

CATEGORY MISTAKES AND THE WAIVER OF  
CONSTITUTIONAL RIGHTS: A RESPONSE TO DEEKSHA  
BHANA ON *BARKHUIZEN*

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INTRODUCTION

One of the wonderful things about law is its enormous variation in rhetorical forms. You can be a formalist. Well, actually only other people can be formalists since it has, sadly, come to be used solely as a term of derision. But that still leaves open the possibility of being a critical legal scholar, a realist, a pragmatist, an original intentist, a Brit crit, a positivist, a feminist, a poststructuralist, a critical race theorist, a critical Latino theorist, a natural law theorist, a minimalist, a lit crit, an ubuntuist, an experimentalist, a plain meaning person, an ordinary meaning person, or just an ordinary guy (like me).

What, if anything, does this list have to do with Ms Bhana's fine piece of scholarship? (Deeksha Bhana 'The law of contract and the Constitution: *Napier v Barkhuizen* (SCA)' (2007) 124 SALJ 269, hereafter 'Bhana'.)

<sup>11</sup> See, for example, C J R Dugard 'The judicial process, positivism and civil liberty' (1971) 88 SALJ 181.

<sup>12</sup> See, for example, A S Mathews & R C Albino 'The permanent of the temporary' (1966) 83 SALJ 16.

<sup>13</sup> See, for example, '... Hanged by the neck until you are dead' (1969) 86 SALJ 457 and (1970) 87 SALJ 60.

<sup>14</sup> John Dugard (1999) 116 SALJ 15 at 17.

Ms Bhana has employed a number of different, but largely consistent, rhetorical forms in her critique of the Supreme Court of Appeal's decision in *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) (hereafter *Barkhuizen*). However, when push comes to shove, Ms Bhana's critique is ultimately political. As she reads *Barkhuizen*, the primary problem with the outcome is that the Supreme Court of Appeal has privileged 'a classical liberal understanding of freedom of contract and the attendant sanctity-of-contract rule within a constitutional dispensation centred on the values of freedom, dignity and equality' (Bhana at 269.) She presses the Supreme Court of Appeal to 'reassess its approach to constitutional values . . . and the importance of the liberal notion of contract in particular' (ibid).

On this point we are in accord. As Ms Bhana knows, I have argued elsewhere that the traditional conception of the common law relies upon the *fiction* that our private law provides a neutral backdrop for agreements, contractual and otherwise, between 'fully autonomous' individuals. This traditional view of the common law is, in turn, wedded to the idea of the sanctity of contract (see Stuart Woolman 'Application' in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (Original Service 02–05) at 31–7, 31–130. See also Stuart Woolman & Danie Brand 'Is there a Constitution in this courtroom? Constitutional jurisdiction after *Afrox* and *Walters*' (2003) 19 *SA Public Law* 37.) We also share the belief that the Supreme Court of Appeal's classically liberal approach to the law of contract reinforces 'the poverty and powerlessness of many South Africans . . . through the structured silence of [contractual] disputes that never make it to court' (Woolman 'Application' op cit at 31–132). Moreover, as Ms Bhana notes, the weight of *recent* academic criticism is undeniably on our side. (See Danie Brand 'Disclaimers in hospital admission contracts and constitutional health rights' (2002) 3 *ESR Review* 17; Dire Tladi 'One step forward, two steps back for constitutionalising the common law: *Afrox Health Care v Strydom*' (2002) 17 *SA Public Law* 473; Luanda Hawthorne 'Closing of the open norms in the law of contract' (2004) 67 *THRHR* 294; Jonathan Lewis 'Fairness in South African contract law' (2003) 120 *SALJ* 330; Deeksha Bhana & Marius Pieterse 'Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited' (2005) 122 *SALJ* 865.)

However, one of the limitations of Bhana's argument is that courts are rarely moved by charges that their politics are too conservative or too progressive. Nor, for that matter, are most academics. Inside or outside the courtroom, we all tend to believe that we are engaged in the pursuit of justice. Baiting a judge or a fellow academic by imputing improper motive is only likely to cause the desired interlocutor to close the journal or the book in which the accusation has been published.

Courts can, I still believe, be moved by logic. And by logic, I simply mean that a court attempting to resolve a dispute will be loath to rely upon internally inconsistent propositions in support of its conclusions. A charge of logical inconsistency lacks the *ad hominem* and incendiary character of a politically motivated attack.

*Barkhuizen* is subject to such a logical critique. *Barkhuizen* presumes that parties can effectively contract out of constitutional rights. In other words, the Supreme Court of Appeal and the Constitutional Court are, to a significant degree, committed to the proposition that our constitutional rights can — in appropriate circumstances — be waived. The purpose of this note is to demonstrate that in a constitutional regime such as ours, the doctrine of constitutional waiver is founded upon a simple error in logic.

It is important to note here that Bhana's approach to this problem and my approach to this problem are *not* simply two different ways of skinning the same cat. Indeed, as I contend during the latter part of this piece, one reason this error in logic occurs is that jurists wedded to a traditional (conservative) view of the common law conflate the very real doctrine of contractual waiver with the imaginary construct of constitutional waiver. And that conflation reveals, at least in part, the causality that generates this doctrinal problem. By delinking the commitment to contractual waiver from the commitment to constitutional waiver, I hope to convince some readers — including Bhana — that political arguments offer only a partial solution to the problem of constitutional waiver, and that the express recognition of constitutional waiver as a category mistake buttresses 'political' arguments against both the ostensible constitutional precommitment to the sanctity of contract and the constitutional cover such a precommitment offers contracts of adhesion.

## CONSTITUTIONAL WAIVER

Whether the beneficiaries of constitutional rights can waive their rights is an underdeveloped and confusing area of constitutional law. It is underdeveloped and confusing because (a) no constitutional provision is made for waiver (in any constitutional jurisdiction) and (b) few meaningful discussions of the notion of 'waiver' have percolated up through South African courts (or constitutional courts generally). For reasons that will become clear, the 'waiver' of constitutional rights should never be tolerated.

But to say that constitutional waiver should never be tolerated is to speak the language of waiver. The real thesis of this note is that there is no such thing as waiver when it comes to constitutional rights. The basis for this thesis is not at all obvious. It is not obvious because most of our courts and commentators have failed to see that what is at issue in all of these cases is not actually the waiver of a right, but the interpretation of a right. To talk of constitutional waiver is to make a category mistake.

Contractual waiver, on the other hand, most certainly does exist. As Ware writes:

'One can alienate one's rights in two ways: in exchange for consideration or in the absence of consideration. To put it another way, one can trade away one's rights, or one can give away one's rights. In some legal contexts, such as contract law, the term "waiver" is often used to refer only to *giving* away one's rights. Standard accounts of contract law, for example, carefully distinguish the

“waiver” of contractual rights, which does not require consideration, from the “modification” of contractual rights, which does.’

(Stephen J Ware ‘Arbitration clauses, jury-waiver clauses and other contractual waivers of constitutional rights’ (2004) 67 *Law & Contemporary Problems* 167 at 169, emphasis original. See also E Allan Farnsworth *Contracts* 3 ed (1999) para 8.5.) Ware does, to be fair, discuss the waiver of constitutional rights under the US Constitution — but that jurisdictional and terminological fact ought not to detain us here.

### CATEGORY MISTAKES

What is a category mistake? A category mistake is the attribution to one, sometimes non-existent, entity attributes that properly belong to another entity, and the unnecessary multiplication of explanations for a single phenomenon (Gilbert Ryle *The Concept of Mind* (1951) 16–20). For example, you may take a visitor for a tour around the firm at which you work. You introduce her to the managing partner and your articled clerk, show her the boardroom and the library, and have her sit in your chair in your office. If, at the end of your tour, she asked you ‘But where is the firm?’, as if it were something different, something over and above what she had already seen, you would be perplexed. The cause of her confusion — and yours — is that she has made a category mistake. This is the kind of error made by those who speak of waiver as if it were an entity — a phenomenon — over and above the content of the specific substantive rights found in Chapter 2 of the South African Constitution. It isn’t. You either have a constitutional right to do something or you don’t. There is no such thing as the waiver of a constitutional right.

Let me put the argument that follows in its simplest form: (1) In a regime of rights in which the Constitution is the supreme law, the only real question is whether the Constitution permits certain kinds of action or proscribes certain kinds of action. (2) Once a court determines what the Constitution allows or does not allow, there is no longer any question of waiver: you either have a right to do something (and can then, for instance, contract in that space) or you don’t (and then no action, such as a contract, may take place).

The argument may be put slightly differently. If, as the Constitution of the Republic of South Africa, 1996 and s 2 (the supremacy clause) require, the Constitution is treated as the supreme law, then the Constitution is prior to all other law and no law or conduct may be inconsistent with its contents. If that is also true of the rights in the Constitution, then constitutional rights are prior to all other law, and no law or conduct may be inconsistent with those rights (whatever their content may be). If no law or conduct may be inconsistent with a right or freedom because the right or the freedom is prior to (or more basic than) the law or conduct under scrutiny, then it is incoherent to say that the constitutional right may be waived. Either the right allows the law or the conduct in question, or it does not. Either

the right prohibits the law or the conduct in question, or it does not. And that is what courts in constitutional jurisdictions determine. Once the court has interpreted the boundaries of a right (and that embraces any limitations analysis), it will be impermissible to do that which the right prohibits and permissible to do that which the right does not prohibit. The *desires* of the parties are not material to the determination of the content of the right. The only parties that matter are those members of the bench who determine what the content of a right is — and is not.

Allow me to offer two quick examples. Section 34, the right of ‘access to courts’, states:

‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’

Brickhill and Friedman note that ‘[p]arties often agree that private arbitrations should be held behind closed doors’ and that ‘Christie contends that such agreements constitute a waiver of the right to a public hearing in . . . s 34’ (Jason Brickhill & Adrian Friedman ‘Access to courts’ in *Constitutional Law of South Africa* op cit (Original Service 12–07) at 59–85, referring to R H Christie ‘The law of contract and the Bill of Rights’ in *The Bill of Rights Compendium* (1996) 3H38.). What Brickhill, Friedman, Christie and the courts really mean is that s 34, properly interpreted and delineated, does not prohibit private arbitration. But the parties do not decide the extension of s 34; the Constitution and the courts do. Similarly, s 35(1)(c) of the Constitution provides that an arrested person shall have the right ‘not to be compelled to make any confession or admission that could be used in evidence against’ him or her. Section 35(1)(c) is not animated by the desire to give the accused some notion of ‘choice’ in the matter. The underlying justification for s 35(1)(c) is the well-founded belief that ‘[n]o admission or confession should be the product of coercion or abuse’ (P J Schwikkard ‘Evidence’ in *Constitutional Law of South Africa* op cit (Original Service 12–07) 52–32. See also *S v Orrie* 2005 (1) SACR 63 (C).)

## A CATEGORY MISTAKE IN *BARKHUIZEN*

### *The facts*

The facts of *Barkhuizen* have been set out previously (see Bhana at 269–70), and I shall merely recapitulate those facts necessary for the argument that follows. Barkhuizen, the plaintiff, insured his new BMW with a syndicate of Lloyd’s underwriters. Shortly thereafter, on 24 November 1999, his vehicle was involved in an accident. He informed the insurer timeously of the incident. Lloyd’s rejected liability for his claim on 7 January 2000.

A clause in the policy required the plaintiff to issue summons in such a case within 90 days. Instead, Barkhuizen issued summons two years later. In defending the claim, the insurer relied on the insurance contract’s 90-day time-bar.

The Supreme Court of Appeal held that Lloyd's was entitled to do so. The court held that although constitutional values may govern the law of contract, the plaintiff had neither adduced evidence that demonstrated that he had concluded the contract with the insurer under duress nor demonstrated that the nature of the contract had impaired his exercise of his constitutional rights to dignity, equality or access to court. Lloyd's defence was therefore upheld.

*The court's reasoning*

According to the Supreme Court of Appeal, the case raised two critical constitutional questions: 'The first is the extent to which Bill of Rights provisions apply between contracting parties. The second is whether, if they do apply, s 34 renders the time-bar unconstitutional' (*Barkhuizen* para 5.)

As to the first question, the Supreme Court of Appeal acknowledged that its own jurisprudence supported the High Court's 'presupposition that contractual terms are subject to constitutional rights' (para 6, where the Supreme Court of Appeal cited its own judgments in *Brisley v Drotzky* 2002 (4) SA 1 (SCA) and *Afrox Healthcare Ltd v Strydom* 2002 (6) SA 21 (SCA)). However, it also confirmed that both *Brisley* and *Afrox* set their face against the notion that High Court judges possess the constitutional power to declare contracts invalid because of what they 'perceive' to be unjust or unconstitutional (paras 7–8). As Bhana notes (at 271), this conclusion reflects an untoward bias in favour of contractual autonomy over the merits of just about any constitutional challenge.

As to the second question, the Supreme Court of Appeal rather quickly dismissed the contention that the evidence supported any meaningful constitutional challenge. Cameron JA wrote (paras 11–12):

'In argument before us plaintiff's counsel referred to the constitutional values of dignity, equality and the advancement of human rights and freedoms. But these provide no general all embracing touchstone for invalidating a contractual term. . . . Nor does the fact that a term is unfair or may operate harshly by itself lead to the conclusion that it offends against constitutional principle.'

While noting — in an interesting re-reading of its own holding in *Afrox* (supra) — that the parties' relative bargaining positions (and thus the values of equality and dignity) may prove decisive when revisiting a contractual agreement (para 14), the court dismissed the notion that these values or the right of access to court could be relied upon in the instant matter. The buyer of a new BMW cannot claim to be incapable of understanding a contract — no matter how fine the print.

Had the Supreme Court of Appeal limited itself to the above propositions — and its revision of the entire tenor of the holding in *Afrox* (supra) — its brief disposal of the appeal might have attracted no notice at all. But the Supreme Court of Appeal could not resist the opportunity to say more about the relationship between contracts entered into by fully autonomous parties and the waiver of constitutional rights. It wrote (paras 21–3 and 28, my emphasis):

‘The plaintiff here had no pre-existing entitlement against the insurer. The insurer did not injure his person, damage his property or violate his reputation or his dignity, nor did it commit any other wrong against him. Outside the contract, it owed him no money. Before the contract was concluded, it had no relationship with him at all. It offered him insurance cover, which he agreed to take on clearly specified terms. Those terms defined the rights he derived from the agreement by specifying that there would be no liability unless summons were served within 90 days of repudiation of a claim.’

‘The plaintiff’s claim arose because of a voluntary arrangement with the insurer: one that entitled him, against payment of a premium, to insurance in respect of his vehicle, on the conditions set out in the policy. The insurer’s defence therefore did not superimpose a time-bar on a pre-existing entitlement: it arose from the very agreement that defined the ambit of the right in creating it.’

‘The approach the learned Judge took implies that the plaintiff had a pre-existing right to insurance, which the time-bar unfairly and improperly impeded by requiring him to institute his claim within 90 days. That, in my respectful view, is wrong. The only right to insurance the plaintiff enjoyed was the one he acquired from the contract; and this required, as a precondition of its enforcement, that he institute his claim within that period. Failing this, he acquired no right at all. To afford him a different and larger right is to create a contract for the parties to which neither agreed.’

‘To summarise. *On the evidence before us, there is nothing to suggest that the plaintiff did not conclude the contract with the insurer freely and in the exercise of his constitutional rights to dignity, equality and freedom. This leads to the conclusion that constitutional norms and values cannot operate to invalidate the bargain he concluded. That bargain contained at its heart a limitation of the rights it conferred. The defendant’s plea invokes that limitation, and there is nothing before us to gainsay its defence.*’

#### *The category mistake in Barkhuizen*

What the paragraphs above tell us is that our courts, steeped in the common law, continue to get things back to front. It is the freedom to contract — and not a constitutional right — that determines for the *Barkhuizen* court whether the plaintiff’s constitutional challenge succeeds. The clear intimation of the language above is that the court has decided that by entering into the contract the plaintiff has ‘waived’ any constitutional rights that he might possess. (Indeed, the court actually eschews justiciable rights-talk and prefers to speak in terms of our Constitution’s amorphous commitment to *non-justiciable* values.)

This approach is, once again, the wrong way around the problem. The Constitution and the Bill of Rights constitute our basic law. Section 2, the supremacy clause, states that we must measure all law and conduct in terms of its provisions. Any law or conduct inconsistent with the Constitution is invalid. We do not, in a constitutional regime, measure the Constitution’s provisions in terms of the common law or in terms of conduct undertaken against the background of common-law rules. In order to do things front to back, we first need to determine the normative content of such rights as dignity, equality and access to courts. Only then can we decide whether a

common-law contract constitutes a breach, and perhaps an unjustifiable breach, of our rights to dignity, and to equality, and to access to courts.

Once the supremacy of the Constitution is reaffirmed, it is possible to understand both why the ‘waiver’ of a fundamental right is logically impossible and why the courts ought to adopt a strong, coherent line on waiver. Here is the line in a nutshell: No fundamental right can ever be waived because consent to a given state of affairs can occur only where no right is violated.

The basis for this conclusion is not as casuistic as it may first appear. Some rights in Chapter 2 will rarely, if ever, allow for an interpretation of their scope by a court of law that will create the space for social relations in which citizens ‘appear’ to relinquish them. We have difficulty, for example, imagining a set of circumstances in which social relations that bear many or all of the hallmarks of slavery or servitude permit parties to abridge these fundamental rights contractually. (Or do we?) Some rights do permit interpretations of their scope that enable both rights-bearers and other parties to engage in a wide array of activities and to form legal relationships that appear, at least notionally, to engage the broad subject matter captured by those rights and do not result in their abrogation. Put pithily, what is at issue in all of these cases is not the waiver of a right but the interpretation of a right.

#### OTHER MISTAKES REGARDING WAIVER IN OUR CONSTITUTIONAL LAW

The clearest Constitutional Court statement on the subject of waiver occurs in *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa Intervening)* 2001 (3) SA 893 (CC) para 61. In this case the South African government handed Mr Mohamed over to US authorities for prosecution on capital charges relating to the bombing of the US embassy in Dar es Salaam in August 1998. In defence of its handing over a person within South Africa and within the control of the South African government to the representatives of a state in which Mr Mohamed could receive the death penalty if convicted, the government claimed that Mr Mohamed had waived those constitutional rights that would have (a) barred his extradition or (b) made such extradition subject to assurance by the US that it would not seek the death penalty if Mr Mohamed were convicted. The *Mohamed* court rejected both of the government’s contentions. First, the full court wrote (para 61):

‘It is open to doubt whether a person in Mohamed’s position can validly consent to being removed to a country in order to face a criminal charge where his life is in jeopardy. The authorities ought not to be encouraged to obtain consents of such a nature.’

Secondly, assuming for the sake of argument, and no more, that the government could legitimately secure such a waiver of rights, the *Mohamed* court held (para 62):



‘To be enforceable, however, it would have to be a fully informed consent and one clearly showing that the applicant was aware of the exact nature and extent of the rights being waived in consequence of such consent.’

Thirdly, the *Mohamed* court declared that ‘[t]he *onus* to prove such waiver is on the government’ (para 64). As a matter of fact, the *Mohamed* court found that under no plausible construction of the case history could the government demonstrate that it had discharged its obligations. The court was a bit fuzzy, however, on whether, as a matter of law, the government could have discharged its obligations. Earlier in the judgment the *Mohamed* court made much of the government’s failure even to attempt to seek assurance that the death penalty would not be imposed: assurance that seemed to be required because of South Africa’s commitment to the rights to dignity, to life and to not be punished in a cruel, inhuman or degrading way. The *Mohamed* court seemed to suggest that absent such assurance, no extradition could be justified (paras 52–60).

But the court’s entire discussion of constitutional waiver undercuts this conclusion. The extradition to the US ultimately turns on whether Mr Mohamed ‘was aware of his crucial right to demand’ that the South African government secure the necessary assurance to protect against exposure to the death penalty (para 65). One must assume, from the manner in which the court writes, that had Mr Mohamed possessed legal counsel, had he been in a position to offer or to withhold meaningful consent and had he still reached the conclusion that he wished to go to the US to stand trial without any assurance regarding a death sentence, the court would have allowed him to go. The *Mohamed* court wrote: ‘Here South African government agents acted inconsistently with the Constitution in handing over Mohamed without an assurance that he would not be executed and *in relying on consent obtained from a person who was not fully aware of his rights and was moreover deprived of the benefit of legal advice*’ (para 68, my emphasis). If this invitation to a beheading is what the *Mohamed* court actually had in mind, then there seems to me to be good reason to decline to follow its reasoning about constitutional waiver.

At least one judge on the Supreme Court of Appeal has, in a previous decision, flirted with a firmer line on waiver. In *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) the respondent (Goodman Brothers) had unsuccessfully tendered to supply wristwatches to the appellant (Transnet). The respondent, relying on s 33 read with item 23(2)(c) of Schedule 6 to the Constitution, contended that the part of the tender conditions that provided that Transnet would not ‘assign any reason for the rejection of a tender/quotation’ was unconstitutional, and that Transnet was obliged to furnish reasons for rejection of the respondent’s tender. The appellant argued that since the Bill of Rights contains no general rule barring the waiver of rights, contracting parties could, with respect to at least some rights, stipulate to their waiver. While the Supreme Court of Appeal did not expressly reject the appellant’s argument, Olivier JA, in a separate concurring judgment, reasoned as follows (paras 47–8):

‘In my view, the correct approach to the question of waiver of fundamental rights is to adhere strictly to the provisions of s 36(1) of the Constitution. It provides that:

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent. . . .”

A waiver of a right is a limitation thereof. One must be careful not to allow all forms of waiver, estoppel, acquiescence, etc to undermine the fundamental rights guaranteed in the Bill of Rights. In my view, a strict interpretation of s 36(1) is indicated. *Transnet* has not made out a case that the waiver it relies upon is warranted by law of general application.’

The reasons for these conclusions are sound — with two very important exceptions. First, it is not clear why the correct approach to waiver is to adhere to the provisions of s 36(1) (the limitation clause). There is nothing about s 36 that has any obvious bearing on questions of waiver; but one way to understand the judge’s remark about limitations is to read it as part of a characterization of waiver as ‘conduct’ that does not qualify as law of general application. Secondly, the approach to constitutional waiver begs the primary question: does the waiver amount to or lead to the violation of a right?

Olivier JA assumes that all assertions of waiver are always parasitic on the violation of a right. In many instances of alleged waiver, there is no right upon which one party may simultaneously rely and waive. Only if one defines a right in a fashion that excludes the possibility of waiver does limitations analysis under 36 ever begin to matter. (Again, in many instances of alleged waiver there is, in fact, no right upon which a party may rely, and thus there is no issue of waiver.) Furthermore, if there is no *prima facie* infringement of a right, then there can be no question about the limitation of a right — for there is none.

Olivier JA was certainly correct on the facts of this case. The respondent was entitled to be furnished with reasons for the rejection of its tender. Given that the case law holds that a tenderer’s rights are always adversely affected by the rejection of a tender, and a tenderer is entitled to the provision of reasons for a rejection, the failure to supply those reasons is a violation of the right to just administrative action. When he looks beyond the facts, Olivier JA seems inclined to establish the following rule: waiver ought not to be allowed to undermine the rights enshrined in Chapter 2. It would have been more interesting if Olivier JA had taken a stronger line: no waiver can take place in the context of an infringement of a fundamental right. As it stands, Olivier JA in *Transnet* and the Constitutional Court in *Mohamed* (supra) seem uncomfortable with constitutional waiver, but not adamantly opposed to it. Neither court is able to articulate, in any principled way, when we should permit waiver and when we should bar it.

Here then, again, is the strong coherent line that courts should adopt. No fundamental right can ever be waived. Consent to a given state of affairs — *contractual waiver* — can occur only where no right can be violated. What is at issue in these cases is not the waiver of a right, but the interpretation of a

right. And in a legal order that commits itself to constitutional supremacy, the interpretation of the right — the determination of its ambit — must precede any assessment of whether law or conduct vitiates that right. To reason otherwise is to turn our constitutional order on its head and make the extant common law, statutory law or customary law the measure of our basic law.

And yet turning our constitutional order on its head is exactly what the Supreme Court of Appeal has recently done in *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA). In *Telcordia* the court held that while s 34 of the Constitution applies to arbitrations, the requirements of s 34 may be waived and nothing prevents the parties from defining what is ‘fair’ for the purposes of their dispute (para 47). Harms JA then held that the rights contained in s 34 could be waived unless the waiver was in conflict with another constitutional principle or was otherwise *contra bonos mores* (para 48). With respect, it cannot possibly be the case, if we remain committed to s 2 and constitutional supremacy, that ‘freely engaged contractual arrangements’ determine what the Constitution means by ‘fairness’ with respect to public trials or alternative forms of dispute resolution. The Constitution determines what is and is not fair — and to the extent it does not speak directly to a particular set of circumstances, the courts will tell us whether a contractual arrangement is consistent with s 34. If the private contractual arrangement is inconsistent with the content of s 34 (and does not constitute a justifiable limitation of the right), then it is invalid. On the other hand, a court might well find that the private contractual arrangement is consistent with s 34 and constitutional dictates more generally. But in either case, it is the Constitution — with the courts acting as its interpreter — that determines the validity of any private contractual arrangement.

#### ACADEMIC COMPLICITY IN THE MISTAKEN NOTION THAT CONSTITUTIONAL RIGHTS MAY BE WAIVED

Academic commentary on this subject has largely aided and abetted the courts’ confusion. Some of this analysis is worth further consideration if only to set out in somewhat starker relief the choices before us. The least attractive position — and one given the Constitutional Court’s imprimatur in *Mohamed* (supra) — is that there exists a hierarchy of rights: at the top, those rights that are so important as never to permit waiver; at the bottom, those rights that are of such little consequence that waiver is effectively built into their exercise. With such a hierarchy clearly in mind, Cheadle simply asserts that the ‘rights to human dignity, life and non-discrimination cannot be waived’ (Halton Cheadle ‘Application’ in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* 2 ed (Issue 4, July 2007) at 3–26.

De Waal, Currie and Erasmus bear some, if not direct, responsibility for Cheadle’s assertion. They have argued that the nature of the ‘rights to human dignity . . . , to life . . . and the right not to be discriminated against . . . or the

right to a fair trial, does not permit them to be waived' (Johan de Waal, Iain Currie & Gerhard Erasmus *The Bill of Rights Handbook* 4 ed (2001) 43–4, as cited by Cheadle *loc cit*; and see the fifth edition of the same work by Iain Currie & Johan de Waal (2005) 41). Other rights, they have said — the freedoms of expression, religion, assembly, property, occupation, association — may be waived. Part of this distinction appears to rest on a rather obtuse if not otiose distinction that De Waal, Currie and Erasmus (and now Currie and De Waal) draw between rights that have both a positive and a negative dimension and rights that do not have both dimensions. The authors do not tell us what such dimensions mean save to say, rather enigmatically, that the right to dignity 'cannot be exercised by being abused', but that freedom of expression can be exercised by being silent (*ibid* 41 in the fifth edition).

More disconcerting is the following paired set of claims. The first claim reads: 'A waiver cannot make otherwise unconstitutional laws or conduct constitutional and valid' and '[t]he actions of the beneficiary of the right can have no influence on the invalidity of unconstitutional law or conduct. That is why a person cannot undertake to behave unconstitutionally' (*ibid* 40). The second claim reads: 'What individuals may do is waive the right to exercise a fundamental right. The individual may undertake not to invoke the constitutional invalidity of state or private conduct' (*ibid*). The first leg of the first claim seems unobjectionable. The second leg of the first claim raises a flag. As an empirical matter, the actions of a beneficiary of a right will have an influence on a finding of validity or invalidity of law or conduct because it is only as a result of the beneficiary's attempt to exercise and to enforce her rights that we will come to know whether law or conduct of a particular kind is or is not unconstitutional. It is true, as the authors of the *Handbook* suggest, that a person cannot agree to behave unconstitutionally; but not for the reasons that they give. A successful annulment of a contract on constitutional grounds stands for the proposition that there never really was a valid contract in the first place, and that the applicant's constitutional right was not waived. When a party goes to court to have an agreement annulled on constitutional grounds and loses, she was, the court tells us, never in a position to assert legitimately that the right in question trumped the agreement in question. The prescriptive content of the substantive provision of the Bill of Rights is deemed not to cover the conduct at issue. In this second case, the party never possessed a constitutional right that she could waive.

We can see now that Currie and De Waal have things the wrong way around. Individuals may not, as a logical matter, choose to allow other individuals or the state to treat them — via law or conduct — in unconstitutional ways. There is nothing for them to choose in this regard. What these authors should have said is that when we interpret the freedom to trade, occupation and profession or the freedom of expression or the freedom of religion to permit two parties to contract, we really mean that these various rights, correctly interpreted, do not proscribe the kinds of activities or relationships or contracts engaged in or entered into by the

respective parties. Now that is a method of proceeding profoundly different from the creation of (a) hierarchies of rights, or (b) categories of negative and positive dimensions of rights, or (c) distinctions between freedoms and rights. Whether we are talking about life, dignity, torture, slavery, religion, expression or property, the question is always the same: does the right permit the kind of activity, relationship or status contemplated — at some point in time — by the parties before the court? If it does not, then, as we noted above, the right bars the law or conduct contemplated and no such thing as waiver can occur. If the right in question permits the kind of activity or agreement in question, then the parties may do as they wish and the question of waiver never arises.

That Bhana has not actually grasped the nettle of this problem — and inadvertently contributes to this ongoing instance of language gone on holiday — is evident in her treatment of s 34 of the Constitution and its relationship to the law of contract. She notes that the implication of the Supreme Court of Appeal's analysis in *Barkhuizen* is that 'one can contractually waive the fundamental right of access to court, which in turn presupposes that freedom of contract trumps s 34' (Bhana at 279). But as to whether this proposition makes any sense, Bhana remains agnostic. She concludes that 'if the court wished to endorse a contractual waiver of a constitutionally guaranteed right, it should have done so expressly on the basis of a carefully reasoned argument' (ibid). By failing to recognize that such a carefully reasoned argument does not exist for constitutional waiver (which explains, in part, why it has not been made), Bhana reinforces the unfortunate notion that such a phenomenon as (or doctrine of) constitutional waiver could exist. (Bhana's ambivalence appears to be a function of her reliance on Hopkins's important but equally ambivalent interventions on the subject; see eg Kevin Hopkins 'Constitutional rights and the question of waiver: How fundamental are fundamental rights?' (2001) 16 *SA Public Law* 122.)

#### WAIVER AND THE LAW OF CONTRACT AS NEUTRAL BACKDROP

What is the explanation for this pervasive category mistake? As I noted above, and as Bhana herself argues, the traditional conception of the common law relies on the fiction that our private law primarily consists of a neutral backdrop of social contracts between 'fully autonomous' individuals. This traditional view of the common law is, in turn, wedded to the idea of the sanctity of contract. Even in those areas of social life where the language of contract is far less appropriate — say, where law-enforcement officials are holding an alleged terrorist incommunicado, and thus out of the reach of any potential legal assistance — we cling to the notion that, just perhaps, Mr Mohamed consented to his extradition to stand trial on capital charges. The predisposition to describe even non-contractual relationships in terms of contract, coupled with the inclination to make common-law rules the

departure point for constitutional analysis, explains why many academics and jurists accord the ‘contract’ between parties primacy of place and describe constitutional rights in contractual terms. But in a country where all law derives its force from the Constitution, and all law is measured for its consistency with the basic law, to describe constitutional rights in contractual terms gets things back to front. One can contract only to do those things that are constitutionally permitted. And since one cannot do what the Constitution does not permit, there is simply nothing to waive.

#### THE POVERTY OF WAIVER

The doctrine of waiver is worth worrying about because contracts of adhesion are still relatively pervasive. If we are concerned about contracts entered into (a) by parties who do not possess the requisite capacity to understand fully the document they sign, or (b) by parties in radically unequal bargaining positions, then we should be concerned about a constitutional doctrine that supports the enforcement of such contracts on the grounds that lack of knowledge or compulsion is equivalent to ‘waiver’. Again, as Bhana correctly notes, *Afrox*, *Brisley* and *Barkhuizen* all rest on the fiction identified above — namely, that the common law constitutes a neutral contractual backdrop for relations between fully autonomous individuals. Even in a case that generates less sympathy — *Barkhuizen* — because it pits an upper middle-class car owner against a multinational corporation, constitutional waiver looks less like an innocent category mistake and more like a potentially pernicious pre-constitutional relic.

What makes the doctrine of constitutional waiver more pernicious than it might otherwise be is that we are unlikely to see too many cases in which parties contest contracts of adhesion. This is so because the persons who need to contest their alleged waiver of constitutional rights are the least likely to be in a position to bargain effectively to protect their constitutional rights, and are similarly unlikely to be in a position to litigate subsequent claims. The poverty and powerlessness of many South Africans shapes the content of our constitutional rights through the structured silence of disputes that never make it to court. The doctrine of constitutional waiver, however, assumes — wrongly — what my understanding of this structured silence denies: that all contracting parties are in a position to make an informed and freely willed choice about their bargaining position as well as their legal remedies. It is terribly ironic that litigation by a party ostensibly capable of enforcing his own rights (*Barkhuizen*) has the untoward effect of making it more difficult for indigent persons to contest contracts of adhesion.

#### CONCLUSION

If you have the facts on your side, pound the facts.

If you have the law on your side, pound the law.

If you have neither on your side, pound the table.

*Barkhuizen* was not all bad news, however. The *Barkhuizen* panel, led by Cameron JA, was capable of recognizing the damage that a doctrine of

constitutional waiver can have on the most vulnerable amongst us: the illiterate, the indigent. The recognition that the illiterate and the indigent may not be allowed to ‘waive’ their constitutional rights constitutes a genuine advance in learning. Castigating the Supreme Court of Appeal — and one of its most progressive and open judges — for its or his revanchist *politics* is highly unlikely to advance Bhana’s otherwise persuasive arguments. I have a strong sense, however, that an identical panel might be moved by a novel appeal to the *logic* of our Constitution. Bhana has both the facts and the law on her side. There is no need to pound on the table.