the declaration of invalidity of the relevant statutory provisions should be confirmed; (d) whether the merits of the criminal conviction should be dealt with by this court; and (e) appropriate relief.

Conspicuously absent from the Constitutional Court's list is any reference to the rights that the common-law definition or the relevant statutory provisions may have infringed *directly*. Indeed, when articulating its preferred mode for constitutional analysis, the court reaches back beyond the final

<sup>7</sup> *Masiya* supra note 2 para 29. The decision in *Masiya* raises profound doctrinal difficulties. Given the *Masiya* court's own analysis, how can the new rule on anal rape not be immediately, objectively unconstitutional? As the Chief Justice recognizes, if one cannot imagine the court's refusing to extend the 'new' rule to embrace coerced anal intercourse of men, then the new rule is objectively unconstitutional as of the moment it was announced. As for considerations of institutional comity, the force of O'Regan J's dissent in *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) ('*Fourie*') — in which she castigated the majority for shying away from the logical remedial consequences of its holding — has equal, if not greater force, in *Masiya*. The same considerations that O'Regan J claims underwrite an immediate and full alteration of the common law in *Fourie* likewise underwrite an immediate and full alteration of the common law in *Masiya*.

Constitution to invoke *Du Plessis v De Klerk* and the preference expressed in that judgment for the *indirect application* of the Bill of Rights to the common law:

'Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law. . . . [In a] constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. . . . The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.'<sup>8</sup>

That cramped role may have been appropriate under the interim Constitution. However, *Khumalo v Holomisa*, decided under the final Constitution, committed the Constitutional Court to the proposition that common-law rules — whether challenged in disputes between the state and private parties or in disputes between private parties — were subject to the direct application of the Bill of Rights.<sup>9</sup> It is an odd interpretative strategy indeed for the *Masiya* court to ignore the one clear statement by the Constitutional Court on the direct application of fundamental rights to the common law. Moreover, it is an interpretative strategy for which the Chief Justice offers little succour. His refusal to adopt the majority's application analysis, while subtle, speaks volumes as to his thoughts about the majority's errant course.

What is wrong with *Masiya*? It never *truly* considers the direct application of the substantive provisions of the Bill of Rights to the challenged common-law rule regarding the definition of rape.<sup>10</sup> It never engages the content of the substantive provisions of the Bill of Rights and thus never articulates constitutional rules that amplify that content. The entire analysis of the common-law rule takes place within the rubric of s 39(2) and in terms of indirect application.

*Masiya*'s implicit conclusions about the application of the Bill of Rights under the Constitution would appear to be as follows: First, there is no meaningful difference between direct application of the Bill of Rights to the common law under s 8 and indirect application of the Bill of Rights under

<sup>8</sup> *R v Salituro* [1991] 3 SCR 654 as cited in *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), 1996 (5) BCLR 735 (CC) ('*Du Plessis*') footnote 66.

<sup>9</sup> *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) ('*Khumalo*').

<sup>10</sup> The court refuses to address the separate claims under ss 10 and 12 of the Constitution specifically made by the parties. The court flirts with s 9 analysis and concludes, wrongly, that to find the common-law rule in question invalid would be tantamount to 'throwing the baby out with the bath water' (ibid para 27). The fuzzy logic behind this conclusion stems — it seems — from a confusion between rights and remedies. The court appears to conclude that a finding of invalidity of a rule of common law can result only in a simple declaration of invalidity. That seems rather odd since the court reached an opposite conclusion — and employed a different remedy — in *Fourie*.

s 39(2). Secondly, those who believe a meaningful difference exists between analysis under s 8 and s 39(2) rely on a clear cleavage between rules and values. Thirdly, since no clear cleavage exists between the rule-governed analysis and the value-governed analysis under the Constitution, then any distinction between the two sections, grounded in the belief that they require different kinds of analysis, collapses.

Despite *Masiya*'s first implicit contention that no meaningful difference exists between direct application of the Bill of Rights under s 8 and indirect application under s 39, one might expect an explanation as to why s 8 is entitled 'Application' and s 39 is entitled 'Interpretation'. The refusal to take the text seriously and to claim that no meaningful distinction exists between ss 8 and 39(2) flies in the face of O'Regan J's injunction in *Khumalo v Holomisa* that we should not attribute a meaning to one section of the Constitution that renders another section, quite literally, senseless.<sup>11</sup> If ss 8 and 39(2) both mean the same thing, then one of those sections is entirely superfluous. In *Khumalo*, O'Regan J quite rightly held that the attribution of distinct purposes to the two sections is an absolutely essential exercise. Under s 8, the specific substantive provisions of the Bill of Rights apply to each and every kind of law, and each and every form of conduct (whether public or private, where appropriate). Section 8 does not mean that the prescriptive content of the substantive provisions in the Bill of Rights covers each and every legal dispute. Put another way, while the specific provisions in the Bill of Rights cover a large domain of law and conduct, they do not engage all law and conduct. The independent purpose of s 39(2) is to engage law and conduct not engaged by any of the specific provisions set out in Chapter 2.

A counterfactual makes this last distinction clear. Assume that ss 39(2) and 8 do require the same mode of analysis. Assume, as the *Masiya* court would have us do, that this mode of analysis is purely a value-driven exercise. Why even have a Bill of Rights? Why not just have a short list of a general goods that embraces all of the values made manifest in the substantive provisions in Chapter 2? The correct reply is that the drafters intended for there to be two different processes. The first process — direct application — takes the rights and freedoms, and the general rules derived from them, as our point of departure for determining whether law or conduct is invalid. The second process — indirect application — allows for a mode of analysis that neither specifies whether a particular right demands vindication nor permits a finding of invalidity. Instead, as *Carmichele* and *Thebus* tell us, the courts operate under a general injunction to bring *all* law into line with the 'spirit, purport and objects' of the Bill of Rights and the 'objective, normative value system' made manifest in the text of the Constitution as a whole.<sup>12</sup>

<sup>11</sup> Ibid para 32. 'We cannot adopt an interpretation which would render a provision of the Constitution without any apparent purpose.'

<sup>12</sup> *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) para 54. See also *S v Thebus* 2003 (6) SA 505 (CC), 2003 (10) BCLR (CC). If s 39(2) objectives map directly onto this 'objective, normative value



The *Masiya* court's second important presupposition is that those who believe that a meaningful difference exists between analysis under s 8 and s 39 rely incorrectly on a cleavage between rules and values. The *Masiya* court claims, implicitly, that since s 39 requires that we analyse specific

system', then the Constitutional Court may assert constitutional jurisdiction through s 39(2) whenever it believes that a rule of common law (or conduct in light of such rules), or the interpretation of a statute (or conduct in light of a given set of statutory provisions), does not conform to its understanding of our basic constitutional norms. The court relies upon this characterization of s 39(2) in *Carmichele* in order to compel the High Court and the Supreme Court of Appeal to develop the common law of delict. Thus, despite the *Thebus* court's admission that s 39(2) 'does not specify what triggers the need to develop the common law or in which circumstances the development of the common law is justified', the failure of any court to adhere to the s 39(2) obligation to develop the common law or to interpret a statute in light of the demands of the Constitution's 'objective normative value system' risks reversal by our highest constitutional tribunal (*Thebus* supra note 10 para 27). This sword of Damocles is particularly dangerous because the court cannot 'specify . . . the circumstances' under which the sword may drop: its authority is *unconstrained* by determinate standards. This then is the linguistic trick that specific substantive provisions of the Bill of Rights — ss 9–35 of the Constitution — to disappear, and then to reappear in the rather amorphous form of 'an objective normative value system'. This phrase plays an equally important role in instances of s 39(2)-informed 'statutory interpretation'. See *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC). In *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* 2003 (5) SA 518 (C), 2003 (3) BCLR 288 (C) the High Court, per Davis and Van Heerden JJ, entertained a direct challenge to ss 15(1) and 23(1) of the then-applicable South African Transport Services Act 9 of 1989 in terms of ss 11 and 12(1)(c) of the Constitution. They held that these substantive provisions of the Constitution imposed a legal duty on Transnet to ensure that all railway commuters — regardless of race or class — enjoyed a certain level of physical safety. In *Transnet Ltd t/a Metrorail v Rail Commuters Action Group* 2003 (6) SA 349 (SCA), 2003 (12) BCLR 1363 (SCA), the Supreme Court of Appeal differed with the Cape High Court over the content of the civic morality enshrined in the Constitution. The Supreme Court of Appeal rejected the proposition that our constitutionally mandated morality demanded that a legal duty of care be imposed on Transnet in order to remedy the endemic violence visited upon commuters from historically disadvantaged communities. The Constitutional Court then reversed the Supreme Court of Appeal. However, the Constitutional Court chose not to follow the High Court's route and view the constitutional infirmity as a direct infringement of fundamental rights. Instead, the Constitutional Court construed the enabling legislation in terms of s 39(2) of the Constitution, and found that it imposed, prospectively, a duty of care on Metrorail. Three decisions — three different modes of analysis. The problem with the Constitutional Court's *Rail Commuter Action Group* judgment is that by employing s 39(2), it once again obviates the need to give meaningful content to the specific substantive rights — ss 10, 11 and 12 of the Constitution — upon which it expressly relies. The same sort of vanishing act occurs in *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International* 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC). The *Laugh It Off* court's preference for s 39(2)-informed statutory interpretation over direct constitutional interpretation in terms of s 16 raises the question of how the court can meaningfully assert constitutional jurisdiction — in order to overturn the Supreme Court of Appeal's judgment — while employing a form of adjudication that actually eschews fundamental rights analysis.

substantive rights, rules of common law or provisions of statutes in light of the same five core values — openness, democracy, human dignity, equality, freedom — or the same general ‘spirit, purport and objects’, then we must necessarily be engaged in the same kind of ‘global’ assessment of rights, rules and statutory provisions whether we undertake direct application or indirect application. *This is false*. First, when we ask whether a statutory provision or a rule of common law — say the definition of rape or indecent assault — violates the right to dignity or the right to equality, we do not engage in some global assessment of competing Bill of Rights considerations. We know that s 9, the right to equality, requires us to ask very specific kinds of questions about ‘differentiation’, ‘discrimination’, ‘unfairness’, ‘systemic disadvantage’, and ‘the impairment of dignity’. We know that s 10 demands that we ask whether a given rule of law treats individuals as mere means, whether it recognizes that individuals are always ends-in-themselves, or whether it allows for inhumane punishment or treatment. Secondly, it could hardly be the case that when we interpret ‘the right to access to housing’ in light of those five core values, we end up with the same content as when we interpret ‘the right to access to court’ in light of those five core values. However general their wording might be, these specific substantive rights generate rules with real purchase. And they appear in distinct provisions in the Bill of Rights because they seek to achieve manifestly different ends.

Does the putative collapse of the rule/value distinction better justify the result in *Masiya*? Well, once we make this move, there is only one question we could ask when faced with any allegation of a rights violation: ‘Stepping back from it all, is the law or conduct under review the kind of law or conduct that the entire scheme of the Bill of Rights is meant to promote (or prohibit)?’ Such a broad enquiry inevitably makes questions about the distinct kinds of application required by ss 8 and 39 superfluous. But this interpretative strategy also floats so free of the text that it makes any analysis of the specific substantive rights in ss 9–35 superfluous. That would seem to violate, with a vengeance, the non-redundancy requirement articulated by O’Regan J in *Khumalo*.

In considering the dangers of the *Masiya* court’s collapse of the rule/value distinction, it may be worth reflecting upon the Constitutional Court’s own distinction between rules and values and the different uses to which the Constitution puts them. In *Minister of Home Affairs v National Institute for Crime Prevention*,<sup>13</sup> Chaskalson CJ writes:

‘The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of section 1 itself, but also from the way the Constitution is structured and in particular the provisions of Chapter 2 which contains the Bill of Rights.’

<sup>13</sup> 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) (‘NICRO’) para 21.

Values are one thing, the *NICRO* court holds, rules another. While it is certainly true that the fundamental values articulated in the Constitution will shape the rules expressed therein, and that the rules will have a reciprocal effect with respect to our understanding of those fundamental values, there remains a distinction with a difference. Rights give rise to rules and enforceable claims. Values do not. The *Masiya* court ignores this distinction at our peril.

## BARKHUIZEN

### *Facts and findings*

The facts of *Napier v Barkhuizen* are clear enough. Barkhuizen, the plaintiff, insured his new BMW with a syndicate of Lloyds Underwriters. Shortly thereafter, on 24 November 1999, his vehicle was involved in an accident. Lloyds rejected Barkhuizen's liability claim on the grounds that a clause in the policy required the plaintiff to issue summons in such a case within 90 days. Barkhuizen had waited two years to issue his summons. The Transvaal and Witwatersrand High Court (sitting in Pretoria) upheld Barkhuizen's challenge on the grounds that the clause in question violated s 34, the right of access to courts. The Supreme Court of Appeal reversed the decision of the High Court.

Ngcobo J, writing for the majority, held that the proper approach to Mr Barkhuizen's constitutional challenge was to determine whether the time-limitation clause in question was contrary to public policy. Such public policy is to be determined by reference to constitutional values, and, in particular, those values found in the Bill of Rights. Once again, the Constitutional Court decided not to analyze the problem in terms of any of the specific substantive provisions of the Bill of Rights. The question then was whether, in light of public policy, Mr Barkhuizen had an adequate and fair opportunity to seek the assistance of a court. Absent evidence that the contract was not freely concluded between persons with equal bargaining power, or that Mr Barkhuizen was unaware of the clause, the majority concluded that Mr Barkhuizen had adequate access to court. Although the judgment contained a number of dissents, the most interesting intervention was, once again, made by the Chief Justice. Langa CJ expressly refused to follow the majority of the court's decision not to engage in the direct application of the Bill of Rights to contracts between private parties.

### *Analysis*

*Barkhuizen* is so badly reasoned, and so at odds with the court's existing jurisprudence, that it is hard to know where to start. But let us begin with the court's boldest assertion: that the Bill of Rights cannot be applied directly to contracts between private parties. This statement, as we shall see, directly contradicts s 8, is entirely inconsistent with the *Khumalo* court's gloss on the meaning of s 8(2), and relies upon a rather baffling conflation of rights analysis, value analysis and public-policy analysis. Once again, only the Chief

Justice possessed the requisite insight to steer clear of this miasma of legal reasoning.

The most important sections on application in the Constitution are s 8(1) and s (2). They read:

‘(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’

I have already argued elsewhere that the words ‘all law’ invariably subject all legal disputes that engage a specific substantive provision of the Bill of Rights to the direct application of the Bill of Rights.<sup>14</sup> The addition of the word ‘judiciary’ leaves little doubt that every exercise of power by a court — whether by applying law or by making law — also engages the Bill of Rights. Moreover, even if one does *not* accept that rather straightforward reading of s 8(1), s 8(2) states that the Bill of Rights will apply to disputes between private parties (and that would embrace disputes over contractual provisions) if the rights asserted were deemed applicable. Indeed, the *Khumalo* court endorses this second reading of s 8:

‘It is clear from sections 8(1) and (2) of the Constitution that the Constitution distinguishes between two categories of persons and institutions bound by the Bill of Rights. Section 8(1) binds the legislature, executive, judiciary and all organs of state without qualification to the terms of the Bill of Rights. Section 8(2) however provides that natural and juristic persons shall be bound by provisions of the Bill of Rights “to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”. Once it has been determined that a natural person is bound by a particular provision of the Bill of Rights, section 8(3) then provides that a court must apply and if necessary develop the common law to the extent that legislation does not give effect to the right. Moreover, it provides that the rules of the common law may be developed so as to limit a right, as long as that limitation would be consistent with the provisions of section 8(3)(b).’<sup>15</sup>

In *Khumalo*, the court held that a defamation action between two private parties was subject, in terms of s 8(2), to the direct application of s 16, the right to freedom of expression, of the Bill of Rights. The *Khumalo* court thus established, without a doubt, a proposition that the interim Constitution had previously denied: the Bill of Rights applies directly to disputes between private parties governed by the common law. And yet the *Barkhuizen* court writes:

‘The section 34 argument raises the fundamental question of the appropriateness, or otherwise, of testing a contractual provision directly against a provision in the Bill of Rights. This raises the question of horizontality, that is, the direct

<sup>14</sup> Woolman op cit note 4.

<sup>15</sup> *Khumalo* supra note 8 para 31.

application of the Bill of Rights to private persons as contemplated in section 8(2) and (3) of the Constitution. *This Court has yet to consider this issue.*<sup>16</sup>

Can one read the two statements from *Khumalo* and *Barkhuizen* and conclude that court has not flatly contradicted itself? The *Khumalo* court states that ‘section 8(2) provides that natural and juristic persons shall be bound by provisions of the Bill of Rights . . . and that . . . section 8(3) . . . provides that a court must apply and if necessary develop the common law to . . . give effect to the right’. The *Barkhuizen* court makes no effort to distinguish *Khumalo* from *Barkhuizen*. Instead of a new doctrine, we have a denial of an existing legal reality. We witness our highest court refusing to acknowledge that it had previously dealt with the same issue.<sup>17</sup>

But let us accept the fact that we have gone, with the *Barkhuizen* court, back through the looking glass. Can we accept the proposition that contracts between private parties can never be subject to the direct application of the Bill of Rights? I see, again, no reason to accept this proposition based upon the previous conclusions reached by the court in *Khumalo*. To the extent that the *Khumalo* court asked whether a delictual dispute between private persons was subject (or could be subject) to the direct application of the Bill of Rights, it answered the question in the affirmative. Thus, to the extent that the issue of direct application in *Barkhuizen* turns on the presence of a dispute between private persons, once again, the holding of the *Barkhuizen* court flatly contradicts the holding of the *Khumalo* court.

The *Barkhuizen* court attempts to finesse the problem of direct application by asserting that there is no law at issue — merely a private contract, and, at best, the common-law commitment to the sanctity of contract.<sup>18</sup> That would be akin to the *Khumalo* court stating that no law was at issue, only an allegedly defamatory statement made by one private party with respect to another. The *Khumalo* court did not entertain such a proposition. But even if

<sup>16</sup> *Barkhuizen* supra note 1 para 23 (emphasis added).

<sup>17</sup> Of course, the paragraph above is open to a less pernicious, but far more trivial explanation. The court could simply be saying that it has never considered the horizontal application of s 34 of the Constitution to a dispute between private parties. (Given the court’s previous decision in *Beinash* — discussed below: see the text to note 34 — this reading, while trivially true, might also be wrong.)

<sup>18</sup> On this point, as to whether there is a cognizable rule of law, I tend to agree with both Sunstein and Tushnet. Cass Sunstein *The Partial Constitution* (1993) 149–50 writes: ‘[The lesson] is that the law of contract, tort or property is just that — law. It should be assessed in the same way other law is assessed. . . . The real issue is whether the action offends the Constitution.’ See also Mark Tushnet ‘The issue of state action/horizontal effect on comparative constitutional law’ (2003) 1 *Journal of International Constitutional Law* 79. Tushnet decries the persistence of form over substance in these debates and concludes that the density of most regimes of common law often outstrips the density of statutes and codes. For Tushnet, this fact thus leaves little scope for any persuasive argument that codes, statutes and regimes of common law are so radically different in kind that we should accept direct constitutional review with respect to codes and statutes, but abjure direct constitutional review with respect to the common law.

it had, the *Khumalo* court would have rejected it as a ground for avoiding direct application. Recall that O'Regan J read s 8(2) and (3) as she did because she believed that this reading is required for circumstances in which 'no law' exists, and in which s 8(3) must be pressed into service. Otherwise, she contends in *Khumalo*, s 8(3) would have no purpose.

This contradiction reveals yet a further contradiction — one that is tantamount to judicial subterfuge. Shortly after the *Barkhuizen* court denies that s 8(2) and (3) dictate the direct application of the Bill of Rights to the instant matter, the court writes as follows: 'Courts are . . . empowered to develop the rules of the common law to limit a right in the Bill of Rights "provided that the limitation is in accordance with section 36(1)".'<sup>19</sup> Assuming the court had decided to alter the common law of contract in *Barkhuizen*, which it did not, then it appears that it might have relied upon s 8(3) to do so. How exactly the *Barkhuizen* court squares its rejection of s 8(3) for the purposes of direct application with its apparent willingness to deploy s 8(3) for the purposes of indirect application, it refuses to say.

The *Barkhuizen* court then claims that the applicant cannot rely upon so gossamer-thin a thread of common law as *pacta sunt servanda* to ground a constitutional challenge in terms of a specific substantive provision of the Bill of Rights, whether it be s 9, s 10 or s 34. As we have already seen, this assertion is wrong. According to the *Khumalo* court, the specific substantive provisions of the Bill of Rights can be applied directly where there is no law at all. But there is law, a whole well-developed body of law, being relied upon by all the parties in this matter. It was law taught to me in my first year of law school: the law of contract.<sup>20</sup>

However, let us assume that there is 'no law' upon which any party to this matter is relying (a truly absurd proposition, given the amount of contract law engaged by the High Court, the Supreme Court of Appeal and the Constitutional Court in *Barkhuizen*). The Constitutional Court has not, in previous matters, shied away from applying the Bill of Rights directly to 'conduct'. In *Hoffmann v SAA*, the Constitutional Court actually used s 9 to find that the applicant had been unfairly discriminated against because of his HIV status and ordered his hiring (not reinstatement) as a cabin steward.<sup>21</sup> The absence of law only mattered in so far as SAA was denied an opportunity to justify its conduct in terms of s 36. Moreover, *Hoffmann* cannot be distinguished on the grounds that s 9 engaged state action. Whether the

<sup>19</sup> *Barkhuizen* supra note 1 para 35.

<sup>20</sup> Again, it is important to note that other scholars, such as Iain Currie, tend towards the view — made popular by Duncan Kennedy — that the law of contract is indeed made up of standardless standards that can generate almost any outcome, depending upon the judge hearing the matter and her predisposition to use the body of contract case law in one way rather than another (by emphasizing one line of precedents conducive to her conclusion over an alternative set of precedents that would support a different outcome).

<sup>21</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC).

unfair discrimination analysis took place in terms of s 9(3) or (4), we have no reason to believe that the court's conclusion would have differed. Had SAA been a private carrier, the *Hoffmann* court would have found its conduct to be unfair discrimination in terms of s 9(4).

So far I have limited my remarks to the internal contradictions of *Barkhuizen* and the manner in which it flatly contradicts the central holding of *Khumalo*. But let us turn now to the nub of the matter: how cases like *Barkhuizen*, *Masiya* and *NM* undermine the Bill of Rights, the rule of law and the court's authority.

Having canvassed and dispensed with the arguments in favour of direct application of the Bill of Rights to the law of contract (between private parties), Ngcobo J, writing for the majority of the court, summarizes the *Barkhuizen* court's position as follows:

'In my view, the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them. It follows therefore, that the approach that was followed by the High Court is not the proper approach to adjudicating the constitutionality of contractual terms.'<sup>22</sup>

The Constitutional Court's argument that its approach to issues of application differs from the High Court's approach to application is entirely parasitic on the existence of a meaningful distinction between indirect application and direct application. Unless the two processes of application are identical, then the various sections of the Bill of Rights that deal with 'Application' or 'Interpretation' must contemplate at least two distinct modes of analysis and must employ language that reflects such a distinction.

Here then is my contention. As a matter of logic, one must know when direct application is or is not required in order to know when indirect application is or is not required. Direct application means that the prescriptive content of the substantive rights found in ss 9–35 of the Constitution engages the law or the conduct at issue. Where the prescriptive content of the substantive rights found in ss 9–35 does not engage the law or the conduct at issue, then s 39(2) tells us that *the more general* spirit, purport and objects of the chapter may inform our efforts to bring all law into line with the Constitution. If we reverse the spin, and we first use s 39(2) to bring the law into line with the general spirit, purport and objects of the Bill of Rights, there is simply nothing left to be done in terms of direct application. The reason is obvious. If the general spirit, purport and objects of Chapter 2, which embraces (at a minimum) the entire value domain reflected by the specific substantive provisions of the Bill of Rights, does not require a change in the law (or a change in conduct brought about by a change in the

<sup>22</sup> *Barkhuizen* supra note 1 para 30.

law), then no narrower set of purposes reflected in a single substantive provision of the Bill of Rights could be expected to do so.

But indirect application was not meant to ‘avoid’ actual constitutional analysis in terms of the specific substantive provisions of the Bill of Rights. It enables a court to go beyond the limited substantive provisions of the Bill of Rights. Section 39(2) promises an expansive understanding of judicial review under the Bill of Rights, not a cramped understanding. However, before one can engage in indirect application and the development of new rules of law in terms of s 39(2), one must first ascertain what the ambit is of the allegedly applicable constitutional provisions. Only when one has determined that ambit, and found that it does not speak to the issues raised by an ordinary rule of law, can one turn to the more open-ended invitation of s 39(2). Analysis of the specific provisions of the Bill of Rights, and the consistency of law or conduct with those provisions, logically *must* be prior to the analysis of the common law in terms of the general spirit, purpose and objects of the Bill of Rights. When s 39(2) — indirect application — is given priority over s 8, it does too much work and turns all of s 8 into surplusage. It does exactly what O’Regan J, in *Khumalo*, says we must not do: it makes s 8(2) and s 8(3) redundant.<sup>23</sup>

That the *Barkhuizen* court says one thing and then does another is evident in the paragraphs that immediately follow para 30 and the court’s denial that contracts can be subject to the direct application of the Bill of Rights. The *Barkhuizen* court says that it is undertaking indirect analysis of the conduct, and thus of the contract, at issue. However, the language of *Barkhuizen* suggests that the court is, in fact, undertaking something akin to direct application of the Bill of Rights. It begins by first defining the ambit of a right:

‘Section 34, the provision in the Constitution that guarantees the right to seek the assistance of courts, proclaims that “[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court . . . .” Our democratic order requires an orderly and fair resolution of disputes by courts or other independent and impartial tribunals. This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court.’<sup>24</sup>

The *Barkhuizen* court then fleshes out the meaning of s 34 by quoting from two previous decisions in which the court had the opportunity to expound upon it:

‘Section 34 is an express constitutional recognition of the importance of the fair

<sup>23</sup> *Khumalo* supra note 8 para 32.

<sup>24</sup> Ibid para 31, citing *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC) para 22; *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC) para 63 (footnotes omitted).



resolution of social conflict by impartial and independent institutions. The sharper the potential for social conflict, the more important it is, if our constitutional order is to flourish, that disputes are resolved by courts. As this Court said in *Lesapo*: “The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance.”<sup>25</sup>

One can be forgiven for thinking that we are directly applying a specific substantive provision of the Bill of Rights. Indeed, the *Barkhuizen* court refers to *Mohlomi* as setting out the ‘applicable test’: *Mohlomi* was concerned with the *direct application* of s 34 to a *statutory* (as opposed to a contractual) time-bar.<sup>26</sup> But within the next four paragraphs the court turns this understanding entirely on its head. The majority in *Barkhuizen* writes: ‘Section 34 therefore not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy.’<sup>27</sup> This sentence is odd indeed. And it is a perfect example of the court’s getting things back to front.

Let us take this last sentence one fragment at a time: ‘Section 34 therefore . . . reflects the foundational values that underlie our constitutional order.’<sup>28</sup> Is this the correct locution? Section 34 is a specific substantive *right* that constitutes our constitutional order. Understanding the content of the right may require one to consider the values said to underlie our constitutional order. Indeed, one might go so far as to contend that we cannot allow for a definition of s 34 that runs counter to the values said to underlie our constitutional order. But s 34 is not a reflection of the underlying values (except in the most trivial and tautological sense). Rather, the underlying values shape our understanding of a very specific constitutional norm that is meant to serve a very discrete set of purposes. The court then writes: ‘Section 34 . . . also constitutes public policy.’<sup>29</sup> Well, no, it does not — at least not in the way one usually understands distinctions between principle and policy, or law and policy. Section 34 provides the measure against which all other law and conduct, and therefore public policy, is assessed. That is what s 2 means when it tells us that the Constitution is supreme and that all law and all conduct inconsistent with its provisions is invalid.

<sup>25</sup> *Zondi* supra note 24 para 61.

<sup>26</sup> *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC) paras 50–2. At a minimum, the contours of the court’s test for public policy are precisely the same as a test conducted in terms of the direct application of s 34 of the Constitution to a comparable statute.

<sup>27</sup> *Barkhuizen* supra note 1 para 33.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

After taking a brief detour to tell us that the common law has *always* recognized ‘the right of an aggrieved person to seek the assistance of a court of law’ and that ‘[c]ourts have *long held* that a term in a contract which deprives a party of the right to seek judicial redress is contrary to public policy’ — for whom, and since when, are questions that immediately spring to mind — the court returns to the following uncontroversial set of propositions: ‘Under our legal order, all law derives its force from the Constitution and is thus subject to constitutional control. Any law that is inconsistent with the Constitution is invalid. No law is immune from constitutional control. The common law of contract is no exception.’<sup>30</sup> But then the court states:

‘When developing the common law of contract, courts are required to do so in a manner that “promotes the spirit, purport and objects of the Bill of Rights.” Section 39(2) of the Constitution says so. All this is, by now, axiomatic. Courts are equally empowered to develop the rules of the common law to limit a right in the Bill of Rights “provided that the limitation is in accordance with section 36(1).”’<sup>31</sup>

The quoted part of the last sentence is taken from s 8(3). Section 8(3) governs instances of direct application of a specific substantive right to disputes between private parties. Again, O’Regan J, writing for a unanimous Constitutional Court in *Khumalo*, told us so. So what is the court doing here in *Barkhuizen*: direct application or indirect application?

The next paragraph only serves further to muddle the court’s analysis: ‘The proper approach to this matter is, therefore, to determine whether clause 5.2.5 is inimical to the values that underlie our constitutional democracy, as given expression to in section 34 and thus contrary to public policy.’<sup>32</sup> *Value analysis, rights analysis, public policy analysis*. This last sentence suggests that they are all one and the same thing. (Even when, as we have already seen, the *NICRO* court has told us that they are not.) Moreover, by asking whether the clause at issue is ‘inimical to the values that underlie our constitutional democracy’ the court seems to obviate the need to ask what, if anything, s 34 demands, so long as what it demands is not inimical ‘to the values that underlie our constitutional democracy’.<sup>33</sup> Indeed, it is the collapsing of the distinction between value analysis, rights analysis, and public policy analysis that enables the court to ask — as any court *without constitutional jurisdiction* might ask — whether contractual time limitation clauses are contrary to public policy?

I see no reason to entertain the *Barkhuizen* court’s assertion that its approach constitutes ‘the proper approach’. The *Barkhuizen* court is incapable of telling us what that approach is, or how it differs, for example,

<sup>30</sup> Ibid para 35.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid para 36.

<sup>33</sup> Ibid.

from the approach the court undertook in *Beinash*.<sup>34</sup> One obvious difference is that the *Beinash* court employed normal, two-step rights analysis and limitations analysis to the rule of law being challenged. It asked what the content of s 34 was, whether the exercise of s 34 rights had been impaired, and whether the impairment was justifiable in terms of s 36.<sup>35</sup>

One can imagine the court distinguishing *Beinash* from *Barkhuizen* on the grounds that *Beinash* involves a challenge to a High Court order grounded in an Act of Parliament (the Vexatious Proceedings Act 3 of 1956) whereas *Barkhuizen* involves a challenge to a contract between private parties grounded firmly in our well-established regime of the common law of property.<sup>36</sup> (Indeed, time-limitation clauses must be grounded firmly in the common law in order for the court to come to the conclusion that they are consistent with public policy, values analysis and rights analysis.) This distinction ought not to secure the court any traction with respect to its notion of the 'proper approach'. In *Khumalo*, a challenge to the common law governing conduct between private parties was subject to the direct application of s 16. In *Hoffmann*, a challenge to ostensibly non-law governed conduct was subject to the direct application of s 9.<sup>37</sup> In *Bhe*, a customary law rule governing conduct between private parties (the rule of male primogeni-

<sup>34</sup> *Beinash v Ernst & Young* 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC) ('*Beinash*').

<sup>35</sup> That the *Beinash* court may have been somewhat confused about what it chose to do at each stage of analysis did not prevent it from undertaking standard two-step fundamental rights (interpretation/limitations) analysis. The acceptance of the two-stage approach to fundamental rights analysis has been, until recently, a trite and relatively uncontested proposition in our law. See *S v Zuma* 1995 (2) SA 642 (CC), 1995 (1) SACR 568 (CC), 1995 (4) BCLR 401 (CC) para 21: Fundamental rights analysis under Chapter 3 of the interim Constitution 'calls for a two-stage approach. First, has there been a contravention of a guaranteed right? If so, is it justified under the limitation clause?'; *S v Mamabolo (E-TV, Business Day, Freedom of Expression Institute Amici Curiae)* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC) para 1: 'The first issue was whether the law . . . limited the right to freedom of expression vouchsafed by the Constitution. The second is whether the procedure recognised and sanctioned by our law . . . fell foul of the fair trial rights guaranteed by the Constitution. . . . In respect of each of the first two issues, a finding that the law does indeed limit the fundamental rights in the respects contended for, will in turn require an enquiry whether such limitation is nevertheless constitutionally justified.'

<sup>36</sup> Is this rather thin distinction between *Barkhuizen* and *Mohlomi, Moise* or *Potgieter* — the latter group involved s 34 challenges (or comparable challenges under the interim Constitution) to statutory time-bar limitations — convincing? See *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC); *Moise Greater Germiston Transitional Local Council* 2001 (4) SA 491 (CC); *Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering Gauteng* 2001 (11) BCLR 1175 (CC). If it is convincing, then we have, indeed, gone back in time, and Michael Osbourne and Chris Sprigman will be delighted to know that *Du Plessis* has been resurrected. See Chris Sprigman & Michael Osbourne 'Du Plessis is not dead: South Africa's 1996 Constitution and the application of the Bill of Rights to private disputes' (1999) 15 *SAJHR* 25.

<sup>37</sup> 2001 (1) SA 1 (CC), 2001 (2) BCLR 176 (CC) ('*Hoffman*').

ture) was found to violate directly s 9 and s 10.<sup>38</sup> And in *Beinash* itself, s 34 was brought to bear, unsuccessfully, on an underlying dispute between two private parties.

NM

*Facts and findings*

NM may be the most disturbing of the three from the perspective of analytical rigour. The applicants claimed that the respondents had violated their rights to privacy and dignity by publishing their names and HIV status in a biography of Ms de Lille. The High Court held that the disclosure of the applicants' names in the book by Ms Smith, the author, was not unlawful and that she did not act with the requisite *intent* to reveal private medical facts. Madala J, writing for the majority in the Constitutional Court, set aside the High Court decision. Contrary to the evidentiary record, the majority in NM claimed that the respondents were, in fact, aware that the applicants had not given their express consent, that such awareness satisfied the factual predicate necessary for *intent* and that all the elements of the *actio iniuriarum* had been satisfied. The publication therefore violated the Bill of Rights' spirit, purport and objects, and in particular, the Bill's commitment to privacy and to dignity. The NM court awarded R35 000 in damages, plus the applicants' costs up to the first day of trial, to each of the three applicants, to be paid, jointly and severally, by the respondents.

*Analysis*

The dissents of Langa CJ and O'Regan J make it rather obvious that the record could not support a factual finding that the respondents had acted intentionally to harm the privacy and the dignity interests of the applicants. Moreover, the current elements of the *actio iniuriarum*, when married to the facts, do not support a legal finding of liability. The majority stretches the facts — beyond all recognition — in order to satisfy the requirements of an *actio iniuriarum*.

But that is not what is interesting about this case — at least for the purposes of this article. What is interesting is that the majority in NM undertakes no meaningful constitutional analysis at all. To the extent that it engages the privacy and the dignity interests at stake in the case, it does so solely to confirm that privacy interests and dignity interests justify the current shape of the *actio iniuriarum*. That the Constitution actually contains a right to privacy and a right to dignity is entirely epiphenomenal. The court merely employs them as rhetorical flourishes to shore up its conclusion that the applicants have experienced a particular form of harm and that the respondents must make appropriate restitution.

<sup>38</sup> *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC).

Surely the mere fact that an *actio iniuriarum* and the rights to privacy and to dignity share common concerns is insufficient to turn something into a constitutional matter. The *NM* majority disposes of this important question of jurisdiction as follows:

‘The applicants approached this Court with the view to vindicate their constitutional rights to privacy, dignity and psychological integrity. [. . .] Their claim, however, is based upon *actio iniuriarum* and, therefore, falls to be determined in terms of the *actio iniuriarum*. [. . .] The dispute before us is clearly *worthy* of constitutional adjudication . . . since it involves a nuanced and sensitive approach to the balancing of the interests of the media, in advocating freedom of expression, [and the] privacy and dignity of the applicants irrespective of whether it is based upon constitutional law or common law.’<sup>39</sup>

Again, it cannot possibly be the case that either the *desire* of the applicants to turn something into a constitutional matter, or the *ease* with which a common-law action maps on to constitutional rights turns a dispute into a constitutional matter, or whether a dispute is ‘*worthy* of constitutional adjudication’ turns that dispute into a constitutional matter. Not even Frank Michelman’s exhaustive rubric of ‘constitutional matters’ contemplates the inclusion of these three new classes of cases.<sup>40</sup>

Where is the Bill of Rights analysis in this matter? In *Barkhuizen* and *Masiya*, the complaint was that Bill of Rights analysis had been subverted by an over-reliance on s 39(2) and a refusal to apply the apposite substantive provisions of the Bill of Rights directly. In *NM*, the majority does not even for a minute flirt seriously with a challenge to the *actio iniuriarum* grounded

<sup>39</sup> *NM* supra note 3 paras 29–31.

<sup>40</sup> Frank Michelman ‘The rule of law, legality and the supremacy of the Constitution’ in S Woolman, et al (eds) *Constitutional Law of South Africa* 2 ed (OS March 2005) ch 11. Professor Michelman’s six classes of cases demonstrate that the Constitutional Court’s commitment to the rule of law and constitutional supremacy turn, potentially, all matters into constitutional matters. Only considerations of institutional comity — vis-à-vis the general jurisdiction of the Supreme Court of Appeal and the specialized jurisdiction of the Constitutional Court — place any meaningful limitation on the court’s jurisdiction. See, e g, *Metcash Trading Ltd v Commissioner for the South African Revenue Service* 2001 (1) SA 1109 (CC), 2001 (1) BCLR 1 (CC): conflicting legal conclusions reached by different panels of the Supreme Court of Appeal on identical subject matter do not engage the rule of law doctrine and are not ‘constitutional matters’ that warrant review by the Constitutional Court. But this limitation is entirely pragmatic — in the thinnest sense — and, as Professor Michelman shows, does not cohere, logically, with the court’s rule of law, legality and supremacy doctrines. Part of the problem is that the court often accepts cases prior to the meaningful application of its collective ‘mind’ to the question of whether or not the case genuinely raises a constitutional issue. The mere assertion by the applicants of the need to develop the common law often convinces the court to accept jurisdiction. Upon further, and deeper, reflection, the court then finds it unnecessary to develop the law or to find the law invalid. The court then finds itself, effectively, in the position of a court of appeal with general jurisdiction. We may have to accept the awkward proposition that our Constitutional Court’s specialized jurisdiction — and its constitutional rules and procedures — turns run of the mill disputes into constitutional matters.

in a specific substantive provision of the Bill of Rights, nor does it contemplate the creation of a self-standing constitutional action grounded in the right to privacy or the right to dignity that would vindicate the applicants' interests. Instead, the majority in *NM* acts as a trier of fact in a run-of-the-mill *actio iniuriarum* matter. Indeed, when it comes to crafting the appropriate order, it frets about the difficulties of calculating an appropriate quantum of damages. That, one might add, is a far cry from the often vexed questions of retrospectivity, suspension, reading in or severance that occupy the court at the remedial stage of proceedings. As it turns out, the substance of the award is also not a constitutional matter. It reflects — almost exactly — the settlement offered by the respondents to the applicants prior to the litigation in the Constitutional Court.

*Barkhuizen* and *Masiya* reflect a court uncomfortable with the direct application of the specific substantive provisions of the Bill of Rights. *NM* shows a court in full flight from any meaningful engagement with Chapter 2 of the Constitution.

## CONCLUSION: MINIMALISM, RESTORATION AND RULES

'What we have here is a failure to communicate.'

Ken Kesey, *One Flew over the Cuckoo's Nest*

The critiques leveled at the Constitutional Court in this article are not especially new. That the court continues to err in such quite obvious ways reflects, at a minimum, three possibilities: (1) the court simply ignores academic interventions; (2) the court believes the academic criticism to be incorrect; and (3) the court ignores obvious doctrinal errors because it holds itself largely unaccountable to the existing community of academic and professional interpreters.<sup>41</sup> (It seems clear enough that the court still holds

<sup>41</sup> Given the court's general reticence on matters of doctrine, it seems likely that some combination of (1) and (3) are responsible for the court's failure to offer compelling, alternative constructions of its own doctrine. This observation is not nearly as churlish as it might seem. For example, I have offered several related critiques of the court's reliance on the metaphor of 'balancing' when undertaking limitation analysis. The court's subsequent jurisprudence reflects neither an engagement with those critiques nor any effort to offer a coherent account of what it often calls 'proportionality' analysis. With respect to a lack of engagement with the academy, the Constitutional Court is no different than most courts that exercise final jurisdiction on constitutional matters. The second failure, to offer a coherent account of limitations analysis, is related in very important respects to the phenomenon of the amazing, vanishing Bill of Rights assayed in this article. The primary critique of balancing — as opposed to more rigorous forms of limitations analysis reflected in the Canadian *Oakes* test — is that it masks the basic features of the task the court must undertake. See *New Jersey v TLO* (1985) 469 US 325, 369 per Brennan J: Balancing is 'doctrinally destructive nihilism'; *Murray v Ireland* [1985] IR 532 per Costello J: Balancing talk is often 'misleading'. See also Cass Sunstein 'Incommensurability and valuation in law' (1994) 92 *Michigan LR* 779; M E Blomquist 'Review of Gaurino-Ghezzi and Loughran's *Balancing Juvenile Justice*' (1997) 7 *Law and Politics Book Review* 24 at 25: 'As a goal, "balance" appears to be one more buzz word like "rehabilitation" and "accountabil-

itself accountable to the political branches of government.) However, two other possible explanations better fit these outcomes: the fully fledged embrace of a uniquely South African doctrine of judicial minimalism; and the nascent development of a jurisprudence of restoration.

### *On minimalism*

The court has, unwittingly or not, transformed minimalism into a uniquely South African account of constitutional adjudication. (I eschew the word ‘theory’ because courts rarely offer theories of what they do.) This normative account of constitutional adjudication is better known here as ‘the principle of avoidance’.

In its least pernicious form, the principle of avoidance has been articulated by the Constitutional Court, in *Mhlungu*, as follows: ‘[W]here it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course that should be followed.’<sup>42</sup> On its face, this salutary rule seems unobjectionable. What is objectionable is the turning of this salutary rule into a full-blown doctrine in which a court must *never* ‘formulate a rule

ity” that is part of the . . . lexicon but is not particularly useful because . . . it lacks . . . content.’ A related difficulty with balancing is that we rarely value things of import in quantitative terms (utility) or in terms of a single metric. We value things in qualitatively different ways. This claim about value pluralism and the qualitatively different ways in which we value goods undergirds a second claim about balancing: that human goods are often incommensurable and that the court’s balancing metaphor intentionally suppresses the fact that competing rights, interests and values cannot be ‘balanced’ in any meaningful way. See, e.g., M. Walzer *Spheres of Justice* (1985); Ted Aleinikoff ‘Constitutional law in the age of balancing’ (1987) 96 *Yale LJ* 943; Mark Tushnet ‘An essay on rights’ (1984) 62 *Texas LR* 1363; Stu Woolman ‘Out of order? Out of balance? The limitation clause of the final Constitution’ (1997) 13 *SAJHR* 102. A fuller critique of balancing and the appropriate doctrinal response to the demands of limitations analysis can be found in Woolman & Botha op cit note 4.

Balancing — Justice Brennan’s ‘doctrinally destructive nihilism’ — is s 39(2)’s kissing cousin. Just as balancing under s 36 of the Constitution masks the complexity of adjudication of incommensurable rights, values and interests when undertaking limitations analysis, s 39(2)’s call for development or interpretation of law in light of ‘the spirit, purport and objects’ of the Bill of Rights suppresses Chapter 2’s clear commitment to explaining how cases are decided in terms of specific substantive rights. It makes sense that this court would opt for doctrines of rights analysis and limitations analysis that are compatible in this manner: they are both ‘doctrines’ that obscure more than they illuminate.

Michael Bishop contends that the need for accountability to the external, primarily academic, community of interpreters is directly linked to the well-accepted distinction between a ‘culture of authority’ and ‘culture of justification’. He claims, as I do above, that a court that cannot be held accountable to its own precedent, to the text of the Constitution, or to the community of constitutional interpreters, and that grounds its decisions by mere genuflection in the direction of s 39(2), more closely approximates a ‘kryptocracy’ than a ‘logotocracy’. (E-mail correspondence between Michael Bishop and the author, 26 July 2007.)

<sup>42</sup> See *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) para 59.

of constitutional law broader than is required by the precise facts to which it is to be applied'.<sup>43</sup>

The *first objection* is that this early statement in *Mhlungu* flatly contradicts the court's later statement in *Mhlungu* as to the nature of constitutional interpretation. The Constitutional Court in *Mhlungu* avers that constitutional interpretation takes the form of 'a principled judicial dialogue, in the first place between members of this Court, then between our Court and other courts, the legal profession, law schools, Parliament, and, indirectly, with the public at large'.<sup>44</sup> However, if a court refuses to say more than is necessary to decide a case on its facts, then one can hardly expect any meaningfully predictive principle to be drawn from the judgment (let alone a principled dialogue). Such is the problem we confront in *NM*. That, of course, leads to the *second objection*. The almost casuistic approach to constitutional adjudication means that it is difficult for any actor — a lower court, a government official or a private actor — to anticipate future forms of law or conduct that would or would not satisfy the basic law's general norms.<sup>45</sup> If there is no rule of law to which a state actor or private actor knows that she must conform her behaviour, then it would be surprising to find her attempting to conform her behaviour to some inchoate sense of a 'rule' that is consistent with the Constitutional Court's understanding of what the Constitution permits. Thus the *third objection*: the absence of rules of law undermines the ability of other branches of government to comply with the Bill of Rights — and places the court in the unnecessarily uncomfortable position of having to reject or to accept the government's positions in any given case as if it were ruling *ab initio*. Such considerations constitute some of the strongest arguments against Currie's jurisprudence of 'judicious avoidance'. A *fourth objection* is that the absence of clearly articulated rules undermines rational political discourse. Reasoned disagreement can only take place when parties agree on the general terms of the debate. The Constitutional Court must, in terms of its institutional role, establish the

<sup>43</sup> *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC), 1995 (10) BCLR 1424 (CC) para 8.

<sup>44</sup> *Mhlungu* supra note 42 para 129.

<sup>45</sup> Judge Dennis Davis has laid the same complaint: the absence of rule-based content in the Constitutional Court's Bill of Rights jurisprudence makes it difficult for High Courts to discharge effectively their function. See Dennis Davis 'Democracy, dignity and deliberation' *Conference on Dignity and the Jurisprudence of Laurie Ackermann* (University of Cape Town, 27 July 2007). Moreover, there are signs that the court itself — or members of the court — are aware of the dangers that attach to this failure. In a radio interview on SA-FM on 27 July 2007, Justice Catherine O'Regan noted that the Constitutional Court could, in its first decade of existence, have provided a stronger, theoretically more secure, foundation for its Bill of Rights jurisprudence — a choice that would have put the current court's jurisprudence on more solid footing. Even Professor Currie admits that the 'court has become far less ambitious in its decisions, with less theoretical depth'. See Jacqui Pile 'Constitutional Court: 1st XI crumbles' *Financial Mail* 30 November 2007 (available at <http://free.financialmail.co.za/07/1130/features/afeat.htm>, last accessed on 5 December 2007).



meaning of constitutional norms and thus the general framework for political contestation. The Constitutional Court abdicates this institutional responsibility to model rational political discourse by refusing to state, in a comprehensive manner, the reasons that ground its conclusions. A *fifth objection* is that avoidance undermines the ‘integrity’ of the legal system. It is impossible to create a more coherent jurisprudence without identifying the rules, and the reasons, that ground decisions.<sup>46</sup> How one handles these

<sup>46</sup> Post and Seigal have just recently offered a far more nuanced set of objections to Cass Sunstein’s minimalist project: see Robert Post & Reva Seigal ‘Roe rage: Democratic constitutionalism and backlash’ (2007) 42 *Harvard Civil Rights-Civil Liberties LR* 373 at 377 and 391–406. In response to Sunstein’s minimalism — which assiduously eschews judicial pronouncements on contentious value choices — they advance a theory they call ‘democratic constitutionalism’. ‘Democratic constitutionalism’, they argue, ‘suggests that some degree of conflict may be an inevitable consequence of vindicating constitutional rights, whether rights are secured by legislation or by adjudication. [...] Democratic constitutionalism suggests . . . that controversy provoked by judicial decision-making might even have positive benefits for the American constitutional order. Citizens who oppose court decisions are politically active. They enact their commitment to the importance of constitutional meaning. They seek to persuade other Americans to embrace their constitutional understandings. These forms of engagement lead citizens to identify with the Constitution and with one another. Popular debate about the Constitution infuses the memories and principles of our constitutional tradition with meanings that command popular allegiance and that would never develop if a normatively estranged citizenry were passively to submit to judicial judgments. . . . Sunstein . . . tends to adopt the juricentric view that judicial decision-making is incompatible with democratic engagement. He writes that for a court to protect a constitutional right is to “rule some practices off-limits to politics”. Sunstein . . . is in the grip of an image of constitutional law as “*democracy-foreclosing*”. Democratic constitutionalism refuses to accept this image, and it thus provides a more nuanced appreciation of the actual operation of our constitutional system. No court, including the Supreme Court, has the capacity to rule a controversial issue “off-limits to politics”. . . . Of course constitutionalization of a right alters the nature of democratic politics. It focuses debate on judicial opinions; it eliminates particular legislative outcomes; it injects constitutional principles into debate; it may [even] . . . “raise the stakes of politics”. Even so, it is a mistake to imagine the relationship between constitutional adjudication and democracy as a zero-sum game in which the augmentation of one necessarily entails the diminishment of the other. Although constitutionalizing a right takes certain legislative outcomes off the table, it can also invigorate and transform politics. . . . A theory of the proper relationship between adjudication and democratic politics necessarily lies coiled at the core of every judicially defined and enforced constitutional right. The assumption that avoiding conflict is necessary for social solidarity is visible in the fifth justification advanced by Sunstein to support minimalism, which counsels interpreting the Constitution in ways that accommodate a “reasonable pluralism”. In “heterogeneous society”, Sunstein notes, “reasonable people disagree on a large number of topics”. Because constitutional law applies to an entire heterogeneous population, Sunstein believes courts should “try to economize on moral disagreement by refusing to challenge other people’s deeply held moral commitments when it is not necessary for them to do so”. . . . Minimalism approaches conflict with the assumption that it is a threat to social cohesion and legitimacy. Democratic constitutionalism, by contrast, examines the understandings and practices that promote the social cohesion and legitimacy of our constitutional order. It considers the possibility that controversy

objections to *thin* minimalism and squares them with the demands for a justiciable Bill of Rights, the rule of law and the legitimacy of the legal system is taken up below.<sup>47</sup>

*On restoration*

How, in *NM*, does one go about explaining that a majority of the Constitutional Court neither allowed itself to be detained by the law or the facts, nor committed itself to a rewriting of the common law in light of the dictates of the right to privacy and the right to dignity? The decision of the majority turns, it would appear, neither on solid legal analysis nor on the need to engage in rigorous constitutional analysis of the content of the rights invoked, nor on the legal system's commitment to the development of the law in a manner that allows all individuals to conform their future behaviour to well-defined legal standards (the hallmark of a system based upon the rule of law). Rather the decision appears to rest upon a deeply-felt offence to the majority's moral sensibility about how vulnerable persons in our society ought to be treated. The award of R35 000 (plus some costs) to each of the plaintiffs recognizes their 'hurt' and seeks to *restore* 'the dignity' of our society as a whole.

What some commentators find particularly irksome in *Masiya* is the majority's constitutional incapacity to recognize that absolutely *no* good reasons exist for its unwillingness to extend the definition of rape to include non-consensual anal penetration of men. However, it becomes less difficult to understand if the decision provides some form of restitution to the individual girl and, in so doing, engineers the restoration of justice in the community as a whole. The direct application of the right to equality, the right to dignity and the right to security of the person to the challenged law,

over constitutional meaning might promote cohesion under conditions of normative heterogeneity. Minimalism's treatment of the Constitution as an "incompletely theorized agreement" may actually be counterproductive if it inhibits forms of engagement that contribute to the very "social stability" minimalism means to promote. Minimalism does not consider this possibility. It views controversy as a simple threat to social cohesion and recommends severing the connection between constitutional adjudication and constitutional meaning in order to avoid conflict. Minimalism would thus undercut the very practices of deliberative engagement that democratic constitutionalism identifies as potential sources of social stability.' (Footnotes omitted.)

<sup>47</sup> Real costs attach to the court's failure to adopt a coherent approach to application, rights interpretation, or limitation analysis when one is asked to teach constitutional rights to second-year LLBs. Post-*Khumalo*, it remained possible to divide up application, rights and limitations analysis between ss 8(1) and (2), the substantive rights of Chapter 2 and ss 36 and 39(2). After *Barkhuizen*, *Masiya*, and *NM*, it is virtually impossible to offer students a plausible reconstruction of how the court approaches Bill of Rights analysis. There is a real problem — with the rule of law — when the next generation of lawyers cannot be shown how the court goes about reasoning its way towards its conclusions.

and the extension of the law's protection to some allegedly abstract class of men then become, for the court, subsidiary concerns.

In *Barkhuizen*, the majority dispatches the applicant's claim on the grounds that these two contracting parties were equals in all ways that mattered. It matters little (to the *Barkhuizen* majority) that the analysis ought to have taken place in terms of the direct application of several substantive provisions of the Bill of Rights to the law of contract. What does matter is that justice be done to the parties before the court and that an appropriate sense of justice is thereby restored to the community as a whole.

Though the three majority decisions manage to make bad law out of easy cases, they speak, in a rather direct fashion, to a jurisprudence of restorative justice. Such a jurisprudence demonstrates far less concern with coherence and far more with compassion. It is unencumbered by rules and doctrine. This form of restorative jurisprudence is primarily committed to the renewed solidarity of the community that flows from each dispute's resolution.<sup>48</sup> The problems with an unencumbered jurisprudence of restoration are taken up in the final section of this article.

### *On rules*

The legislature makes law. The executive makes law. The courts make law. And in making law, these three branches of government generate the rules that the majority of us live by. That much seems rather uncontroversial. We often do not attend to the rule-governed nature of our behaviour because the rules themselves are well entrenched and do not generate disputes in which the parties contest the validity of a particular rule of law (as opposed to its application to a particular set of facts). Constitutional law sometimes appears different from other forms of law because the arguments that seize the court are, quite often, those hard, marginal cases in which genuine disagreement exists about what the constitutional text means, or how an existing judicial precedent, and the rule articulated therein, ought to be construed.

<sup>48</sup> See *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC) paras 105 and 113–15 per Sachs J: 'I offer reasons for proposing a remedial shift in the law of defamation from almost exclusive preoccupation with monetary awards, towards a more flexible and broadly based approach that involves and encourages apology. . . . What is called for is greater scope and encouragement for enabling the reparative value of retraction and apology to be introduced into the proceedings. In jurisprudential terms, this would necessitate reconceiving the available remedies so as to focus more on the human and less on the patrimonial dimensions of the problem. The principal goal should be repair rather than punishment. To achieve this objective requires making greater allowance in defamation proceedings for acknowledging the constitutional values of ubuntu-botho. [ . . . ] Ubuntu-botho is highly consonant with rapidly evolving international notions of *restorative justice*. Deeply rooted in our society, it links up with worldwide striving to develop restorative systems of justice based on reparative rather than purely punitive principles. The key elements of restorative justice have been identified as encounter, reparation, reintegration and participation.' (Emphasis added).

None of the above commits me, as some have suggested, to some rather benighted Hartian, positivist view of the law and the rules that judicial decisions (ought to) generate. As Justice O'Regan has recently noted in a public discussion of the nature of judicial decisions: 'As a member of the bench, I am required to issue a judgment; and in that judgment, I am required to lay down a rule of law that binds both the parties before the court and South African society as a whole; however, if laying down a rule of law makes me, ipso facto, a positivist, then a positivist of some stripe my office commits me to be.'<sup>49</sup> For the time being, endorsing the proposition that courts (like other law-making bodies) can — and ought to — generate rules of law that are determinate enough to guide the behaviour of state and non-state actor alike is sufficient for the purposes of this article. Whether I am inclined to follow Schauer,<sup>50</sup> Dworkin,<sup>51</sup> Singer,<sup>52</sup> Bilchitz,<sup>53</sup> Fagan<sup>54</sup> or

<sup>49</sup> Justice Kate O'Regan 'Dignity, application and the rule of law' *Conference on Dignity and the Jurisprudence of Laurie Ackermann* (University of Cape Town, 27 July 2007). (Notes of conference on file with author.)

<sup>50</sup> See Frederick Schauer 'Rights as rules' (1987) 6 *Law & Philosophy* 115 at 116–18: 'Consider first the idea of a rule, apart from the context of rights. On many occasions rules will be applicable in cases in which their justifications are inapplicable. Indeed, it may be central to ruleness that in at least some cases the compass of a rule will diverge from its justification for if it were otherwise there would be no need for the rule. And whether or not this is true of rules as supralinguistic entities, it is certainly true of rule-formulations, bounded as they are by the imperfections and limitations of language. Yet this imperfect fit between a rule's linguistic articulation and its underlying justification does not, eo ipso, cause the justification to trump the rule. If we take rules seriously, . . . then rules and rule-making may generate arguments that would be unavailable had we not elected to reduce *abstract and infinitely flexible justifications* to more particular and less pliable rules. Whether for reasons of expediency, or for that aspect of fairness that comes from certainty and predictability, we often choose some amount of ruleness instead of instance by instance determination. [. . .] Much of the foregoing applies to the particularization of general foundational rights such as the right to equal concern and respect. The impetus towards setting out, in advance and in comparatively clear form, specific rights such as the right to political participation and the right to equal employment opportunity, is analogous to the impetus towards setting out the justification for a rule in the form of a rule. Particularity . . . provides . . . certainty, predictability, uniformity, mental manageability and insurance against misunderstanding and misapplication of general principles. If we did not believe these values to be important, we would have no need no particularize abstract general principles, but could instead apply the abstraction directly to cases without the mediating force of particularized rights.' Schauer makes clear, in the last two sentences, exactly what is lost when we refuse to generate constitutional rules out of constitutional rights and rely instead on a diffuse coterie of values. See also Frederick Schauer *Playing by the Rules* (1991) 62–72; Woolman & Botha op cit note 4.

<sup>51</sup> Ronald Dworkin *Taking Rights Seriously* (1977) 105–23; Ronald Dworkin *Law's Empire* (1986) 355–99; Ronald Dworkin 'The Supreme Court phalanx' (2007) 64 *New York Review of Books* (2007) 92 at 99. Dworkin's oeuvre — a direct, sustained response to Hart — is of particular import when it comes to understanding what little theoretical work is required to defend the necessity of constitutional rules: 'The revolution that many commentators predicted when President Bush appointed two ultra-right wing Supreme Court justices is proceeding with breathtaking impatience,

Baker and Hacker<sup>55</sup> on what it means to follow a rule (and especially rules generated by rights) is not germane to the primary argument of this article.<sup>56</sup>

and it is a revolution Jacobin in its disdain for tradition and precedent. Bush's choices, Chief Justice Roberts and Justice Samuel Alito have joined the two previously most right-wing justices. Antonin Scalia and Clarence Thomas, in an unbreakable phalanx bent on re-making constitutional law by overruling, most often by stealth, the central constitution doctrines that generations of past justices, conservative as well as liberal, have constructed. . . . [The result] is serious jurisprudential confusion. The first essential virtue of constitutional law is integrity: the law must allow all citizens the benefit of whatever constitutional principles protect some of them. That is what equal citizenship means and demands. Lower courts must sometimes respect superior court decisions that they cannot overrule but that have been isolated by intervening doctrine and should be interpreted narrowly. But for the Supreme Court *stare decisis* — respect for precedent — means something deeper and more important. *It means respect not for the narrow holding of earlier cases, one by one, but for the principles that justify those decisions.*' (Emphasis added). These words are not the words of a positivist. Dworkin recognizes rules as part of a system of law that embraces, the text, principles, moral philosophy, interventions from the academy and an overarching commitment to integrity. The problem in South Africa, of course, is that we have little by way of constitutional rules, principles and doctrine to integrate and to challenge. Instead, we enjoy, much like the Roberts court, the unencumbered freedom engendered by 'values', 'balancing' and thinly reasoned judgments.

<sup>52</sup> Joseph Singer 'Property and coercion in federal Indian Law: The conflict between critical and complacent pragmatism' (1990) 63 *Southern California LR* 1821 citing J Dewey 'Logical method and law' (1924) 10 *Cornell LQ* 17 at 26: 'Although pragmatists are impatient with questions of conceptual fit, they do not argue that preexisting social and legal practices are irrelevant or should be ignored. On the contrary, John Dewey emphasizes that one purpose of a legal system is to provide a modicum of regularity and predictability. *Conceptual structures and rule systems* are parts of the social mechanisms by which legal systems achieve those goals.' (Emphasis added).

<sup>53</sup> David Bilchitz *Poverty & Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 139: '[The Constitutional Court] has employed the values of dignity, equality and freedom so as to interpret the Bill of Rights. The problem comes in seeing whether it has given sufficient content to these values and the rights themselves in order to reach its conclusions. . . . [T]he Court . . . has employ[ed] fuzzy thinking concerning the foundational values of dignity, equality and freedom . . . [and] failed to provide sufficient content to [Chapter 2's] rights to enable it to reach the conclusions it has arrived at, and its decisions are thus theoretically weak.'

<sup>54</sup> Anton Fagan 'In defense of the obvious: Ordinary meaning and the identification of constitutional rules' (1995) 11 *SAJHR* 545 at 545: 'In order to determine whether a statute (or executive act) is unconstitutional, a court must go through a two-stage process. In the first place, it must identify what the constitutional rules are. In the second place it must apply the constitutional rules to the statute . . . [and] determine whether the statute is inconsistent with [those] . . . rules.'

<sup>55</sup> G P Baker & P M S Hacker *Scepticism, Rules & Language* (1984) 81–2: 'In following a rule, what I always do is the same. In expanding the series of integers I always add to 2, neither more nor less. Writing "1002" after "1000" is what I call "doing the same" to 1000 as I previously did to 998 and indeed to every other term in the series. But, Wittgenstein insisted, I have no reason. I cannot justify calling this "the same" by reference to further grounds.' In rejecting Kripke's community-based response to the rule-skeptic's challenge, Baker and Hacker write: 'The rule-skeptic is fascinated by the terminus of justification, and prone to think that when, "I have

Or, to put matters slightly differently, I work within a tradition of constitutional law — of which South Africa is most avowedly a part — that recognizes rules as a necessary feature of the legal landscape. (Their ontological status, within that constitutional order, may well be contested.) The problem with which this paper is concerned is the extent to which our Constitutional Court fails to generate cognizable legal rules and meaningful precedent. To take a less bellicose tack, the observation that animates this article is that our Constitutional Court often operates like a court interpreting a code in a civil system: there is the code; there are discrete disputes; there are outcomes. However, with each case the court returns to

reached bedrock, and my spade is turned”, then the whole panoply of rules, language and rule-following rests on irrationality. . . . And it may seem to proponents of the community view that wisdom lies in the recognition of necessity, that an unjustified stab in the dark is unobjectionable as long as it is made in good faith. For as long as we all do it in the same way, [as Kripke writes] “no one will feel justified in calling the answer wrong”. [Saul Kripke *Wittgenstein on Rules and Private Language* (1982) 112.] This is confused. The supposition that the skeptic can rationally outstrip my justifications is false. What Wittgenstein says is [this]: “If I have exhausted the justifications I have reached bedrock. But exhausting justifications does not mean: having no justifications. It means: having run through them all. When I have spent my last penny paying off all my debts, it is true that I have no money left. But it is also true that I have no more debts! An explanation is a norm of correct use. If my explanation is not understood, I can clarify it, i.e., I can give a further explanation of my explanation (a rule for the application of the rule). Ultimately, perhaps, I will explain a series of examples with an ‘and so on’ rider. This too is an expression of the rule . . . If I am now asked ‘Why?’ I can only say ‘This is simply what I do.’” [Ludwig Wittgenstein *Philosophical Investigations* § 217.] I have no *further* justification. But I have given a justification for what I do, so I cannot be accused of having made a stab in the dark.’

<sup>56</sup> Some commentators, including a referee for this work, contend that I must describe the ontology and the phylogeny of constitutional rules before I can legitimately claim that their absence from much of the court’s recent jurisprudence is a problem with which we must be concerned. The same referee avers that I must confront Duncan Kennedy’s argument that the line between rules and standards (or in our constitutional jurisdiction, rules and values) is hopelessly blurred. Duncan Kennedy ‘Form & substance in private law adjudication’ (1976) 89 *Harvard LR* 1685. This entire article has considered why, as a textual matter and a logical matter, the line between rules and values is not, and ought not to be, hopelessly blurred. (The *NICRO* court itself accepted this distinction.) Moreover, the jurisprudence of the three cases analysed above is so thin that they could be described as both ruleless and standardless. In which case, Kennedy’s distinction — and all that follows from it — has nothing to offer South African constitutional law. However, my alleged failure to describe, in detail, my position on rules or to confront Kennedy leads the referee to the ineluctable conclusion that I am a ‘fully fledged Hartian rule jurisprude’. In the notes immediately above, I demonstrate just how catholic the liberal constitutional tradition is with regard to the nature and the status of rules in constitutional law. As a constitutional lawyer working in that tradition, it is fair to say that I occupy a pew in that great church and take a reasonably reflective position on constitutional rules.

the code — in our case, the Constitution — and often appears to begin its analysis of a textual provision *de novo* (if it engages a textual provision at all).<sup>57</sup>

### RECONCILING MINIMALISM, RESTORATION AND RULES

The jurisprudence of minimalism and the jurisprudence of restoration share some family features: namely, abstention from rule-creation. However, their motivations could not be more different.

Minimalism asks that we defer broad doctrinal pronouncements, and the urge to make law from first principles, because we lack the information and the experience, as well as the shared normative frameworks, necessary to derive legal doctrines rich enough to dispose of most novel legal disputes. The problem with minimalism — and one recognized more openly by Sunstein in his later work — is that it fails to acknowledge that many minds can produce better knowledge, greater predictive certainty, and more politically legitimate outcomes, under appropriate conditions.<sup>58</sup> So, for example, one way to produce better results on multi-member judicial panels — as opposed to skewed, ideologically driven results — is to ensure that such panels possess a healthy mix of judges.<sup>59</sup> Another solution is for courts to share the responsibility for constitutional interpretation with other state actors and non-state actors who are in a better position to provide both the information and the insight required to place the best possible gloss, empirically and normatively, on a constitutional right.

Restoration asks that we defer broad doctrinal pronouncements, and the urge to make law from first principles, because such abstraction tends to favour the powerful — men — over the less powerful — women — or, if you prefer, western systems of justice over traditional systems of justice. So a jurisprudence of restoration is a natural and necessary corrective to systems of law that make certain classes of people invisible. However, restoration is no substitute for justice, and for justice's powerful demand for reasoned justification. Drucilla Cornell correctly identifies a middle ground:

'The goal of a modern legal system is synchronization and not rational coherence. Synchronization recognizes that there are competing rights situation and real conflicts between the individual and the community which may not yield a coherent whole. The conflicts may be mediated and synchronized but not eradicated. [...] In reality, a complex, differentiated community can never be reduced to a single voice. Synchronization recognizes

<sup>57</sup> I owe this apt characterization of the Constitutional Court's behaviour to Theunis Roux.

<sup>58</sup> See Sunstein *Infotopia* op cit note 4.

<sup>59</sup> See Cass Sunstein, David Schkade & Lisa Ellman 'Ideological voting on Federal Courts of Appeals: A preliminary investigation' (2004) 90 *Virginia LR* (2004). The Chief Justice has reached similar conclusions. See also Chief Justice Pius Langa 'The emperor's new clothes: Bram Fischer and the need for dissent' *Bram Fischer Memorial Lecture* (University of the Witwatersrand, 3 May 2007).

the inevitable complexity of the modern state and the imperfection of all our attempted solutions.<sup>60</sup>

Synchronization recognizes our ability to mediate competing claims and to articulate rules that reflect such mediation — so long as we do not fall victim to the fantasy that ‘a complex, differentiated community can ever be reduced to a single voice’.<sup>61</sup> I believe, following Professor Cornell, that the need for rules in a modern nation-state, the inclination towards minimalism in a judiciary that must settle disputes in a highly heterogeneous polity, and the natural urge for compassion can all be reconciled. The question is how?

One must first acknowledge that well-defined constitutional rules are the embodiment of the democratic impulse to treat all persons as equals and to recognize the capacity of each of us for self-actualization and self-governance. Having made such an acknowledgement, our pre-commitment to the rule of law and to the right to dignity does not displace a commitment to recognizing difference: in fact, the pre-commitment allows the stories of both the powerful and the vulnerable to shape the rules our courts must generate.

As cases such as *Barkhuizen*, *Masiya* and *NM* make clear, neither thin minimalism nor restoration *alone* creates the appropriate conditions for a just constitutional order. Minimalism, properly reconceived as a form of Dorfian constitutional experimentalism, (or a Postian/Seigalian democratic constitutionalism), can produce conditions under which sufficient information and cross-cultural normative engagement exist for courts to craft constitutional rules that lead to greater certainty, accuracy and legitimacy.<sup>62</sup> Similarly, a

<sup>60</sup> See Drucilla Cornell ‘Institutionalization of meaning, recollective imagination and the potential for transformative legal interpretation’ (1988) 136 *University of Pennsylvania LR* 1121 at 1135.

<sup>61</sup> *Ibid.*

<sup>62</sup> That reconceptualization rests upon the acceptance of (1) a doctrine of shared constitutional interpretation that mediates the inevitable tension between the doctrine of constitutional supremacy and the doctrine of separation of powers; and (2) various subtle alterations to the manner in which courts elicit information from the parties to a dispute (and the other parties interested in the outcome.) These changes amount to an invitation to the legislature, Chapter 9 institutions and various other stakeholders to assist the courts in shaping (and thereby deepening) constitutional norms and to aid the court in the construction of ‘optimal’ remedies in a given matter. The commitment to experimentalism recognizes the provisional nature of such norms and remedies. The extent to which these norms and remedies remain provisional turns on the extent to which they are seen, by all, to ‘work’. See Dorf & Sabel *op cit* note 4; Woolman *op cit* note 4. By ‘work’, I follow my predecessors in the pragmatic tradition. Pragmatism as a political philosophy has most often — from John Dewey through Richard Rorty to Michael Dorf — been committed to some form of social democracy, often radical social democracy. See John Dewey ‘My philosophy of law’ in *My Philosophy of Law: Credos of Sixteen American Scholars* (1941) 73; Richard Rorty *Contingency, Irony & Solidarity* (1989); Richard Rorty ‘Thugs and theorists: A reply to Bernstein’ (1987) 15 *Political Theory* 564; Michael Dorf ‘1997 Supreme Court term foreword: The limits of Socratic deliberation’ (1998) 112 *Harvard LR* 4 (1998). But see Stanley Fish ‘Almost pragmatism: The jurisprudence of Richard Posner,



jurisprudence of restoration is, potentially, consistent with a commitment to synchronization. Synchronization recognizes the ability of the courts to mediate competing claims and to articulate general, but rolling, constitutional norms (in a manner also consistent with the dictates of experimental constitutionalism.) ‘To recognize the inevitable complexity of the modern state and the imperfection of all our attempted solutions’, as Cornell notes, does not require that the Constitutional Court abdicate its responsibility to create a constellation of constitutional rules that gives adequate content to the Bill of Rights.<sup>63</sup> Quite the opposite. Only once the Constitutional Court has recognized the irreducible complexity of our heterogeneous state and offered, ever so tentatively, norms that mediate conflicting claims about what a just South African legal order requires, will the court truly have secured the rule of law, the Bill of Rights and its own authority.

Richard Rorty and Ronald Dworkin’ in *There’s No Such Thing as Free Speech and It’s a Good Thing Too* (1994) 200: Pragmatism lacks the content and the capacity to realize meaningful change; Richard Posner ‘What has pragmatism to offer law?’ 63 *Southern California LR* 1653: Posner endorses a technical pragmatism in which we have moderate agreement on ends and general agreement on the means — say, the market — for realizing those ends.

What ‘works’ is that which enables us to secure the ends of a social democracy. However, the exact nature of those ends are themselves open to revision in light of experience (of what ‘works’ or ‘does not work’) and in light of further reflection upon what the ends of a given social democracy ought to be (above and beyond rooting out the most obvious forms of oppression that confront us daily.) See Margaret Radin ‘The pragmatist and the feminist’ (1990) 63 *Southern California LR* 1699; Singer op cit note 52 writes: ‘Hilary Putnam reminds us that pragmatism, as Dewey conceived it, was not intended to support the status quo. . . . Dewey was a radical who time and again, pointed out the social practices that stood in the way of freedom and democracy.’ (At 1826 citing Hilary Putnam ‘A reconsideration of Deweyan democracy’ (1990) 63 *Southern California LR* 1671.) The ‘critical pragmatism’ that animates this article is profitably contrasted with what Margaret Radin calls ‘complacent pragmatism’. Radin loc cit at 1710. The complacent pragmatist [read Posner] downplays conflicts ‘among social groups and ideals by presuming that we are all in agreement about ultimate goals and that the only thing we need to do is listen to people with mature judgment. For this reason it fails to deal adequately with the problem of power.’ Singer loc cit at 1824–5.

<sup>63</sup> Cornell op cit note 60 at 1135.