Chapter Eight

Tweaking Doctrine:
Constitutional Court Cases
Revisited and Revised

Do not judge me by my successes, judge me by how many times I fell down and got back up again.

Nelson Mandela

A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.

Ralph Waldo Emerson
At the outset of this work, I claimed that the Constitutional Court’s initial emphasis on freedom-talk, rather than flourishing, and on the deference reflected in an often arid separation of powers doctrine, rather than a more fluid inter-institutional and inter-personal theory of experimental constitutionalism, has had several untoward consequences for our constitutional jurisprudence. In this section, I revisit and recast twenty important and representative Constitutional Court judgments in terms of the modest theory developed thus far: experimentalism married to flourishing. Some critiques take their aim at rights analysis, others toward remedies. Some re-appraisals take stock of a tendency toward an overweening effort toward institutional comity, while some accounts chide the Court for a failure to envisage ways in which co-operation between the branches and the pooling of information of potential stakeholders might advance the interests of all of our polity’s denizens.

Over the course of this survey, readers will see a gratifying pattern emerge. They will appreciate a trend in more recent judgments toward an experimentalist approach: from pre-trial orders for meaningful engagement, to expanded grounds for standing, to rights analysis that invites comment from all interested stakeholders, to remedies that grant suspended orders while parties (including the legislature and the executive) work out the appropriate contours of a legislative ‘fix’ that falls within the broadly framed constitutional norms articulated by the Court, to structural injunctions that ensure that a system of ongoing reports to the Court from interested stakeholders effectively rights the wrong identified by the Court in a manner that allows the parties to work out solutions, over time, by seeing what works and what doesn’t. Indeed, this latest cohort of cases reflect a mature Court possessed of an increasingly bold vision that takes seriously the possibility of a collective imagination that exists beyond the chambers of eleven women and men. We can glimpse a Court that wants to ‘learn aggressively’ – as my friend Frank Michelman might put it – from the parties before the Court and from individuals, associations and institutions not initially party to a given matter.¹

Two riders attach to the organization of the case studies that follow.

It would be convenient if the development of the Constitutional Court’s jurisprudence (along the lines this book has espoused) occurred in perfect chronological fashion. It didn’t. It would be the rare court at the apex of a legal system that moved in logical lock-step with its own or some academic’s deeply theoretical musings. So while the case studies begin at a time when hints of experimentalism and flourishing might have been difficult to discern, they do track the evolution of the Court’s jurisprudence in a manner that is quasi-linear and subject-matter driven. It makes greater sense to group later cases together in terms of subject matter – say, customary law or education – than strict adherence to the date the judgment was handed down. By grouping the later case studies thematically, one actually gains a greater appreciation for the subtle shifts that have occurred over time.

It would serve the ends of writerliness if the following cases struck you as entirely fresh and simply served as additional proof of the most contentious arguments proffered in the preceding chapters. However, many, though not all, of this score of cases will have been discussed and analysed over the past 400 pages. Some cases rehearsed here performed very different ends in earlier passages. Some aided my initial explication of experimental
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constitutionalism and flourishing, and simply receive more expansive treatment now: often in an attempt to show how both experimental constitutionalism and flourishing work in tandem. In either case, some repetition is inevitable. Skip, rather than march, where necessary. It’s your book after all.

A. The Tenets of a Theory of Experimentalism and Flourishing Rehearsed

Before we begin this exercise in reconstruction, it is worth recalling the content of the flourishing and experimentalist criteria by which the cases will be reassessed.

The conservative strain in my account of flourishing emphasizes the manner in which various social practices and natural dispositional states determine that which makes us human. Our recognition that there is a radical givenness to our ways of being in the world and that ‘meaning makes us’ explains why the metaphysical commitment to conditioned choice results in little or no explanatory power being lost when we substitute the notion of flourishing for the outré metaphysics of freedom.2

The revolutionary strain in my account of flourishing recognizes that these same social practices and forms of life from which we derive the better part of meaning in our lives may, unnecessarily, limit our ability to act in a manner that we believe will enhance our own well-being. The revolutionary dimension of flourishing requires that issues of access, of coercion, of choice, of voice, of exit must be constantly negotiated – by the state and other actors – in order to ensure that all members of our society have a meaningful opportunity to flourish. A meaningful opportunity to flourish will, in turn, require the provision of those basic goods (material and immaterial) that individuals must possess in order to pursue lives worth valuing.3

This revolutionary understanding in no way diminishes our responsibility to engage in case-by-case analysis of rights claims made on behalf of those who prefer to inhabit unchosen worlds that we view as anathema to our own conception of the right and the good. Flourishing per se and the underlying nostrum that ‘meaning makes us’ should sound a cautionary note that ought to be heeded by those who identify freedom as the ultimate trump, as well as by those who reify equality and tend to treat all unchosen social institutions as suspect and in need of reformation along sweeping and radically egalitarian lines.4

Experimental constitutionalism serves both strains of flourishing. First, all constitutional orders recognize an ineradicable private ordering of social affairs. To that extent, constitutions are inherently conservative documents. Second, while this account begins with the premise that individual flourishing occurs primarily within the many communities into which an individual is born and of which she remains a member, experimental constitutionalism envisages a heterogeneous society made up of radically heterogeneous selves5 and a state that does not aim to determine or to exhaust the possibilities of individual lives.6 At a minimum, the experimental state enables individuals and groups to realize fully extant sources of the self. At the same time, experimental constitutionalism is predicated upon the belief that best practices are more likely to surface within institutions designed to promote social experimentation, and that, as a result of such experimentation, individuals are more likely to alight on a preferred way of being in the world if provided with roughly equal and mutually
respectful conditions – political, social and economic – under which to compare, contrast and critique different ways of being in the world.7

Recall that a broad array of principles undergirds experimental constitutionalism. First, the judiciary, as well as the legislature and the executive, can act as an agent of social change, even as it moves from top-down command and control models to flattened hierarchies that invite broad participation and rolling best practices that are both forward and lateral looking.8 Second, difficult cases, especially those cases that turn on limitations analysis of prima facie abridgements of constitutional rights, become somewhat easier to resolve when courts move away from traditional models of adjudication and adopt such experimentalist, problem-solving modalities as meaningful engagement orders, structural injunctions and remedial equilibration.9 Third, for experimental constitutionalism to succeed, courts and other fora – including non-political institutions – must facilitate the sometimes rough and tumble debates between stakeholders that are often essential for information gathering, information pooling, information sharing, collective action and collective norm setting.10 Fourth, these processes, forward and lateral looking, are reflexive and committed to rolling best norms. It’s not that a baseline or core for constitutional rights does not exist – flourishing helps us to establish such first principles – but that constant reassessment of the means by which we pursue our ends often has the consequence of changing both our means and our ends. Moreover, courts and non-traditional problem-solving fora can – when they balance the playing field – destabilize existing social hierarchies and produce new ‘experiments in living’ that may enhance individual and group flourishing.11

Experimental constitutionalism can also be explained in terms of two overlapping emergent modes of governmental design: (i) shared constitutional interpretation; and (ii) participatory bubbles. Shared constitutional interpretation (a) supplants the ‘arid’ notion of judicial supremacy with respect to constitutional interpretation,12 and grants all branches of government a relatively equal stake in giving our basic law content; (b) contemplates courts that consciously limit the reach of their holdings regarding the meaning of a given provision and, as already suggested, invite co-ordinate branches, other organs of state and other social actors, to come up with their own alternative gloss on the text;13 (c) views these invitations as mechanisms to flatten political hierarchies, to increase the opportunities to see how different doctrines operate in different spaces, and to make revision of constitutional doctrines possible in light of new experience and novel demands; (d) ratchets down the conflict between co-ordinate branches and levels of government14 and frees the court of the burden of having to provide a theory of everything; and (e) assumes the different means employed by different actors may shed new light on – or change our understanding of – the very constitutional norms we seek to promote.15

The notion of participatory bubbles directs our attention to experimentation in smaller units: at the level of the individual or the local community.16 As I have already noted, my naturalized account of the self and the social takes seriously the limits on our capacity for rational reflection and collective deliberation. But my naturalized account of the self never denies our capacity to engage in meaningful and careful rationation.17 However, rather than limiting our collective conversations to a few earth-shaking moments of universal
participation—think of the Multi-Party Negotiating Forum of 1993, the elections of 27 April 1994 or the Constitutional Assembly circa 1996—small-scale bubbles of limited participation can regularly experiment with and challenge the conventional understanding of individual constitutional norms and their application to subject matter-specific, and often time-sensitive, institutional contexts.

The physical metaphor of bubbles is meant to convey four (or more) qualities of small-scale experimental institutional processes. First, processes of brass-knuckled engagement between parties with different interests are a natural part of ongoing social interactions. They originate when challenges to a given authority accumulate and finally come to a boil: just as bubbles form after pressure builds up and escape to the surface of a liquid. Second, bubbles are meant to suggest limits on the scope of engagement. Bubbles enclose a small number of contested issues. Third, bubbles are (often, but not always) ephemeral. After satisfactory resolutions emerge from multi-party participatory processes, the raison d’être for such processes generally ceases to exist. Yet courts and other oversight fora may wish to retain jurisdiction until we can be assured that a novel practice has succeeded. Fourth, a court creating a bubble must be willing to articulate norms or frameworks—as departure points—that enable less powerful stakeholders to have a meaningful role to play in the polycentric decision making process initiated by the court. The promise of such a process is successful action. Each participant adopts a reflexive stance toward their own views and attempts ‘to make the interests of others their own, [and to recognize] the circumstances in which they should give moral priority to what is good for others or for the polity as a whole’. Thus, participatory bubbles facilitate processes of institutional reform that proceed within the vocabulary and inside the norms of the relevant institutions and contested communities, instead of via top-down imposition by a judicial authority. The reflexive stance should both foster a deeper commitment to public political participation and enhance individual and group aptitudes for experimentation and error correction.

Put another way, participatory bubbles are important experimental feedback mechanisms. First, they enable state actors (and private actors) responsible for the creation of policy to benefit from insider information about the problem the parties aim to solve. Second, state actors and citizens who are not participants in a given bubble, at a given moment, have an opportunity to benefit—down the line—from the forward- and lateral-looking experimentation of their predecessors. Third, both the process and the outcome of bubble making should have a knock-on effect. It should create incentives for political institutions to pro-actively open up their decision making processes to affected stakeholders in advance of conflict so as to seek out non-adversarial solutions.

In addition, courts called upon to perform limitations analysis and to fashion remedies cannot avoid adjudicating conflicts that are not readily susceptible to straightforward doctrinally essentialist solutions. Here again experimental constitutionalism offers two additional constructs: (a) provisional adjudication, and (b) remedial equilibration. Provisional adjudication promises two primary benefits. Provisional adjudication puts alternative possible remedies to the test of experience without necessarily elevating such remedies to the level of established doctrine. It gives parties that may have been aggrieved with a final non-provisional
outcome the opportunity to experiment with a remedy of their own making. Remedial equilibration may facilitate compromise. By enabling individuals to exit communities that treat them as second-class members, without dismantling entire communities in the process, remedial equilibration should enable affected parties, learn from practical experience and adjust their beliefs and conduct accordingly as they maintain existing sub-publics or create new sub-publics.

B. Experimentalism and Flourishing Applied

1. Prince v President, Cape Law Society & Others

There is, perhaps, no better example of the limits of the Constitutional Court’s basic approach to rights analysis than its judgment in *Prince*. A narrowly divided Court found itself doctrinally incapable of extending the protections of religious freedom and religious communal practice to the kind of vulnerable minority most in need of judicial solicitude. How might the judgment have differed if the Court had followed the outlines of the slightly altered jurisprudence described in these pages?

The most significant outcome-determinative difference would have been to supplant ‘freedom-talk’ with ‘flourishing’. The *Prince* Court ought to have been disposed towards viewing the actions of the members of the Rastafarian community in terms of social endowments that largely determine the meaning of individual lives – and not through the lens of rational, autonomous moral agents that freely will their ends (or rather, the ends of a hide-bound majority). Had it been so inclined, the Court might have taken more time to explore legal structures that would take the Rastafarian way of being in the world seriously.

A shared constitutional interpretation approach to limitation’s analysis might have also altered the outcome. The *Prince* Court did ask for the government’s assistance in making a difficult instance of limitations analysis easier. The Court asked the government to furnish facts regarding (1) practical difficulties with granting an exemption for the sacramental use of cannabis, and (2) the differential impact on law enforcement posed by a religious ritual exemption as compared with medical and scientific exemptions. But the information provided, to the extent it was provided, did little to shape the Court’s approach to its limitations analysis. The majority of the Court accepted the state’s contention that a feasible exemption could not be crafted.

But what if the Court had adopted an experimentalist approach toward limitations analysis – linked to a remedial equilibration doctrine that proceeds from the recognition that the determination of the reasonableness of a limitation and the identification of the best of all possible remedies are interdependent processes. Remedial equilibration might have led the Court to recognize how difficult it is to discover the ‘right’ answer – or remedy – from an outsider’s perspective; a difficulty with respect to which the Court was already partially aware. Had it acted on this awareness, instead of simply relying on the good faith of the government, it could have used a number of mechanisms to mediate the competing positions.

The experimentalist approach to limitations and remedies analysis – with its explicit commitment to eliciting better information from all the relevant parties – might have led the Court to issue a structural injunction or one of the creative panoply of partial and temporally limited remedies it now employs. A structural injunction or an order for meaningful engagement
that brought law enforcement officials and Rastafarian leaders together might have (a) elicited the relevant information for more precise limitations analysis, and (b) generated proposals for remedies that might diminish – to the vanishing point – the constitutional conflict. At a minimum, the participatory bubble created by the order might have led the Rastafarian stakeholders and the state to find a short-term answer to the problem of the ritual use of cannabis. The Court would not then have been in the uncomfortable position of imposing its will by fiat through rights essentialism and automatic remedialism. Moreover, retention of jurisdiction through a structural injunction (or what would become hard-nosed orders for ‘meaningful engagement’) would have allowed the Prince Court to track any unintended consequences that might flow from adaptive processes triggered by shifting legal principles and would have allowed it to modify the remedy – say, through some form of exemption for the use of cannabis – on the basis of new empirical evidence. The disentrenching powers of such a remedy might have also led, over time, to a general social acceptance of Rasterfarianism as just one of many of South Africa’s religious orders. (Here again it’s worth recalling how drug treatment courts have led to a more and more widely shared view (in the United States) of drug use as a form of treatable addiction, rather than a criminal offense that warrants sustained incarceration that provides little hope of rehabilitation. Don’t believe me? Two US states have, by recent referendum, in 2012, decriminalized marijuana use.)

As the last several paragraphs suggest, a doctrine of shared constitutional interpretation ought not be limited to colloquies between the legislature and the courts. Shared constitutional interpretation – especially in a constitutional order that places constitutional duties on both private actors and public actors – would require both law enforcement officials and citizen-stakeholders to offer their respective gloss on constitutional norms. Such shared competence enables parties at the coal-face to assist the Court in developing constitutional norms and to facilitate experiments in the application of such norms to novel sets of circumstances.

The recast-experimentalist Prince judgment suggests how the original Prince Court, with the assistance of others, could have gone Justice Sachs’ ‘extra mile’ in order to safeguard the constitutive attachments of a vulnerable minority. It also shows how experimental constitutionalism steers a path between a conservative constitutional politics committed to extant understandings of individual and group flourishing and a revolutionary politics committed to error correction and the increased acceptance of out-groups through novel institutional arrangements.

2. S v Jordan

Jordan warrants recasting for two distinct reasons.

a. Flourishing, not Freedom

As I have already discussed at length in Chapters 1, 2 and 7, the Jordan Court rejected equality, dignity, privacy and freedom of profession challenges to those sections of the Sexual Offences Act that criminalise prostitution. The majority reasoned as follows:

If the public sees the recipient of reward as being ‘more to blame’ than the ‘client’, and a conviction carries a greater stigma on the ‘prostitute’ for that reason, that is a social attitude and not the result of the law. The stigma that attaches to prostitutes attaches to them, not by virtue of their gender, but by virtue of the conduct they engage in. That stigma attaches to female and male prostitutes alike. I
am not persuaded by the argument that gender discrimination exists simply because there are more female prostitutes than male prostitutes, just as I would not be persuaded if the same argument were to be advanced by males accused of certain crimes, the great majority of which are committed by men.33

The majority’s commitment to a very strong form of metaphysical autonomy – a form of autonomy that makes all individuals morally and legally culpable for actions that issue ineluctably from their circumstances – fails dramatically many sex workers. (It seems particularly inapt for the many sex workers who ply this trade only because they are victims of sexual trafficking.34) The majority approaches the circumstances of such prostitutes – to use classic metaphysical parlance – as if they ‘could have done otherwise’. That is the kind of ‘freedom talk’ that does no meaningful work.

The Jordan majority and minority’s approach may hold for some sex workers who are attracted to this profession. But such circumstances are rare. First, as I have argued above, the attribution of culpability to those who act under circumstances of severe economic duress is suspect. Prostitution generally involves the sale of sexual services by women (controlled and exploited by syndicates). This exploitation of women, of people who have little chance, and virtually no choice, in life’s wheel of fortune, to pursue lives worth valuing, seems to do the argument from autonomy little favour. It may be true that a free market might make decriminalized prostitution more appealing than starvation. But that argument hardly seems to work to the Court’s advantage.35 Second, the Jordan majority and minority’s approach cannot be applied, without real violence being done to the word ‘voluntary’, as well as the large cohort of prostitutes who are the victims of sexual slavery.

The Jordan Court has left us with the impression that this most vulnerable and marginalised class of individuals is not especially deserving of our solicitude and that they have, somehow, brought this fate upon themselves. This errant belief constitutes a cultural – and not just a legal – practice that makes the manumission of sexual slaves – and other prostitutes who work under some form of duress – that much more difficult.

A later judgment hints at a way out of the kind of autonomy trap on display in Jordan. In Khosa v Minister of Social Development; Mahlaule v Minister of Social Development, the Constitutional Court found unconstitutional, as a violation of both FC s 9 and FC s 27 (1), the exclusion of permanent residents from the class of persons entitled to a variety of social security grants: old age, disability, veterans, child support and foster care. Mokgoro J writes:

The exclusion of permanent residents in need of social-security programmes forces them into relationships of dependency upon families, friends and the community in which they live, none of whom may have agreed to sponsor the immigration of such persons to South Africa … Apart from the undue burden that this places on those who take on this responsibility, it is likely to have a serious impact on the dignity of the permanent residents concerned who are cast in the role of supplicants.36

Mokgoro J could well have added that permanent residents are, as supplicants, not merely dependent on family members, but quite literally at their mercy.37 Many prostitutes would consider themselves fortunate to be supplicants. They are not just excluded from the protection of the law. Many sex workers do not speak the language, do not know the lay of the land, do not have the resources to engage corrupt immigration officials or to escape criminal syndicates. Many are enslaved by their own families.
The point is not that sex workers are excluded from some particular benefit to which another class of persons is entitled. *Khosa* stands for the broader proposition that FC s 7(2) places the state under an obligation to protect and to fulfil the rights of all persons in South Africa. As the *Khosa* Court rightly recognises, legal regimes that offer incentives to become members of the political community but that punish inhabitants who cannot act on such incentives – by withholding benefits or through incarceration – are perverse. These disincentives deny the affected person exactly that which the state is obliged to provide. *Khosa* indicates that where meaningful opportunities for flourishing are curtailed, the state bears part of the burden for bringing the material conditions for flourishing into being.

### b. Experimentation, not Deference

Could we also use structural injunctions, meaningful engagement or remedial equilibration, and any consequent participatory bubble, to recast the outcome in *Jordan*? Perhaps. Law enforcement officials and streetwalkers might yet be able to reach some consensus on the kind of framework necessary for the de-criminalization of prostitution. (They already ‘work’ together.) If concerns about coercion, disease transmission and trafficking lie at the heart of criminalization of the sex trade, then one can easily imagine setting up structures that would permit the state or entrusted non-state actors (NGOs) to supervise the industry. The affected parties might agree that a requirement that commercial sex take place at brothels in a set area of a city would enable the state and entrusted non-state actors (NGOs) to conduct regular inspections. Such regulation of the profession would enable the responsible authorities to track the health, age and (relative) autonomy of many sex workers.

Another benefit of experimentalism is that by recasting the law in a manner that allows for limited state sanction and greater state control of commercial sex workers is that the general population may, over time, come to view prostitution itself as less morally repugnant. That may seem like a stretch in as conservative and religious society as South Africa. But previously well-embedded practices, say speeding, or a refusal to wear condoms, do change as laws, policies and enforcement mechanisms surrounding traffic safety and HIV/AIDs alter the social landscape.

The *Jordan* Court could have moved beyond deference – with its rather unfortunate consequences for the Court’s dignity jurisprudence – to norm setting that recognized the intrinsic worth of prostitutes as human beings. That does not, of course, mean that the Court would be obliged to craft a remedy other than it did. It only means that a participatory bubble might have offered the Court a broader array of institutional arrangements with which to work.

### 3. Government of the Republic of South Africa v Grootboom & Others

I have, in Chapter 6, already suggested how *Grootboom* has led to a minor revolution in South African housing law and policy. I will rehearse that discussion here only to demonstrate in a rather step-by-step fashion how the analytical tools provided by experimental constitutionalism can be used to re-think similar sorts of socio-economic rights cases.
a. Structural Injunctions and Participatory Bubbles

The Grootboom Court could have issued a structural injunction (or mediation) that required representatives for affected citizens in the Cape Flats and parties responsible for housing in national, provincial and local government to engage in talks aimed at an effective solution. Using a structural injunction to create such a participatory bubble would have had several beneficial consequences. First, government agencies would have had to come up with a remedy particularly tailored to the needs of the Grootboom community. Second, this participatory bubble could become the model for other similarly situated groups around the country. Third, such a polycentric process of political participation would generate other experimentalist responses to the resource constraints confronted by both government agencies and those persons and communities in need of adequate housing. A structural injunction, coupled with the replication of participatory bubbles throughout the country, would give the courts, the government and the public the ability to share information about the kinds of strategies that work to alleviate homelessness.43 (As I noted above in Chapter 5 and 6, the Court did order – in a separate judgment – the South African Human Rights Commission to monitor the implementation of its holdings in Grootboom. One can only speculate as to whether that monitoring injunction would have been more effective had it been made part of the original judgment. That the SAHRC failed to discharge its obligations might well have been a function of the Constitutional Court’s inability to foresee the consequences of not using a structural injunction to bring all parties together from the outset.)

That such an approach is possible is reflected in the subsequent Cape High Court cases of Rudolph I and Rudolph II.44 The High Court in Rudolph I and Rudolph II noted the lack of responsiveness on the part of government. The High Court’s structural injunction forced the state to come up with a housing plan that – if implemented – would meet its constitutional obligations. It is rather more heartening to see my writing (very) slowly being overtaken by time. The approach advocated above has, to some degree, now been adopted a decade later by the Court itself. As we shall see below, the Court’s novel notion of ‘meaningful engagement’ creates the conditions for the kinds of creative solutions that can only be achieved within an experimentalist framework.

b. Experimentalism, Systemic Feedback Effects and Transformation

Perhaps the most compelling consequence of an experimentalist revision of Grootboom would be its replication. Grootboom would come to represent a classic example of citizens emboldened with a set of ‘destabilization rights’ that would secure greater accountability from government and other social actors. We would see a Grootboom effect. That effect would flow from its trend-setting use of innovative injunctive relief to create participatory bubbles that facilitate widespread experimentation. The Grootboom effect would place other government agencies responsible for delivering basic necessities or transforming social institutions on notice that they are best served by finding stakeholder representatives who can provide the necessary feedback on new and better forms of service delivery. The decisions of the High Court in Rudolph I and Rudolph II suggest that putting such feedback loops in place is both possible and desirable.
c. Shared Constitutional Interpretation

The Grootboom Court’s approach to socio-economic rights suggests a deep-seated fear of ordering relief that would require sustained judicial oversight of a complex remedial apparatus that would appear to displace the policy-making prerogatives of the political branches of government. By retaining jurisdiction through a structural injunction, but allowing responsible government officials and citizen stakeholders the opportunity to craft an appropriate remedy, the Court would obviate the need to allocate scarce administrative resources to remedial management or to wade into complex terrain through which it feels ill equipped to move. (Such a flexible response is a paradigmatic example of the experimentalist commitment to remedial equilibration adumbrated in Chapter 4.)

As we shall see in some of the most recent cases, the Court can go about setting out general norms to guide various government actors and non-governmental stakeholders. It can invite, a la the Miranda Court, other government actors to provide effective means of realizing the right in question. General norm setting (even the minimalist minimum core now taking shape within the parameters of s 26) married to such an open-ended invitation services experimental constitutionalism by creating a body of doctrine and experience that is flexible enough to address new challenges. The flexibility of shared constitutional competence frees the Court from its ever-present anxiety that it will say too much and thus bind its hands in the future. Likewise, it frees the Court from the doctrinal dead-end of one-case-at-a-time land, where the future is always now and no guiding principles can ever be affirmed. As I noted in Chapter 6, the National Department of Housing’s new policy document, Breaking New Ground, various amendments to the Housing Code, and even more supple recent developments in the delivery of housing units suggest that the Court’s general norm setting has had the intended effect of motivating those parties with greater expertise to generate social, economic, political and legal responses consistent with newly articulated constitutional norms.47

However, as the judgments in both Modderklip and in Rudolph I and Rudolph II suggest, the state may not always respond with alacrity to the Court’s invitation to create new policy. (It may well often be that a government department (with 15% capacity) lacks the requisite capacity to implement a meaningful response.) If the state fails to respond to the Court’s invitation, then de facto constitutional damages – as in Modderklip – or threats of citation for contempt – as in Rudolph – become necessary and appropriate judicial responses.

4. Minister of Health & Others v Treatment Actions Campaign & Others (No 2)50

Treatment Action Campaign is often considered both a significant victory for advocates of a more robust approach to socio-economic rights and an easy case for those commentators who view the Court as rather reluctant to put the government on specific terms in the event of an adverse ruling.51 After just over a decade, Treatment Action Campaign warrants a re-appraisal.52

From the perspective of flourishing, Treatment Action Campaign promised an easy solution to the problem of intra-partum transmission of HIV. Moreover, the Court’s order held that the government must ‘make provision if necessary for counsellors based at public hospitals and clinics other than the research and training sites to be trained for the counselling necessary
for the use of nevirapine to reduce the risk of mother-to-child transmission of HIV [and] take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.\textsuperscript{53} Implementation of these portions of the Court’s order would have gone some distance towards solving the problem of sero-conversion that takes places if HIV-positive mothers breastfeed their children after birth. From the perspective of experimental constitutionalism, the order looked tough enough to guarantee the desired result – provision of Nevirapine to HIV-positive pregnant women in order to prevent intra-partum transmission of HIV from mother to child (MTCT) – while flexible enough to allow government to shift its policies should a more efficacious, safer and cheaper solution to the problem of MTCT be found.\textsuperscript{54}

\textit{a. Failure to Flourish}

There can be little doubt that the Constitutional Court believed that its order requiring Nevirapine to be provided at all public hospitals would be carried out and that a clear consequence of its order would be a significant diminution in MTCT and a concomitant decrease in infant mortality. The statistics tell another story.\textsuperscript{55} Five years after the \textit{TAC} judgment, roughly 94,900 HIV-infected children were born each year. That number reflects an overall 40\% increase. Moreover, only 13,134 of these 94,900 children received any antiretroviral treatment (ART).\textsuperscript{56} In sum, over the first five year post-\textit{TAC} period, 400,000 children who urgently required access to antiretrovirals (ARVs) did not receive them. The majority of these children did not reach the age of two.\textsuperscript{57} Yet, as the \textit{TAC} Court was aware at the time of its judgment, and as the World Health Organization continues to emphasize:

Paediatric HIV is almost entirely preventable. It has been virtually eliminated in high-income countries.\textsuperscript{58}

One doesn’t require a particularly sophisticated account of flourishing or capabilities to conclude that the South African government under former President Mbeki failed to take the Constitutional Court’s order seriously.\textsuperscript{59} Many of the HIV/AIDS policies of the Mbeki presidency were patently retrogressive – a clear violation of FC s 27 of the Constitution and South Africa’s international law obligations.\textsuperscript{60} While the HIV/AIDS policy regime under President Zuma reflects a palpable improvement, retrogressive measures remain in place.\textsuperscript{61}

\textit{b. Not Tough Enough}

Part of the responsibility for this failure surely lies with the Court itself.\textsuperscript{62} After surveying the foreign literature on structural interdicts, the Court concluded that no good jurisprudential reason existed for making them a routine remedy.\textsuperscript{63} The Court held that it could employ a structural interdict that forced the government to alter its policies as the exigencies of the moment so dictated:

A factor that needs to be kept in mind is that policy is and should be flexible. It may be changed at any time and the executive is always free to change policies where it considers it appropriate to do
so. The only constraint is that policies must be consistent with the Constitution and the law. Court orders concerning policy choices made by the executive should therefore not be formulated in ways that preclude the executive from making such legitimate choices.64

However, despite incontrovertible evidence that the government’s reasons for refusing to supply Nevirapine were internally incoherent and factually incorrect, the Court decided that the government deserved the benefit of the doubt.65 Had it retained the jurisdiction that normally attaches to a structural injunction, it might have found itself in a position to address what appears to be a persistent pattern of malign neglect around MTCT of HIV/AIDS. As Courtenay Sprague, Vivian Black and I have argued elsewhere:

... [I]n something of a break with ... current academic commentary – which only presses the point that the government should not be held to the rather amorphous dictates of the ‘reasonableness’ standard – we believe that the institutionalised use of poorly remunerated, marginalised ‘lay counsellors’ to discharge the responsibilities of healthcare professionals (doctors and nurses who had previously undertaken counselling and testing) constitutes a ‘retrogressive measure’. In short, despite the government’s commitment to an expanded, more efficacious rollout, it is currently delivering less health care – not more – and less adequate health care – not better – to this particular cohort of patients with HIV. Such retrogressive measures violate international covenants to which South Africa is bound. At the same time, these measures would also seem to offend the Court’s own understanding of the delivery of this constitutionally-mandated public good to pregnant women with HIV and their infants.66

5. Port Elizabeth Municipality v Various Occupiers67

The Port Elizabeth Municipality sought an eviction order against 68 persons living in shacks on privately owned land. The occupants agreed to move to ‘suitable alternative land’. However, the space offered by the Council, in Walmer Township, provided no security of occupation and was controlled by criminal networks. The municipality contended that no other alternative existed and that making a special exception for the occupiers would be tantamount to queue jumping with respect to the municipality’s comprehensive and co-ordinated housing scheme.

After having won in the High Court and lost in the Supreme Court of Appeal, the municipality sought a ruling from the Constitutional Court that would confirm that it was not constitutionally obliged to find alternative accommodation or land when seeking an order evicting unlawful occupiers. The Court denied the appeal. It held that although a municipality was not generally under an obligation to provide alternative accommodation or land, the municipality’s failure to take any steps – let alone all reasonable steps – to solve this social problem meant that the municipality had failed to discharge its constitutional obligations. Given this abdication of responsibility, the Court held that it was neither just nor equitable for the eviction order to be granted.

The Constitutional Court noted, relatively early in its judgment, that the polycentric nature of the problem – homeless persons in need of shelter, private land owners who wished to use the occupied land, municipalities charged with creating a coherent housing scheme for all its
inhabitants, sheriffs charged with executing an eviction, inhabitants of other communities to which the homeless persons might be moved – posed significant challenges:68

The court is thus called upon to go beyond its normal functions, and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and orders it might make.69

The Court first appeared as if it might rise to the challenge. It noted that cases that affected the lives of so many parties might be best resolved through face-to-face meetings. It introduces the term: ‘mediation’. On the virtues of such participatory bubbles, the Court wrote:

In seeking to resolve the above contradictions, the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.70

The Port Elizabeth Municipality Court elucidated two further benefits of participatory bubbles: the internalization of constitutional norms by the participants in the negotiations; and the ability of such bubbles to make up for the information deficits that top-down statecraft or adversarial legal proceedings tend to generate:

Not only can mediation reduce the expenses of litigation, it can help avoid the exacerbation of tensions that forensic combat produces. By bringing the parties together, narrowing the areas of dispute between them and facilitating mutual give-and-take, mediators can find ways round sticking-points in a manner that the adversarial judicial process might not be able to do. Money that otherwise might be spent on unpleasant and polarising litigation can better be used to facilitate an outcome that ends a stand-off, promotes respect for human dignity and underlines the fact that we all live in a shared society.71

Despite these largely unassailable observations, the Port Elizabeth Municipality Court balked when it came down to ordering mediation and retaining jurisdiction to ensure that a just and equitable outcome occurred. Its reasons for not putting mediation and a structural injunction in place ranged from the intransigence of the parties, the small likelihood of success given the failure to reach any agreement earlier in the process, the failure of lower courts to employ this dispute resolution mechanism and the idiosyncratic nature of the community effected. With respect, these justifications for refusing to issue a structural injunction are extremely good reasons for doing so.72 A structural injunction that sets out the general norms that will shape the outcome of the dispute, but leaves the parties to discover the best possible remedy, is exactly the kind of remedy that might overcome existing intransigence, idiosyncrasies of circumstance and previous failures to generate an outcome that both sides might prefer (to the zero-sum outcome of a court order). As it turns out, the parties have been left pretty much where they started: the Municipality has ‘illegal’ occupants that it cannot move, as yet, and
the occupiers remain, for the moment, on private land to which they can stake no meaningful claim. Despite its high minded rhetoric about novel judicial interventions, the Port Elizabeth Municipality Court looks, ultimately, to be more concerned with saving its political capital than with creating the conditions that might present a lasting solution to a particularly pressing social problem.73

One can speculate, in a meaningful way, as to the basis for the strong rhetoric, and the absence of action: disagreement within the Court. Whereas some may have pressed for mediation, others resisted. On a Court institutionally and politically committed to unanimity, the result is hardly surprising. Ultimately, as we shall see, the pragmatism of unanimity yields to the pragmatism of meaningful engagement.

6. The Minister of Public Works & Others v Kyalami Ridge Association & Another

In 1999, unseasonable rains caused floods across South Africa. These floods, in a country rife with informal housing, resulted in widespread homelessness. To address this national calamity, the national government established a committee to address the urgent need for shelter. It committed R557 million to the provision of temporary and permanent housing.

The gravamen of the complaint in Kyalami Ridge was that the committee charged with finding appropriate space and building necessary shelter had created a transit camp on the Leeuwkop prison farm to accommodate flood victims in Alexandra Township (in Johannesburg). The respondent, an association that represented residents in the vicinity of Leeuwkop, challenged the committee’s decision. It contended that the transit camp would adversely affect property values and the long term habitability of the surrounding environment.

The High Court and then the Supreme Court of Appeal accepted the association’s contention that the committee’s actions were indeed invalid. Not only was the decision taken absent authorizing legislation, but it was found to have infringed statutory and constitutional rights regarding land and the preservation of the environment. Moreover, given the polycentric nature of the decision, the High Court and the SCA accepted the association’s claim that they should have at least been consulted.

The Constitutional Court, in a detailed and nuanced response, reversed the SCA and High Court’s decisions and upheld the government’s appeal. Sadly, the Court’s decision comes up short in ways we have seen occur in two of the cases surveyed thus far – Grootboom and PE Municipality.

After holding, not uncontroversially, that the government has the same rights as other land owners,75 the Constitutional Court traversed the applicable township ordinances, development statutes, environmental legislation and apposite rights in the Constitution – the right to housing, FC s 26, and the right to a safe and healthy environment, FC s 24. In the end, the Court held that the rights of the displaced persons in need of urgent shelter and housing after the occurrence of a national disaster trumped other considerations. The decision had to be taken quickly – and the Government did so within its available resources and after appropriate consideration. But ought the Court to have done more?

As Ernst Basson and Morné van der Linde have observed:
Some commentators have argued that *Kyalami Ridge* would have been an ideal opportunity for the Court to discuss the principle of sustainable development and to tackle an alleged conflict between economic development and environmental protection. Although the Court could have considered sustainable development, this argument does not properly appreciate the scope and application of sustainable development. The case only raised competing commitments to adequate housing and environmental protection: economic development did not feature.

Is the last statement entirely true? Surely the home-owners association was far more concerned with the economic value and the capacity for economic development of the land of its members than it was with the environmentally detrimental effects of the effluents emitted by the transit camp.

**a. The Failure to Create a Participatory Bubble**

The real problem with the judgment – from an experimentalist perspective – is two-fold.

First, the Court notes, without comment, a lack of engagement with other affected actors: 'No discussions were, however, held with residents in the vicinity of Leeuwkop.' Residents learned of the government's decision at a press conference:

Mr Paul Mashatile, the Gauteng MEC for Housing … stress[ed] that a transit camp was being established, and that the persons to be accommodated there would move to permanent housing when that became available, and that the transit camp would then be dismantled.

After finding that the failure to engage or to consult with the residents of *Kyalami Ridge* violated neither statute nor the constitutional norm of legality, then Chief Justice Chaskalson shrugged his shoulders and remarked:

It may have been better and more consistent with salutary principles of good government if the government had found an appropriate method to inform the neighbouring residents of its intentions before contractors went onto the site, and if it had engaged them in discussion and the planning at an early stage of the project. However, for the reasons that I have given, the absence of such consultation and engagement did not invalidate the decision.

C'est dommage.

**b. The Consequences of a Failure to Create a Participatory Bubble**

An equally important failure – perhaps one of greater import – seems to have been the inability or the lack of interest on the part of the state to honour its commitment to wind up the transit camp as soon as possible and provide adequate permanent housing to its occupants. The *Kyalami Ridge* Court writes, as it delivers its remedy:

This has been a most unfortunate case. When the proceedings were commenced the government contemplated that the flood victims would be accommodated on the prison farm temporarily and that they would be allocated permanent accommodation elsewhere within 6 to 12 months. Later it was said that the time would at most be 12 to 24 months. Nearly a year has passed since then. In the meantime the flood victims have been living in deplorable circumstances, and there is no word as to when permanent accommodation will become available. It is time that attention be paid to their needs.
But the Court’s concerns do not lie with the homeless alone. They acknowledge the interests – statutory and constitutional – that rest with the members of the association that brought the matter to Court:

In responding to the application for leave to appeal, the Kyalami residents said that if there is no other place in the vicinity of Alexandra Township for the flood victims to be given temporary accommodation, they would be willing to consent to this being done on the prison site if they are consulted and if their concerns relating to access to the site from the main road and the sewerage system to be installed are addressed. They also seek greater certainty as to when and where the permanent housing will be provided for the victims.84

The government promises that such housing will be provided. It fails, as the Kyalami Ridge Court notes, to say how and when that will happen, and whether such development will accord with the statutory and constitutional analysis laid out in the Court’s judgment:

The constitutional rights of the flood victims and the corresponding obligations on the government are clearly relevant to any consent that may be required for the development to take place. The government must, however, discharge its constitutional obligations lawfully. If the law requires it to secure such consent it must seek and obtain it, or pass legislation that either exempts it from the provisions of such legislation, or enables it to override its provisions in cases of emergency. It cannot, however, on the basis of its rights as owner of the land and a constitutional obligation to provide access to housing, claim the power to develop its land contrary to legislation that is binding on it.

Whether there are such constraints is a matter which is left open in this judgment and on which I express no opinion. The order to be made cannot anticipate this issue.85

But why not? The Court has acknowledged the amount of time that has passed. The government’s silence is deafening. As many a South African knows, Ms Grootboom died, almost a decade after the judgment (in her favour?), without ever receiving the kind of shelter to which she had thought she was constitutionally entitled. Such regular failures to carry out in full the judgments of the courts in these cases casts something of a pall over the positive outcomes bestowed upon the homeless, and the long-forgotten promises made to other members of the community – such as the Kyalami residents – that their concerns will be taken into account.

In sum: from an experimentalist perspective, Kyalami Ridge disappoints in two important respects. It fails: (a) to bring all the affected parties together in order to reach as optimal an outcome within the law as possible; and (b) to ensure that the government respects the norms articulated by the Court so that all the affected parties – in the present and an easily imagined future – might benefit from the Court’s otherwise thoughtful judgment.86

7. Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province87

This decision provides something of a corrective to its predecessor – Kyalami Ridge. As we saw in Kyalami Ridge, the Court deferred to government officials, left, right and centre, when it came to virtually any determination the government had made regarding urgency,
temporariness of shelter, the building of permanent structures, consultation, the control of
effluents and the willingness of affected members of the two communities in question to
work together in order to better solve the problems with which they were both confronted.
While it can be fairly said that the Kyalami Ridge Court took the plight of the flooding
victims seriously, the same cannot be said of the bona fides of the association contesting the
government’s immediate response or the government officials charged with implementing a
plan: a plan that at the time of the Constitutional Court’s judgment was already substantially
delayed.

a. A Few Participatory Bubbles
Fuel Retailers offers us an opportunity to re-think Kyalami Ridge in three respects. First,
the Court does not defer to the local government’s analysis of the need for a new petrol
station either in terms of environmental impact or in terms of socio-economic development
(shared constitutional interpretation). Second, the Court effectively recalls the parties to the
table (albeit through heads of argument and oral argument) to determine whether the prior
decision complied with extant environmental law and the imperative of economic development
(participatory bubbles). Third, the Court is clearly engaged by the need to vouchsafe a clean
environment in order to secure greater long term economic benefits (flourishing). In short, the
Court takes its responsibilities as a shared interpreter of the basic law and statutes seriously
and is willing to recall the parties affected in order to arrive at a more optimal outcome for
all concerned.

b. Shared Constitutional Interpretation
No other right creates more internal tension than FC s 24. The tripartite alliance of
environmental protection, economic development and local community participation is
fragile indeed. While the three domains may occasionally overlap, they are just as likely to
come into conflict. The Court appreciates that decision makers confronted with development
applications have no easy task, and yet in order to do justice to all concerned, they must
attempt to assess the competing virtues of a plan all the same. As Justice Ncgobo writes:

Unsustainable developments are in themselves detrimental to the environment. … It is … not
enough to focus on the needs of the developer while the needs of the society are neglected. One of
the purposes of the public participation provision of NEMA is to afford the opportunity
to express their views on the desirability of a [development] that will impact on socio-economic
conditions affecting [a local population] … [S]ocio-economic development must be justifiable in
the light of the need to protect the environment. The Constitution and environmental legislation
introduce a new criterion for considering future developments. Pure economic factors are no longer
decisive. The need for development must now be determined by its impact on the environment,
sustainable development and social and economic interests. The duty of the environmental
authorities is to integrate these factors into decision making and make decisions that are informed by
these considerations. This process requires a decision-maker to consider the impact of the proposed
development on the environment and socio-economic conditions. … [Similarly, the developer must]
identify and predict the actual or potential impact on socio-economic conditions and consider ways
of minimizing negative impact while maximizing benefit.
These words bring us back to one of the primary goals of constitutional experimentalism: rolling norms based upon empirical findings. The kind of analysis required of decision makers faced with FC s 24 decisions should, over time, build up a base of knowledge that enables all parties to make more informed evaluations of specific cases and allow courts to better determine how environmental concerns, economic development and community empowerment relate to one another as interlocking principles. The more s 24 cases heard, the better idea we shall have of what FC s 24 means.91

8. Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others92

Thus far, we have re-analyzed cases in terms of shared constitutional interpretation, participatory bubbles, rolling norms and flourishing. At the time that I began writing in 2004, such imaginative reconstructions of the cases were all the Court's decisions afforded us. However, over the last couple of years the Court itself has moved from the standard model of binary conflict to – depending on the case with which it is confronted – a model of judicial review better suited to polycentric conflicts and provisional constitutional adjudication. (In other cases, as I have noted elsewhere,93 it has, moved away from general norm setting, and multiple-stakeholder engagement. As a result, the legal community and the community at large occasionally find themselves in the uncomfortable position of having to imagine the state of the law and what future judgments will hold.)

While some degree of multi-stakeholder participation appears in such housing cases as Kyalami,94 Grootboom95 and Port Elizabeth Occupiers,96 the Court was, by and large, content to accept the facts placed before it. Whether the new polycentric approach actually fits this book's theories about shared constitutional interpretation, participatory bubbles, flattened hierarchies, reflexivity, remedial equilibration and rolling norms model will be interrogated later. Suffice it to say that a Court with a largely new bench has begun to experiment with a new manner of adjudicating cases.97

In Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others, the Court was asked to determine whether the City of Johannesburg had acted constitutionally in attempting to evict residents from derelict – and dangerous – inner-city buildings.98 In some instances, the eviction notice came without any plan to provide comparable housing. In other cases, the eviction notice contemplated the ejection of a building's residents and their forced removal to the city's outskirts.

a. A Participatory Bubble: The Dawn of 'Meaningful Engagement'

The 51 Olivia Road Court's ingenuity at the outset of the hearing distinguishes itself from its many predecessors. Rather than impose a decision on the parties framed by Grootboom-based criteria, the Court ordered the residents and the City of Johannesburg to repair to the negotiating table in order to reach a settlement that would lead to a more optimal outcome for both sides. The parties did. Their settlement then became an order of the Court.

While the judgment arrived with generally well-established justifications for its order, the most fascinating part of the judgment – from the perspective of experimental
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constitutionalism – is that the Court held that, in addition to any other duties FC s 26(2)'s right to access to adequate housing might impose, ‘a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of [its] constitutional obligations’. What does this mean? First, it appears that the courts may not be the right branch of government to determine how some 63,000 persons – living in dangerous conditions – are to be best accommodated when a municipality determines that their current housing constitutes a threat to their lives. Second, having decided that persons who live in dangerous conditions must be removed, the Court also resolved that a municipality must determine where they are to be otherwise accommodated. A right to housing cannot be reconciled with a decision of the state to make people ‘homeless’. Third, in deciding on how to accommodate this endangered class of persons, the city is obliged to engage all of the affected parties. As Yacoob J writes:

Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.

No small task. The Court held, in addition, that the city had an obligation to engage meaningfully all 63,000 evictees in a systemic fashion. In short, a scheme had to be put in place to ensure that each individual or each family was heard and accommodated to the best of the state's capacity. Of course, the obligation placed upon the state did not mean that the occupants could employ obstructionist tactics to delay a move. The Court noted that ‘[e]ngagement is a two-way process’ that ‘will work only if both sides act reasonably and in good faith’.

Consistent with the precepts of experimental constitutionalism, the 51 Olivia Road Court places a premium on pooling information and on reaching accommodations that place all parties in a better position than they might find themselves if the Court were to act as the final arbiter in a zero-sum game. The court-enforced settlement obliged the parties to produce a range of alternatives for housing those in danger, rather than merely allowing the residents to remain endangered by living in derelict buildings or living in less-than-adequate shelter had they been forcibly removed to the outskirts of the city.

b. An Absence of Norms?

Although 51 Olivia Road looks attractive from the perspective of polycentric problem solving, a significant question looms over the judgment. What will the ratification of the judgment mean for future housing judgments or any judgments in which the Court calls
for meaningful engagement (prior to preceding with any hearing should the engagement fail)?

One answer is that the ratification of a settlement lets the Court off the hook for the development of even the most basic norms when eviction orders are accessed against the backdrop of the right to access to adequate housing. After all, if the Court accepts the settlement, then it is not bound to develop the law. It need not force the hand of any given party to the litigation. The result – from one point of view – is that future litigants in similar cases will not know how to go about structuring their arguments regarding evictions. Neither side will know the contours of their obligations prior to entering into negotiations.

A second answer might reflect the legal realist view of adjudication that animates both experimental constitutionalism and South African socio-economic rights jurisprudence. One will come to know what is expected of the state, an occupant, another land-holder or other interested parties as more and more cases come before the Court for review and for settlement. We will learn, one, two, or three cases at a time, exactly what the Court requires from the state in terms of meaningful engagement and the satisfaction of other Grootboom-based criteria.

A third answer exists. Victories in housing cases in South Africa have been notoriously difficult to enforce. Court findings of a breach of FC s 26 have not necessarily resulted in changes on the ground. Why? Two reasons. First, as a rule, violations of FC s 26 only require the state to conceive of a programme likely to realize the right to housing in the short term, mid term and long term. Second, by refusing to retain jurisdiction of most housing cases, the courts have relied on the good faith of the government to discharge its constitutional obligations. Too often, the government has failed to do so. The use of settlements, and court enforced ‘meaningful engagement’ to reach them, may offer the best opportunity for the dispossessed or the homeless to wring immediate benefits from FC s 26.

Meaningful engagement in the case at hand dramatically turned matters around. Upon further inspection, all the parties agreed that the dangerous buildings could be upgraded – to the requisite standards – and that the residents could stave off eviction. What would have likely been a loss-loss for all parties (in cost and result), turned into a win-win when the parties were forced to reapply their minds to the various problems of collective action with which they had been confronted.

9. *Abahlali Basemjondolo Movement SA & Another v Premier of the Province of KwaZulu-Natal & Others*<sup>106</sup>

In *Abahlali Basemjondolo Movement SA & Another v Premier of the Province of KwaZulu-Natal & Others*, Abahlali BaseMjondolo, a radical shack dweller movement, challenged the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act (‘Slums Act’).<sup>107</sup> The Act itself seemed little more than a craven attempt to ‘clean up’ Durban prior to the influx of foreign visitors for the 2010 World Cup.<sup>108</sup>

From the perspective of experimental constitutionalism, the most important challenge to the Slums Act flowed from the Act’s willingness to allow eviction without engagement. The entire bench found that the Act, to pass constitutional muster, had to be read so that engagement was required. Moseneke DCJ wrote:
No evictions should occur until the results of the proper engagement process are known … Proper engagement would include taking into proper consideration the wishes of the people who are to be evicted; whether the areas where they live may be upgraded *in situ*; and whether there will be alternative accommodation. The engagement would also include the manner of eviction and the timeframes for the eviction.\(^{109}\)

Engagement extracts information that might not, as yet, appear in the heads of argument. It requires the various stakeholders concerned – and perhaps not just the original parties, given the Court’s generous approach to standing – to put all their cards on the table. Engagement should make the outcome (the settlement) less contingent on well-drafted heads, voluminous records and courtroom theatrics. What the state and other parties can do – and what the potentially homeless will and will not accept – becomes the measure of a settlement’s merit. The openness of the negotiation and settlement process – as Yacoob J notes – makes engagement more than mere window dressing:

If it appears as a result of the process of engagement, for example, that the property concerned can be upgraded without the eviction of the unlawful occupiers, the municipality cannot institute eviction proceedings. This is because it would not be acting reasonably in the engagement process.\(^{110}\)

The requirement of engagement might explain the difference between the majority and the minority opinion on the validity of s 16 of the Act. Section 16 gave the Member of the Executive Council of the Province power to determine the period within which an owner or person in charge of land or a building occupied by unlawful occupiers must institute proceedings to evict the occupiers under the PIE Act. Where the owner or person in charge failed to comply, the municipality was obliged to institute proceedings to evict the occupiers.

The majority may have ultimately arrived at the conclusion that s 16 of the Act violated FC s 26 of the Constitution because it so loaded any pre-litigation settlement negotiations between the disputants in favour of the state or person responsible for the land by: (a) enabling an owner of a building or land to institute eviction proceedings against unlawful occupiers even in circumstances where the requirements of the PIE Act, which protects unlawful occupiers against arbitrary evictions, are not met by the land owner; and (b) making residents of informal settlements, who are invariably unlawful occupiers, more vulnerable to evictions should an MEC decide to issue a notice under section 16. Given a legal backdrop against which eviction notices can be secured with little difficulty, the state or other landowner had little reason to reach a somewhat more amicable solution with illegal occupiers. The ease of issuance of such orders constituted a blunt cudgel that might cause even the most radical social movement to search for (alternative) cover. By eliminating the possibility of easily obtained arbitrary eviction notices or the promulgation of potentially arbitrary and irrational notices by an MEC, the majority put illegal occupiers – the inevitable, unenviable inhabitants of South African slums – on a slightly more even footing with the state or another landowner. At the very least, meaningful engagement would now have to precede any attempt to secure an eviction notice – thus reversing the spin of a statutory scheme designed to sweep communities away or place them out of sight and out of mind.
10. **Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others**

a. **Participatory Bubbles and Popular Sovereignty**

In August of 2005, the Municipal Demarcation Board took an ostensibly straightforward decision to consolidate the town of Merafong and to place it entirely within the North West Province. Its various parts had previously cut across the borders of the provinces of Gauteng and North West. A single cross-border municipality served by two provincial governments had created administrative confusion, led to the unnecessary replication of responsibilities and, not surprisingly, resulted in the failure to deliver the most basic of basic services.

The citizens of Merafong, however, were less than impressed with this rationalization of resources and made their displeasure known through ongoing protests in the streets. The gravamen of their complaint: provincial services in Gauteng were deemed far superior to those services found in North West. The citizens of Merafong had little interest in moving in with the poorer provincial cousin.

The government could not ignore this clear expression of popular sovereignty and responded accordingly. It moved Merafong back into Gauteng. For a day. It then moved Merafong back into North West.

Merafong exploded. People burned tyres in the streets. The police responded with measured force. The violence resulted in a meeting with the Minister for Provincial and Local Government and a promise of more face to face discussion.

Meaningful engagement could not prevent political chaos. Bills in both Houses of Parliament had been prepared with the cross-border move in mind. At the same time, the Gauteng Provincial Legislature’s (GPL) Local Government Portfolio Committee and the North West legislature held a joint session at which the majority of constituents present elected to remain in Gauteng. In an about face, Gauteng charged its NCOP select committee with an obligation that would allow it to approve the 12th Amendment Bill subject to the requirement that Merafong remain in Gauteng.

Unfortunately, the GPL then received poor legal advice. The GPL was informed that it could neither amend nor propose amendments to a bill in the National Council of Provinces. So rather than query this initial counsel, the GPL reversed course and recommended a final mandate that would support the entire bill. The NCOP passed the 12th Amendment Bill and Merafong was placed on the schedule for a cross-border move to North West on 1 March 2006.

Not surprisingly, the people of Merafong refused to accept the outcome. The streets were, once again, set alight. The insurrection continued up to and through the local elections. On 1 March 2006, a mere 232 members of 29 540 Merafong’s citizenry cast their votes. The resistance to reincorporation continued throughout 2006 and 2007.

At the same time, the Merafong Democratic Forum initiated litigation. This round of MDF-inspired litigation failed to postpone the 2006 elections. However, following the Constitutional Court’s decision in *Matatiele* – in which the Court had found that a provincial legislature had failed to create the proper space for public consultation – the MDF approached the Court for a different form of relief. As Michael Bishop writes:
The main issue … was whether the GPL had fulfilled their duty under s 118(1)(a) of the Constitution to ‘facilitate public involvement in the legislative and other processes of the legislature and its committees’. The Court recognized in *Doctors for Life v Speaker of the National Assembly & Others* that s 118(1)(a) imposed a justiciable obligation on provincial legislatures and that ‘legislative processes’ encompassed determining mandates for votes in the NCOP. If the duty was not fulfilled, then the legislation would be invalid. *Matatiele Municipality & Others v President of the Republic of South Africa & Others* confirmed that this obligation applied not only to ordinary legislation, but also to constitutional amendments. But what is the nature of the obligation imposed on the legislature? Restating s 118(1)(a) in new language, the *Doctors for Life* Court tells us it ‘means taking steps to ensure that the public participate in the legislative process. The legislature must, however, have ‘considerable discretion to determine how best to fulfil their duty’. Nonetheless, the Court would review the specific measures taken to enhance involvement for individual pieces of legislation. The standard that government must meet in fulfilling both parts of the duty is reasonableness.113 Expanding on this theme [of reasonableness], Justice Ngcobo writes: ‘Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament’s conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation’s content, importance and urgency.’114

Ngcobo J held that ‘the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less’.115 Whatever their shortcomings, the GPL, the NCOP and other government entities – including the courts – had allowed the citizens of Merafong just that: a meaningful opportunity to be heard and to have their interests taken into account. That the citizens of Merafong had neither persuaded the state nor the Court to alter the decision to move Merafong back into Gauteng does not count against the open-ended, experimentalist cast of the case. Virtually every form of democratic engagement – participatory, direct and representative – had played some role in the ultimate outcome. Experimentalism means that all the right questions are asked and answered, and that future litigants and stakeholders will have an opportunity to learn from the case decided. To that end, the citizens of Merafong, the MDF and the Constitutional Court all played their roles in advancing our understanding of the Constitution and in contributing to appreciation of how such volatile public conflicts ought to be handled in the future.

b. When Bubbles Run Up Against the Limits of Shared Constitutional Interpretation

Until now, I have spoken as if participatory bubbles and shared constitutional interpretation were two sides – or perhaps the bottom and the top – of experimental constitutionalism. It is, perhaps, important to distinguish between the two once again: (1) shared constitutional interpretation relies upon conflicting constructions that an array of governmental and non-governmental actors place upon a given constitutional norm and the results that such
conflicting constructions generate; (2) participatory bubbles depend upon the creation of space in which a variety of stakeholders in a given constitutional or legal dispute are able to bring as much information to the table as possible so that either the stakeholders themselves or the court or forum obliged to render a judgment can reach the most informed decision possible. Shared constitutional interpretation engages the basic law’s norms at a relatively high level of abstraction and allows contested readings of the law’s meaning to play themselves out over time. Participatory bubbles are, in effect, the experiments themselves. They provide the kind of feedback that enables courts and the other co-ordinate branches to pool information on the kinds of policy strategies and legal regimes that work best over a broad range of individual cases.

The notion, then, of a participatory bubble is to give various stakeholders a say in the outcome of a dispute. Participatory bubbles do not supplant the established roles of the courts, the legislatures or the executives; nor do they displace representative democracy and participatory democracy with popular sovereignty. Whatever mistakes might have been made in Merafong – and there were quite a few – the case should not be viewed as one in which the Court turned a deaf ear to the petitioners.

At the end of this drama, the Merafong Court decided not to give disappointed parties licence to extend the debate over the proper location of Merafong. The people and the government had had their say, and their day, in court. Why then is Merafong different – in terms of a structural interdict or continued court oversight – than previous cases?

The Court was largely unmoved (even if incorrectly so) by the substantive arguments made by the citizens of Merafong. In some sense, nothing remained to be done. From the first word of the potential move, through the rioting in the streets, to the less fraught contentions made in court, the parties had been heard and various solutions to the problem tabled. Merafong was not a case which required greater ventilation.

Not all commentators agree. For Michael Bishop, the system was rigged in a manner that gave Merafong’s denizens a mere semblance of voice, but no meaningful participation in the outcome. Neither the GPL’s misreading of its legislative obligations, nor the Constitutional Court’s endorsement of that reading, truly allowed Merafong’s citizens the opportunity to alter the course of the decision making process. Bishop’s contention undercuts the notion that Merafong can readily be read as part of the Court’s evolution toward greater stakeholder participation.

11.  Bhe v Magistrate, Khayelitsha

In Bhe v Magistrate, Khayelitsha & Others, the Constitutional Court found that the customary law rule of male primogeniture – and several statutory provisions that reinforced the rule – unfairly discriminated against the deceased’s wife and her two female children because the rule and the other impugned provisions prevented the children from inheriting the deceased’s estate. On an initial reading, the Bhe Court’s strategy for reconciling this rule of customary law with the dictates of FC s 9 (equality) and FC s 10 (dignity) of the Bill of Rights struck me as masterful, and the decision a model for finessing the radical disjunction between the
ideals of a western-style constitutional democracy and the traditions and the lived experience of many South Africans.

a. Whose Norms, Whose Flourishing?

The Bhe Court begins with the following bromide. While customary law provides a comprehensive vision of the good for many South African communities, the new-found constitutional respect for traditional practices does not immunize them from constitutional review. The Court locates any ongoing justification of customary law in the provisions of the Final Constitution. The Bhe Court then goes on to characterize the customary law of succession in terms that validate its spirit without necessitating that the Court be beholden to its letter. The customary law of succession is, according to the Court, a set of rules designed to preserve the cohesion and stability of the extended family unit and ultimately the entire community. The heir did not merely succeed to the assets of the deceased; succession was not primarily concerned with the distribution of the estate of the deceased, but with the preservation and perpetuation of the family unit. Property was collectively owned and the family head, who was the nominal owner of the property, administered it for the benefit of the family unit as a whole. The heir stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the family head. He inherited the property of the deceased only in the sense that he assumed control and administration of the property subject to his rights and obligations as head of the family unit. The rules of the customary law of succession were consequently mainly concerned with succession to the position and status of the deceased family head rather than the distribution of his personal assets.

By recasting the justification for customary rules of succession in terms of family and community stability, rather than patriarchy and property, the Court softens its critique of this traditional way of life. It then notes that the conditions of family and community which gave rise to the challenged rules no longer obtain. The Bhe Court writes:

Modern urban communities and families are structured and organised differently and no longer purely along traditional lines. The customary law rules of succession ... determine succession to the deceased’s estate without the accompanying social implications which they traditionally had. Nuclear families have largely replaced traditional extended families. The heir does not necessarily live together with the whole extended family which would include the spouse of the deceased as well as other dependants and descendants. He often simply acquires the estate without assuming, or even being in a position to assume, any of the deceased’s responsibilities. In the changed circumstances, therefore, the succession of the heir to the assets of the deceased does not necessarily correspond in practice with an enforceable responsibility to provide support and maintenance to the family and dependants of the deceased.

Customary law has not, the Bhe Court ruefully observes, evolved to meet the changing needs of the community. It fails African widows because ‘(a) … social conditions frequently do not make living with the heir a realistic or even a tolerable proposition; (b) … the African woman does not have a right of ownership’; and (c) ‘the prerequisite of a good working relationship with the heir for the effectiveness of the widow’s right to maintenance’, as a general matter, no longer exists. Again the Court takes care to note that the fault for this arrested development
lies outside traditional communities. Ruptures within traditional ways of life – caused by apartheid, the hegemony of Western culture and capitalism – have, according to the Court, prevented the law’s evolution. This aside actually sets the stage for delivery of the Bhe Court’s coup de grace: that ‘the official rules of customary law of succession are no longer universally observed’. The trend within traditional communities is toward new norms that ‘sustain the surviving family unit’ without re-inscribing male primogeniture.

By showing that the spirit of succession lies in its commitment to family cohesion, that the traditional family no longer coheres as it once did, and that the ‘distorted’ rules of customary law, as frozen in time by apartheid-era statute and case law, that ‘emphasise … patriarchal features and minimise … communitarian ones’, the Bhe Court closes the gap between constitutional imperative and customary obligation. Had customary law not been fossilised, traditional communities would have noted how male primogeniture entrenched ‘past patterns of disadvantage among a vulnerable group’ and endorsed the Bhe Court’s re-working of customary understandings of the competence ‘to own and administer property’ in a manner that vindicates a woman’s right to dignity under FC s 10.

The decision in Bhe makes manifest the related virtues of reliance on objective characterizations of the subordinate position of women in traditional communities and avoidance of thorny issues of false consciousness. As I have written elsewhere:

It seems trite, but still worth noting, that when faced with physical coercion, the rights of women to freedom and security of the person, to freedom from servitude, to equality and to dignity all trump any and all benefits that might accrue from sustaining traditional ways of life that re-inscribe such abuse. Female genital mutilation and forced labour are obvious candidates for the trash-heap of history. But polygamy and lobola? It is easy – and in most cases quite right – to identify such practices with the continued subordination of women. … The more difficult question is whether such practices can be reconfigured so as to sustain legitimately both intimate familial associations and cultural practices. … With adults, one difficulty is the paternalistic presumption that government can substitute its judgment of what is best for that of its citizenry. Inquiries into non-physical coercion of children and adults are united by considerations of exit. One must take great care, however, when we interfere in associational life that we are not too quick to allow attributions of false consciousness to masquerade as concerns about the inability of children or adults to vote with their feet.

Caution with respect to such attribution does not mean abdication. Where reliable qualitative studies and statistical analyses can show that lobolo-like exchange correlate closely with lower levels of education, higher incidents of domestic violence, lower wages, higher rates of morbidity and lower levels of life expectancy for women, then caution ought to be overcome. That, at least, was my initial response to Bhe. And from the Sen-like development perspective adopted in this work, I’m not entirely convinced that my immediate response was wrong. However, other voices in our constitutional democracy demand to heard.
b. Rolling Norms or Riding Roughshod Over Tradition?

It did not take long for me to find out that my Manhattanite, Northern Suburb, ‘White-tendency, little thingy’ weltanschaunng (as so aptly described by Julius Malema) was dramatically out of step with the beliefs and the lived experiences of many South Africans. In this case, my teachers were my students at the University of Pretoria and the University of the Witwatersrand and my colleagues at the South African Institute for Advanced Constitutional, Public, Human Rights and International Law.

I should not have been surprised. I had, after all, been forewarned by Justice Ngcobo’s weighty caesura in Bhe. It was, however, the vehemence of the response to these decisions, and most especially the reaction of female students who might have been thought opposed to the stipulation of lobolo or other biases in customary law, that caught me short. Justice Ngcobo’s dissent best captures the disjunction between the sentiments of many South Africans still tied to traditional moorings and western-trained academics such as myself. Justice Ngcobo writes:

Ours is not the only country that has a pluralist legal system in the sense of common, statutory and indigenous law. Other African countries that face the same problem have opted not for replacing indigenous law with common law or statutory laws. Instead, they have accepted that indigenous law is part of their laws and have sought to regulate the circumstances where it is applicable. In my view this approach reflects recognition of the constitutional right of those communities that live by and are governed by indigenous law. It is a recognition of our diversity, which is an important feature of our constitutional democracy. The importance of diversity in our country was emphasised by this Court in Christian Education South Africa v Minister of Education, where the Court said: ‘[t]here are a number of other provisions designed to protect the rights of members of communities. They underline the constitutional value of acknowledging diversity and pluralism in our society and give a particular texture to the broadly phrased right to freedom of association contained in s 18. Taken together, they affirm the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the ‘right to be different’. In each case, space has been found for members of communities to depart from a general norm. These provisions collectively and separately acknowledge the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern. It seems to me therefore that the answer lies somewhere other than in the application of the Intestate Succession Act only. It lies in flexibility and willingness to examine the applicability of indigenous law in the concrete setting of social conditions presented by each particular case. It lies in accommodating different systems of law in order to ensure that the most vulnerable are treated fairly. The choice of law mechanism must be informed by the need to: (a) respect the right of communities to observe cultures and customs which they hold dear; (b) preserve indigenous law subject to the Constitution; and (c) protect vulnerable members of the family.’

One need not agree with Ngcobo J’s inclination to allow customary law to develop unfettered in our ‘newish’ constitutional democracy to recognize the coherent line that he adopts on associational and community rights in a radically heterogeneous society and that he speaks for any number of different communities – traditional, religious, linguistic and cultural – in contemporary South Africa. If we are to take flourishing seriously as a foundation for South
Africa’s basic law, then Ngcobo J’s arguments cannot be ignored. Indeed, 18 years into our constitutional democracy, the clarion call of tradition is making itself heard and the practices behind the protests are making their presence felt.

c. How Experimental Constitutionalism Addresses Conflicts between Conservative Flourishing and Revolutionary Flourishing

How, if at all, can Ngcobo J’s conservative breed and Langa DCJ’s revolutionary strain of flourishing – as manifest in the Constitution and our nascent jurisprudence – be squared with one another? As we saw in Chapter 7, we will struggle to reconcile them at the purely conceptual level of constitutional case law. More likely than not, the resolution of these conflicting strains of flourishing will be worked out through the actual lived experience of individuals and communities shaped by both well-entrenched tradition and the pressures of modernity.

Still, something remains to be said of our empirical inquiries into both the physical coercion and the non-physical coercion of children and adults by the practices of traditional, religious and cultural communities that are united by considerations of exit. On my initial reading of Langa DCJ’s judgment in *Bhe*, the Constitutional Court proved itself quite adept at distinguishing circumstances in which neither child nor adult can meaningfully vote with their feet, from those instances in which adults willingly remain members of traditional communities in which their rights and privileges may well be subordinate to the rights and the privileges of other members of the community. The Court appeared able to distinguish the objective conditions of second-class citizenship from the attribution of false consciousness to any individual or group of individuals who remain within their community’s traditional confines. The Court might have been aided by placing an experimentalist twist on how we can accommodate the close bonds Justice Ngcobo rightly associates with traditional communities, while, at the same time, ensuring that individuals and groups within the community possess an opportunity to form revised or alternative associations. My preferred mode of analysis suggests the following five-fold conclusion:


2. However, where, as in *Bhe*, different communities may have different responses to rules of male primogeniture or lobolo or ritual circumcision, and where clear empirical life outcomes can be established, the Constitutional Court must set clear norms about what will and will not be tolerated.

3. The Court – and other political institutions, from Parliament through the CGE, SAHRC and CRLC to CONTRALESA – can also help to establish the contours for meaningful engagement between members of the same traditional community and allow for some settlement that might enable individuals heretofore treated as second-class citizens of the sub-public to remain members of the community. Or, the ‘meaningful engagement’ might enable different constituencies within the same traditional community to conceive of a manner in which the various parties can dissolve the links between them with a minimum of animus.

4. The dissolution of a traditional community is no easy matter. The social capital built up by a community might be its most important asset. Moreover, communities with large
stores of social capital are apt to possess similarly large stores of real capital. Courts or other mediating institutions may be required to determine how an appropriate divorce – and a concomitant dissolution of assets – occurs.

(5) The analysis of cases in the Constitutional Court, as well as our equality courts, suggests how remedial equilibration allows for (a) public sanction of retrogressive practices out of step with generally accepted norms of dignity and equal treatment, (b) remedies that enable second-class members of such communities to exit such communities as necessary and with adequate support to join and to create new sub-publics, and (c) recognition that as outré as the mores of some communities may be, they still supply the meaning that makes so many South African lives worth pursuing (even if others would rather not have them pursued). Change, as I discuss in the Preface, and Chapters 1, 2 and 3 and 4 is an ineradicable part of the human condition. Unfortunately, progress – even for hard-nosed realists like myself – never takes a linear path. We must do, as my father sagely said, the very best that we can with the resources and the capacity for creative solutions available to us. To expect more, of ourselves and others, is hubris.

12. Minister of Home Affairs & Another v Fourie & Another

a. Finessing Flourishing

Fourie engaged the question of whether same-sex couples were constitutionally entitled to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples. The Fourie Court found that granting such status to same-sex couples would in no way attenuate the capacity of heterosexual couples to marry in the form they wished and according to the tenets of their religion. The Court then concluded that the common law and section 30(1) of the Marriage Act were inconsistent with FC s 9(1) and FC s 9(3) and FC s 10 to the extent that they made no provision for same-sex couples to enjoy the status, entitlements and responsibilities that they accord to heterosexual couples.

Of immediate moment is the remedy crafted by a majority of the Court. It has been summarized by the Fourie Court as follows:

- The common law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with the responsibilities it accords to heterosexual couples.
- The omission from section 30(1) of the Marriage Act 25 of 1961 after the words ‘or husband’ of the words ‘or spouse’ is declared to be inconsistent with the Constitution, and the Marriage Act is declared to be invalid to the extent of this inconsistency.
- These declarations of invalidity are suspended for twelve months from the date of this judgement to allow Parliament to correct the defects.
- Should Parliament not correct the defects within this period, section 30(1) of the Marriage Act 25 of 1961 will forthwith be read as including the words ‘or spouse’ after the words ‘or husband’ as they appear in the marriage formula.
From the perspective of the doctrine of shared constitutional interpretation, it might be argued that the Court's refusal to follow the simple proposal found in the papers of the Equality Project – or in Justice O'Regan's partial dissent – to 'read in' the words 'or spouse' after the words 'or husband' in the Marriage Act was correct.\textsuperscript{131} Parliament, if one takes the Court's majority seriously, was invited to craft a remedy of its own device that would ensure that legal unions of same-sex life partners were accorded the same respect by the state as opposite-sex life partners.\textsuperscript{132} Even if one agrees with Justice O'Regan – as I do – that no such invitation was warranted (given the precedents set by the Court on the rights of same-sex couples), the broader, normative 'Coverian' legitimacy afforded by Parliament's Civil Unions Act may have been worth the cost imposed by suspending the order of invalidity for a year while constitutionally compliant legislation was passed.\textsuperscript{133} In short, the Republic of South Africa, and its citizens, were confronted with, and had to come to terms with, the revolutionary understanding of flourishing that informs the Fourie Court's judgment(s).\textsuperscript{134}

\textbf{b. Negotiating between Conservative Flourishing and Revolutionary Flourishing}\textsuperscript{135}

Parliament appears to have had little interest in passing the Civil Union Act. It waited almost a full year (the period allotted by the Court) to come to terms with Fourie's dictates. Parliament's resistance – a relatively clear function of its members' reluctance to recognize gay marriage as a constitutional entitlement – raises again the question of how the conservative breed and revolutionary strain of flourishing manifest in our Constitution can be squared with one another.

The Fourie Court captures much of what is at stake in all matters associational, as well as conservative forms and revolutionary forms of flourishing, when it writes:

A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society. … The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation. Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting. As was said by this Court in \textit{Christian Education}, there are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society (ss 10, 15, s 16, 29, 30 and 31), and give a particular texture to the broadly phrased right to freedom of association contained in s 18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able
to enjoy what has been called the ‘right to be different’. … The strength of the nation envisaged by
the Constitution comes from its capacity to embrace all its members with dignity and respect.136

This portion of the holding signals a significant victory for communities – traditional,
cultural, linguistic and religious – whose mores might not be on all fours with many of the
other rights and values articulated in the Final Constitution.

However, as I have just noted in Chapter 7, the Constitutional Court’s jurisprudence answers
hard questions about the extent to which group identity in our many sub-publics should be
tolerated and offers us useful guidance as to how the state ought to engage the religious,
cultural and linguistic communities that make up the state and how those communities
ought to engage one another. The Fourie Court writes:

[The amici’s] arguments raise important issues concerning the relationship foreshadowed by the
Constitution between the sacred and the secular. They underline the fact that in the open and
democratic society contemplated by the Constitution, although the rights of non-believers and
minority faiths must be fully respected, the religious beliefs held by the great majority of South
Africans must be taken seriously. … For many believers, their relationship with God or [another
transcendental entity] is central to all their activities. It concerns their capacity to relate in an
intensely meaningful fashion to their sense of themselves, their community and their universe. …
[The associations they form] play a large and important part in public life, through schools, hospitals
and poverty relief programmes. … The test, whether majoritarian or minoritarian positions are
involved, must always be whether the measure under scrutiny promotes or retards the achievement
of human dignity, equality and freedom. The hallmark of an open and democratic society is its
capacity to accommodate and manage difference of intensely held world views and lifestyles in a
reasonable and fair manner. The objective of the Constitution is to allow different concepts about
the nature of human existence to inhabit the same public realm, and to do so in a manner that is
not mutually destructive and that at the same time enables government to function in a way that
shows equal concern and respect for all.137

As noted in Chapter 7, the Fourie Court commits itself to five propositions that are
fundamental for our understanding of flourishing: (1) traditional, religious, cultural and
linguistic communities are a critical source of meaning for the majority of South Africans;
(2) traditional, religious, cultural and linguistic communities create institutions that support
the material, intellectual, ethical and spiritual well-being of many South Africans; (3)
religious, cultural and linguistic associations, as part of civil society, play an essential role
in mediating the relationship between the state and its citizens; (4) traditional, religious,
cultural and linguistic associations are entitled to articulate – and make manifest through
action – their ‘intensely held world views’, but they may not do so in a manner that unfairly
discriminates against other members of South African society; (5) since the ‘intensely held
world views’ and practices of various traditional religious, cultural and linguistic associations
invariably excludes other members of South African society from some forms of membership
and diminishes the nature of their participation when they are granted membership, such
exclusion necessarily constitutes a prima facie case of unfair discrimination.

Can the prima facie burden of unfair discrimination be overcome? Should it? If we accept
the Fourie Court’s fifth proposition – which goes to the heart of the matter in conflicts
between egalitarian concerns and associational rights – then South Africans, as members of a socially democratic constitutional state, are obliged to ask a number of other questions about the effects of exclusionary practices.

The easy question is whether communities possess the power to exclude members who initially agree to follow the rules of the community, but then subsequently refuse to do so. Of course they do.

The hard question contains multiple parts. Would South African society as a whole be better off if it eliminated those exclusionary practices that not only excommunicate non-compliant individuals from the community, but prevent other individuals – who begin as outsiders – from gaining entrance into the community? What remedies do we have at the ready, if we are to take the hard question seriously?

The first part of the answer to the hard question turns primarily on access to those goods which individuals require in order to flourish. In 21st-century social democratic states – such as South Africa – there are no hard and fast lines between the public sphere and the private sphere (and the various goods they provide to individuals). The result is that the Final Constitution affords no easy answers about what remains in the private domain and thus subject to some constitutional pre-commitment to non-interference. Instead, the Final Constitution – and super-ordinate legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act – is or should be primarily concerned with questions about individual and group access to the kind of goods that enable us to lead lives worth valuing, as we each come to understand them.

It is easy to conclude that clubs, associations and communities that have been the bastion of white male Christian privilege must open their doors to persons of all colours, all sexes and all religions. But what of the large stores of social capital that have been invested in such institutions, and what of that capital which continues to offer the possibility of significant returns to the original members (and future members)? Almost all meaningful action occurs within the context of such self-perpetuating social networks of various kinds. As I have already contended, the wholesale trashing of institutions that create and maintain large stores of real and figurative capital is a recipe for a very impoverished polity.

The answer to the first part of the hard question thus turns on features of both traditional sub-publics and the broader Republic grounded in our basic law. We must interrogate the extent to which the practices of religious, cultural and linguistic communities are justifiable forms of discrimination that further constitutionally legitimate ends, and, with somewhat greater discernment, assess the extent to which the state and other social actors can make equally legitimate claims on the kinds of goods available in these communal formations that cannot be accessed elsewhere.

The answer to the second part of the hard question arises when, as I argue elsewhere, the state and other social actors cannot secure access to or make legitimate claims upon the kinds of goods made available in these communal formations. At this juncture, a court may, as has been noted above, have to rely upon forms of remedial equilibration in order to square both conservative strains and revolutionary forms of flourishing. In short, the subpublic engaged in the discriminatory behaviour and a Republic that sets its face squarely against
such discrimination may be obliged to ensure ease of exit and to supply the real capital necessary to ensure that otherwise second-class citizens possess the material conditions and the immaterial goods necessary to ‘seek justice elsewhere’.

13. **Shilubana v Nwamitwa**

a. **The Facts, Findings and Holdings in Shilubana**

In 1968 Ms Shilubana’s father, Hosi Fofozza Nwamitwa, died without a male heir. Customary law at the time did not permit a woman to become Hosi. As a result, Ms Shilubana did not succeed him. Instead, Hosi Fofozza’s brother, Richard Nwamitwa, succeeded him. However, some thirty years and a peaceful constitutional revolution later, the traditional authorities of the Valoyi community passed resolutions in 1996 and 1997 that held that Ms Shilubana would succeed Hosi Richard. Her succession was subsequently approved by the provincial government. Hosi Richard died in 2001. Not everyone was pleased to see Ms Shilubana’s ascension to Hosi. Sidwell Nwamitwa, Richard’s son, sought an interdict to prevent Ms Shilubana’s installation. He claimed that he, as Hosi Richard’s eldest son, was entitled to succeed his father. Both the Pretoria High Court and the Supreme Court of Appeal ruled in favour of Mr Nwamitwa.

The Constitutional Court reversed the rulings of both the Pretoria High Court and the Supreme Court of Appeal. The Court held that the High Court and the Supreme Court of Appeal had failed to acknowledge, appropriately, the power of and the manner in which traditional authorities could interpret and alter customary law. The Court placed particular emphasis on s 211(2) of the Final Constitution’s injunction that all courts and state institutions must respect the right of traditional communities to develop their own law. Courts must come to understand the present practice (as well as the past practice) of traditional communities and ratify those developments that remain consistent with constitutional dictates. The *Shilubana* Court articulated the following multi-part test for constitutionally influenced development of traditional norms and practice:

i. ‘Where there is a dispute over the legal position under customary law, a court must consider both the traditions and the present practice of the community.’

ii. ‘If development happens within the community, then the court must strive to recognise and give effect to that development, to the extent consistent with adequately upholding the protection of rights.’

iii. ‘The imperative of section 39(2) must be acted on when necessary, [but] deference should be paid to the development by a customary community of its own laws and customs where … possible.’

iv. ‘Customary law must be permitted to develop, and the enquiry must be rooted in the contemporary practice of the community in question. Section 211(2) of the Constitution requires this. The legal status of customary law norms cannot depend simply on their having been consistently applied in the past, because that is a test which any new development must necessarily fail. Development implies some departure from past practice. A rule that requires absolute consistency with past practice before a court will recognise the existence of a customary norm would therefore prevent the recognition of new developments as customary law. [C]ourts applying laws which communities themselves no longer follow … would stifle
the recognition of the new rules adopted by the communities in response to the changing face of South African society. This result would be contrary to the Constitution and cannot be accepted.  

The Shilubana Court, in applying this test to the instant matter, found that while the succession to the leadership of the Valoyi had operated in the past according to the principle of male primogeniture, the traditional authorities retained the authority to develop customary law. After promulgation of the Interim Constitution and the Final Constitution, the Valoyi authorities altered the traditional law in a manner consistent with the constitutional right to equality. The value of recognising the development by a traditional community of its own law in accordance with the Constitution was not outweighed by the need for legal certainty or the protection of communal rights. The Court found that the immediate change in Valoyi customary law did not create legal uncertainty. As a result, Mr Nwamitwa did not have a vested right to be Hosi. The Court concluded that the traditional authorities had the authority to develop their customary law under the Constitution, to ensure Ms Shilubana’s ascension to Hosi and to conclude that Mr Nwamitwa did not have a right to be declared Hosi.

b. A Nuanced Response to Flourishing when the Analysis is Driven by an Experimentalist Approach

Yes, Shilubana concerns a gender-inflected leadership succession battle in a traditional community. But the one thing that jumps out for experimental constitutionalist is the number and variety of applicants and amici, in addition to the respondent (who is not without support amongst the amici): Tinyiko Lwandhlamuni Philla Nwamitwa Shilubana, First Applicant; Walter Mbizana Mbhalati, Second Applicant; District Control Officer, Third Applicant; The Premier: Limpopo Province, Fourth Applicant; MEC for Local Government and Housing, Limpopo, Fifth Applicant; House for Traditional Leaders, Sixth Applicant; Christina Somisa Nwamitwa, Seventh Applicant; Mathews T N Nwamitwa, Eighth Applicant; Ben Shipalana, Ninth Applicant; Ernest Risaba, Tenth Applicant; Stone Ngobeni, Eleventh Applicant; Commission for Gender Equality, First Amicus Curiae; National Movement of Rural Women, Second Amicus Curiae; The Congress of Traditional Leaders of South Africa, Third Amicus Curiae. No one can claim that the Shilubana Court lacked the benefit of hearing from numerous participants, with varying perspectives, and relatively unique access to information relevant to any final decision taken.

The second revelation is the bottom-up quality of the Court’s analysis. Having established the parameters for constitutional analysis – the right to equality, the right to dignity, the right to language and culture, the right to community practice of religion, culture and language, the power of traditional authorities to develop customary law and the manner in which customary law engages constitutional law – the Court spends the better part of its time tracing the factual and historical narrative behind Ms Shilubana’s rise to Hosi of the Valoyi community. The Court does not deny that the Constitution remains the supreme law and the law by which all other law is measured. However, in reaching its decision in Shilubana, the Court allows for various voices beyond its chambers to shape the constitutional norms at play.
The third pleasant surprise is that the Court’s use of experimentalist tools enables it to chart successfully a path from conservative understandings to revolutionary conceptions of traditional law that stay true to the original moorings of customary norms and practices. I have no doubt that some readers of Shilubana will find its conclusion repugnant to their conception of African customary law. Could it be otherwise when so many voices are heard and when the conception of ascension to Hosi remains contested territory? Yet I have little doubt that in the context of constitutional adjudication, the Shilubana Court’s method of analysis is largely beyond reproach. It takes the commitment to (traditional and revolutionary forms of) flourishing and experimentalist modes of investigation seriously.

c. On Rolling Constitutional Norms: Mind the Gap between the Doctrine Rehearsed and the Doctrine Applied

Shilubana looks, on first blush, to be a textbook example of an experimentalist’s approach to the determination of constitutional norms that cabin customary law. It does not take a top-down approach – say, employing FC s 9(4) equality analysis to assess the validity of Valoi practices past and present. In addition to its direct invitation to CONTRALESA and the National House of Traditional Leaders to participate in the proceedings, the Constitutional Court also allowed the Commission of Gender Equality and the National Rural Women’s Movement to join the matter. It’s difficult to imagine the Court engaging any more stakeholders as it strived to determine the contours of the Valoi’s living law. This exercise enables the Shilubana Court to arrive – without saying as much – at a truism about monarchy and passage of the throne. The Valoi are no different than any other tribe, say the English, when it comes down to the passage of the crown from one generation to another. Just as the British crown was bathed in blood and subject to regular contestation, the Valoi royal tradition, while less gruesome in many respects, has been equally hotly contested. Finally, the careful parsing of the Valoi tradition allows the Shilubana Court to arrive at a conclusion that permits what I have called revolutionary flourishing.

The question that hangs over the final judgment is what work it will do for future courts and communities confronted with comparable conflicts over ascension to the leadership of a traditional community. The Court, rightfully so, looks to steer a careful path between the Scylla of tradition and the Charybdis of revolution. It acknowledges that customary norms develop over time and that they cannot be locked into past practice – especially under a Constitution that requires courts to consider present ‘lived’ practice when determining what the apposite rule is and what the outcome ought to be. Beyond that, the Court says little more. Such silence about what women in traditional, cultural and religious communities can expect from political authorities naturally lead commentators such as Cathi Albertyn to inveigh against ‘the stubborn persistence of patriarchy’ in traditional, cultural and religious communities.142 And well she should: at the same time as she remembers that she is but one voice in a radically heterogeneous, quite conservative, hotly contested social order. South Africa is a densely populated, radically heterogeneous 'we'.
14. **Nyathi v Member of the Executive Council for the Department of Health Gauteng** (‘Nyathi I’)

15. **Minister for Justice and Constitutional Development v Nyathi** (‘Nyathi II’)

a. **Modelling Participatory Democracy and Institutional Comity in the Face of Contempt**

In *Nyathi I*, Mr Nyathi, the applicant, sought confirmation of a declaration that section 3 of the State Liability Act was inconsistent with the Constitution. The impugned portion of section 3 barred the execution, the attachment or any similar process against a state defendant or respondent or against any property of the state for the satisfaction of judgment debts. Mr Nyathi had, by the State’s own admission, been treated negligently at Pretoria Academic Hospital. Mr Nyathi sued the MEC for Health, Gauteng for an amount of R1 496 000 and asked for an interim payment of R317 700 to cover his medical and legal expenses pending the determination of the quantum of the state’s liability. The Pretoria High Court approved this interim payment. Gauteng’s MEC for Health failed to comply with the High Court’s interim order. Mr Nyathi asked the High Court to declare s 3 of the State Liability Act unconstitutional and to force the MEC to execute the interim order. The High Court held that the Act’s blanket ban on execution and attachment unjustifiably limited the right to equality and the right to access to courts and unjustifiably impaired ss 165(5) and 195(1)(f) of the Constitution. After finding s 3 of the State Liability Act unconstitutional, the High Court sought confirmation of the order in the Constitutional Court. The Constitutional Court, subsequent to an urgent hearing, ordered the Gauteng MEC for Health to make good the applicant’s request for interim costs and to demonstrate that it had discharged this debt. After a full hearing, the Court held that s 3 of the Act violated the right to equal protection of the law (in terms of FC s 9(1)), the right to dignity, right of access to courts, and the constitutional principles of judicial authority over the accountability of the administrative arms of the state to the greater South African public. However, in confirming (and extending) the declaration of constitutional invalidity, the *Nyathi I* Court suspended the order for twelve months. It gave Parliament twelve months to promulgate legislation that would create an effective means of enforcement of money judgments against the state. The *Nyathi I* Court censured the state severely for its abject failure to discharge over 200 outstanding judgment debts. The *Nyathi I* Court then placed the state on strict terms (a) to provide it with details of all outstanding judgment debts and (b) to submit a plan to discharge all outstanding debts, with alacrity.

b. **Shared Constitutional Interpretation and a Participatory Bubble**

The Executive undertook its responsibilities with some zeal, if not zest. Several reports from the Director-General and other parties, at the insistence of the Court, ensured that all outstanding debts were paid and that the state had a plan in place to avoid any future dereliction of duty.

The *Nyathi I* Court had, according to some commentators, placed upon Parliament an obligation to pass new legislation. But that reading misconstrues the actual content of the
Nyathi I Court’s judgment. Consistent with Nyathi I, the state could have adopted the position that it did not need new legislation, but preferred instead to adopt the proposition that state property could be as easily attached as private property with respect to the discharge of outstanding debts. Parliament chose not to take that route.

Instead, the Minister for Justice and Constitutional Development approached the Nyathi II Court with a request for an extension of the suspended order of invalidity handed down in Nyathi I. After noting the irony of being asked by the state for an extension for the promulgation of legislation designed to curb the failure of the state to respond with the appropriate degree of institutional comity, let alone alacrity, to court orders, the Nyathi II Court granted the request. It gave Parliament two more years to enact effective legislation.

In the interim, it put in place a set of procedures that would enable judgment creditors to attach moveable state property owned by the responsible state party ‘for the purposes of a sale in execution to satisfy the judgment debt’. The Court also made it clear that it had tired both of waiting for Parliament in the instant matter and of the implicit contempt that various state institutions had generally demonstrated for court orders (including orders of the Constitutional Court itself). The Nyathi II Court did not respond with a diktat. It invited the original parties, the intervener and the amici – Mr Nyathi, the Minister for Justice and Constitutional Development, the Law Society of South Africa, the Legal Resources Centre, Freedom under Law, the Aids Law Project – as well as the Minister of Finance to provide more effective alternatives than the Court’s preferred interim solution. The Court – unless it received more useful procedures – would craft an order that created a tailored attachment and execution procedure against state assets similar to that which it had already articulated.

The Minister for Finance suggested that judgment creditors could approach the national treasury or the provincial treasury for the satisfaction of their judgment debts if the relevant state department failed to discharge its judgment debts. The Minister for Finance then recommended that any amount paid by the treasury in question be set off against the budget allocation of the debtor department for the current or future financial year. Despite eliciting the ire of the amici and the intervening party – who accused various state parties of having violated repeatedly the rule of law in this case and others – the Court received useful advice from all concerned. The Court cobbled together a viable order from the best of the suggestions on offer from the Minister for Finance, Mr Nyathi, the amici and the intervening party. From the perspective of shared constitutional interpretation, it is also worth noting that the new State Liability Act closely tracks the remedy that the Court issued in Nyathi II.

c. **On Shared Constitutional Interpretation and Participatory Bubbles: Mind the Gap between the Doctrine Rehearsed and the Doctrine Applied**

Again, the Court’s solicitation of participation from a broad array of parties looks like a paradigmatic example of shared constitutional interpretation. The Court, on its own steam, sought out the views of the Minister of Finance and made those views a part of the Court’s remedy. The Nyathi II Court also took on board suggestions by the applicant, the intervener and the amici about how best to ensure that state judgment debts are paid and, moreover, discharged with alacrity. In addition, the Court requested that the state provide an account of

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146 The Court also made it clear that it had tired both of waiting for Parliament in the instant matter and of the implicit contempt that various state institutions had generally demonstrated for court orders (including orders of the Constitutional Court itself). The Nyathi II Court did not respond with a diktat. It invited the original parties, the intervener and the amici – Mr Nyathi, the Minister for Justice and Constitutional Development, the Law Society of South Africa, the Legal Resources Centre, Freedom under Law, the Aids Law Project – as well as the Minister of Finance to provide more effective alternatives than the Court’s preferred interim solution. The Court – unless it received more useful procedures – would craft an order that created a tailored attachment and execution procedure against state assets similar to that which it had already articulated.

147 From the perspective of shared constitutional interpretation, it is also worth noting that the new State Liability Act closely tracks the remedy that the Court issued in Nyathi II.
all the outstanding judgment debts on its books and a plan as to how the state would acquit itself of such future arrears.

Could one ask for more? One could look back at the degree of contempt shown for court orders in a broad array of housing cases and easily arrive at the conclusion that we are likely to see continuing contempt by various state parties in this arena. Recent reports by the Auditor-General give us little reason to expect otherwise. Moreover, the failure of Parliament to address the Court’s concerns in Nyathi I places a question mark over the state’s commitment to following the weakest branch’s instructions.148

That said, it would seem churlish to fail to acknowledge the steps the Court has taken to devise optimal solutions to the persistent disdain displayed by the co-ordinate branches for its edicts. As Michael Bishop has shown in his incisive discussion of meaningful engagement, the Court has maintained ongoing supervision in recent housing cases in large part because multiple stakeholder arrangements could overcome information deficits and secure greater normative legitimacy. Political doctrine cases are an altogether different matter and turn more appropriately on a clear conception of the form of democracy that the Constitution requires. While Bishop may disagree with the substantive outcome in such politically charged matters as Merafong, supervisory orders are an inappropriate mechanism for their resolution. As Theunis Roux has made clear, some cases offer the Court the opportunity to establish clear and compulsory principles, while other cases suggest caution, and a case-by-case accretion of binding precedent.149 Such acknowledgement of the Court’s ability to establish general norms at the same time as it takes account of changing circumstances seems very much of a piece – and at peace – with the theory of experimental constitutionalism adumbrated in these pages.

16.  Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others (‘Joe Slovo I’)150

17.  Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others (‘Joe Slovo II’)151

Another one or two housing cases have enabled the Court to further refine the requirements of meaningful engagement and, in so doing, to inch ever closer to what a truly experimentalist court might be expected to do. In Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others (‘Joe Slovo I’), the Court addressed the constitutionality of the state’s controversial N2 Gateway project. The project, as planned, would have moved approximately 20,000 residents in existing informal settlements along the N2 highway to Delft – a community some 15 km away. The residents resisted the removal. The government sought support for the removal through an eviction order.

The Western Cape High Court granted the eviction. Hlophe J held that the government agencies seeking the eviction had complied with the requirements of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (‘PIE’).151 The High Court action succeeded, in large part, because the government claimed that the eviction’s primary purpose was to enable the government to upgrade and redevelop the settlement (a) for the current occupants, and (b) in terms of the government’s housing policy. The residents appealed directly to the Constitutional Court.
In many respects, the *Joe Slovo I* Court’s various members allowed the facts to speak eloquently for themselves. The Court found that many of the residents of the Joe Slovo settlement had lived there for as long as 15 years, that the City of Cape Town had never previously tried to remove them or intimated that they might be removed, and that the City had, in terms of its constitutional and legislative obligations, provided substantial ongoing permanent services (streets, electricity, and basic municipal services). The City’s own actions reflected its recognition of the settlement’s relative permanence and the obligation to treat its denizens in a humane manner until more adequate housing (and services) could be provided.153

While the *Joe Slovo I* Court – in a five opinion judgment – reversed the High Court’s ruling, its members split on the question as to whether the state had ‘meaningfully engaged’ the community regarding the removal. The different takes on this new requirement are reflected in the opinions of Ngcobo J, O’Regan J and Sachs J. According to Ngcobo J:

The requirement of engagement flows from the need to treat residents with respect and care for their dignity. … It enables the government to understand the needs and concerns of individual households so that, where possible, it can take steps to meet their concerns. … . The goal of meaningful engagement is to find a mutually acceptable solution to the difficult issues confronting the government and the residents in the quest to provide adequate housing. This can only be achieved if all sides approach the process in good faith and with a willingness to listen and, where possible, to accommodate one another. … Ultimately, the decision lies with the government. The decision must, however, be informed by the concerns raised by the residents during the process of engagement.154

In sum, while the ultimate decision may lie with the government, and be upheld if reasonable, a court undertaking reasonableness analysis must assess whether the process of engagement treated potential evictees with dignity and whether the government made sincere efforts to meet the concerns of the persons to be removed. By tying the process of engagement to the value of dignity, Ngcobo J places a weighty thumb – the Court’s dignity jurisprudence – on the scales of justice in a manner that favours persons opposing eviction.

Justice O’Regan’s approach to meaningful engagement is somewhat more formal or process driven, and may appear to leave applicants with little more than the right to be heard:

Th[e] purpose [of engagement] is to give affected parties an opportunity to be heard on a decision before it is finally made. Fair process improves the quality of decisions and establishes their legitimacy. However, it should not result in unnecessary and prolix requirements that may strangle government action.155

In fairness to Justice O’Regan, by requiring a hearing, or multiple hearings, the Court creates a richer administrative record that forces the state to take cognizance of the needs of the potentially dispossessed and gives the Court a fuller record against which to assess the reasonableness of the government’s plans for post-eviction housing.

However, the opinion that best connects (a) shared constitutional interpretation between the courts and other branches of government in terms of setting norms, and (b) the participatory...
bubbles that enable enhanced participation and greater extraction of information relevant for optimal decision making is penned by Justice Sachs:

This case compels us to deal in a realistic and principled way with what it means to be a South African living in a new constitutional democracy. It concerns the responsibilities of government to secure the ample benefits of citizenship promised for all by the Constitution. It expands the concept of citizenship beyond traditional notions of electoral rights and claims for diplomatic protection, to include the full substantive benefits and entitlements envisaged by the Constitution for all the people who live in the country and to whom it belongs. At the same time it focuses on the reciprocal duty of citizens to be active, participatory and responsible and to make their own individual and collective contributions towards the realisation of the benefits and entitlements they claim for themselves, not to speak of the well-being of the community as a whole. When all is said and done, and the process has run its course, the authorities and the families will still be connected in on-going constitutional relationships. It is to everyone’s advantage that they be encouraged to get beyond the present impasse and work together once more.156

Sachs J captures, better than virtually anyone, anywhere else in the Court’s entire oeuvre, the ongoing reciprocal relationship between citizens and a truly robust democratic state. Sachs J emphasizes how, after the participatory bubble of a particular conflict has burst, and the various stakeholders have returned to their regular lives, the residue of active citizenship and responsive government remains. First, the parties have not only learned more about the particular problems that forced the immediate litigation and engagement. The state has learned something more about the communities that they govern. The stakeholders have learned more about the political and social processes that govern their lives. Second, in keeping with the commitment to experimentalism, governments and citizens throughout the country should take away lessons on housing and evictions that can be profitably applied to future conflicts. So, although Sachs J refers to a two-way street of engagement, the better metaphor, as I noted in Chapter 6, is a piazza. In the piazza, members of the public, governors and governed alike, meet again and again, share new information and reflect upon the community’s collective wisdom – as occasionally active citizens and politicians in a republic do.157

Despite their difference in views, notice how – in their order – the various members of the Joe Slovo Court push the opposing parties into the piazza. Although the Court granted the eviction, it did so subject to a range of conditions that required continued interaction between the residents and the government. The Court framed the conditions for meaningful engagement over relocation between the parties as follows:

- Ascertainment of the names, details and relevant personal circumstances of those who are to be affected by each relocation;
- The exact time, manner and conditions under which the relocation of each affected household will be conducted;
- The precise temporary residential accommodation units to be allocated to those persons to be relocated;
- The need for transport to be provided to those to be relocated;
- The need for transport of the possessions of those to be relocated;
• The provision of transport facilities to the affected residents from the temporary residential accommodation units to amenities, including schools, health facilities and places of work;
• The prospect in due course of the allocation of permanent housing to those relocated to temporary residential accommodation units, including information regarding their current position on the housing waiting list, and the provision of assistance to those relocated with the completion of application forms for housing subsidies; and
• A report back to Court on the implementation of the order and on the allocation of permanent housing opportunities to those persons affected by this order by 1 December 2009.158

As Michael Bishop and Jason Brickhill note, while the meaningful engagement component of the order appears procedural in nature, the Court’s order as to engagement has a clearly substantive aim: to minimise the prospect of homelessness or other hardship for the individuals being evicted, relocated and, eventually, permanently housed by building in safeguards to ensure that individuals do not fall through programmatic cracks. The order develops the importance already assigned to engagement as an element of the s 26 right to housing.159

The eviction order is made contingent upon two conditions: (a) meaningful engagement with respect to the relocation; (2) court-determined standards for any temporary accommodation prior to permanent re-settlement. A failure to meet either condition would result in a withdrawal of the order of eviction. Appropriate pressure is placed upon the state to create a scheme – à la 51 Olivia Road – to accommodate individuals and families. The individuals and families concerned have a reciprocal obligation to participate in the structures designed to address the problem with which they are confronted. The order then compels the parties to agree to a timetable and any outstanding issues that might block the settlement. Although an eviction order dangles over the heads of the applicants, no removal could take place until ‘alternative’ accommodation that met the ‘specific requirements’ of the Court’s order had been arranged. The respondents were, in addition, required to go over the details of the relocation and to provide assistance with any move. But the move was not necessarily a foregone conclusion for the Joe Slovo residents. The respondents were further ‘directed to allocate 70% of the “Breaking New Ground” houses to be built at the site of Joe Slovo to the current and former residents of Joe Slovo who apply for and qualify for this housing’.160 Thus the Joe Slovo I Court ensured that a significant cohort of the current residents would benefit from the planned permanent housing to be built on the site. To ensure that meaningful engagement resulted in meaningful action, the Court retained supervision over the order and required the parties to report back to the Court within a year regarding progress made and compliance with the Court’s dictates. In short, any order of eviction (a) had to guarantee appropriate provision for the safe, dignified and humane relocation of the settlement’s residents, and (b) had to promise that the settlement’s residents must be allocated a significant proportion of the new houses to be built on the site of the current Joe Slovo settlement, and (c) that the preceding two processes had to occur in terms of meaningful engagement between the
The process of meaningful engagement did not result in a meaningful agreement between all the parties concerned. After one deadline passed, another was requested. During these discussions, the MEC for Housing suggested that the relocation order might be prohibitively expensive and that an upgrade to the existing settlement would make eviction unnecessary. For the next half year, negotiations between the parties turned on the possibility of an in situ upgrade. Indeed, a joint steering committee was created to work out the technical features of the government’s proposal. The eviction order originally sought by the government and granted by the Court apparently no longer lay on the table.

In *Joe Slovo II*, the Court requested that both the residents and the MEC lodge affidavits that stated that the eviction order was no longer necessary. So they did. The *Joe Slovo II* Court noted that it possessed the power to vary orders as necessary, and where justice and equity so required. But it added the following qualifier:

There may be some force in the argument that there is no reason in logic or policy why an order that is made because it is just and equitable to make it should not be susceptible to rescission when justice and equity require that course. Indeed, it seems illogical for this Court to have the power to vary an order issued on the basis that it was just and equitable when changing circumstances require, but not to have the power to discharge an order when the dictates of justice and equity require. Common sense tells us, and we must emphasise, that there is a fundamental difference between the variation of an order and its rescission. That difference requires that orders of this Court ought not to be discharged lightly. In our view, something more than a change in circumstances pointing to a different justice and equity conclusion is required.162

The order in *Joe Slovo II* reads:

(a) There have been no adequate steps by the government to carry out the supervised eviction order made by this Court. The order has for all intents and purposes been left in abeyance.
(b) There is no intention to proceed with the supervised eviction order as granted.
(c) The order cannot be executed absent agreement between the parties or a complex amendment to the order.
(d) The order relates to thousands of people.
(e) The circumstances that motivated this Court to grant the supervised eviction order have ceased to exist.
(f) There is no reason why the threat of eviction, in all the circumstances, should continue to disturb the applicants.163

*Joe Slovo I* and *II* demonstrate, collectively, virtually all the virtues of experimental constitutionalism and the potential power of court-supervised polyarchy.

a. Shared Constitutional Interpretation

In the true spirit of shared interpretation, the Constitutional Court first handed down a detailed order that created a framework within which the parties could meaningfully engage the constitutional and statutory rights in play as well as reach a concrete outcome with which all the parties would be satisfied. Surprisingly, the grant of power to the denizens of the
settlement and the MEC to work out an accord resulted in an outcome that the *Joe Slovo I* Court did not anticipate – a rejection of the framework. In keeping with dictates of an experimentalist regime, the Court noted that while a discharge of an order is not a matter to be taken lightly, should the parties to a matter arrive at a conclusion that serves the ends of justice better, then the Court should rescind its original order. Rather than forcing the parties to accept a solution – and a reading of the Act and the Constitution – that the other spheres of government and the citizenry affected deemed suboptimal, the Court acknowledged that the parties might, ultimately, have a better, birds-eye view of what worked best.

One must take note of the disaggregation between interpretation and remedy. Nothing in *Joe Slovo II* suggests that the Constitutional Court had reconsidered its reading of PIE or FC s 26 of the Constitution. What became clear, after a year, was that Court’s anticipated remedy – forced engagement on the condition of humane relocation – had led the parties to reconsider their original positions. Given the flexible nature of meaningful engagement, however, it is reasonable to conclude that the Court, other spheres of government and similarly situated communities will, in the future, come to consider their constitutional and statutory positions differently in light of the different outcomes in *Joe Slovo I* and in *Joe Slovo II*.

**b. Participatory Bubbles**

*Joe Slovo I* and *Joe Slovo II* possess all the hallmarks of functional participatory bubbles. First, they were not limited to the initial parties to the litigation. Other interested stakeholders – amici et al – participated. The aim, again, was two-fold: greater elicitation of information; greater normative legitimacy of any decision ultimately taken. Second, the other salient feature of these participatory bubbles is that they did not remain within the domain of the courts. The parties to *Joe Slovo I* and *Joe Slovo II* ultimately arrived at a mutually beneficial agreement provoked, but not determined, by the Court. Third, participatory bubbles lose their cohesion – and the pressure to produce better than zero-sum outcomes – if courts fail to articulate the norms within which a preferred solution is meant to occur and refuse to maintain some degree of oversight over the deliberative process. In *Joe Slovo I* and *Joe Slovo II*, the parties could only reach an agreement because (a) the Court placed them under fairly strict, procedural cum substantive requirements, and (b) the Court required and responded to regular reports from the parties after the initial order was put in place. Ultimately, the Court’s decision to discharge its original order is consistent with a legal system that is both forward and lateral looking.

**c. Chastened Deliberation and Destablization Rights**

The destabilization rights in *Joe Slovo I* and *Joe Slovo II* were shaped by the Court’s initial order. While the order was only partially implemented – in terms of the report process – the rest of the order placed the state and the inhabitants of the settlement on relatively equal footing. The requirement of engagement (with conditions attached) forced the state back to the table.
Moreover, the Court’s order possessed sufficient substance that only fairly generous terms for relocation would satisfy the terms for eviction. The Court’s order shook up the status quo.

It seems clear – from the history of both *Joe Slovo I* and *Joe Slovo II* – that deliberation did not drive the resolution. Action did. Were deliberation the primary driver, one would have expected pre-litigation engagement to provide an optimal response. Instead, the power of government to secure an eviction order in the High Court was countered by the Constitutional Court’s substantive meaningful engagement requirements. The two remedies, in tandem, eviction on the one hand, appropriate alternative accommodation on the other, forced the two parties to knock heads and come up with a solution in which both came out better off. Less an ideal speech situation than a squeeze play.

d. Reflexivity and Flattened Hierarchies

Both *Joe Slovo I* and *II* began as rather top-down command and control operations. In the first instance, the state sought evictions in order to realize its vision of an optimal housing scheme. The courts followed suit: through the grant of an eviction order and other rigid riders. Once the eviction orders were tied to strict terms of meaningful engagement and humane alternative accommodation, the hierarchy of state and citizenry was partially flattened if not entirely levelled.

Reflexivity appears in a number of related forms. For example, although the state secured an unencumbered eviction order in the High Court, the *Joe Slovo I* Court, the settlement dwellers and the amici forced the state to reconsider its original position. The Court, fascinatingly enough, was then pressed by the state and the settlement dwellers to reconsider its own original position in *Joe Slovo I*. In *Joe Slovo II*, the Court found itself in a rather unprecedented self of circumstances: having handed down a fairly restrictive meaningful engagement order (designed to push the parties to a particular outcome), only to have to discharge the order when the parties arrived at a more optimal solution. Parties in future eviction and housing cases have much to learn from the forward- and lateral-looking manner in which *Joe Slovo II* was resolved.

e. A Court that Aggressively Learns

At the time of writing, the Constitutional Court continues to experiment with shared constitutional interpretation and the use of participatory bubbles with respect to its housing jurisprudence. The Constitutional Court has extended its housing jurisprudence beyond meaningful engagement to ‘linkage’. Linkage recognizes, on the basis of past learning, that (1) meaningful engagement, (2) alternative accommodation, and (3) eviction, cannot be treated as discrete pieces of South Africa’s housing puzzle. No eviction order can be granted without a municipality (and/or a private landowner) first ensuring that proper alternative accommodation has been arranged prior to the eviction and, as necessary, before the relocation accommodation has been put in place.165
18. **Head of Department, Mpuamalanga Department of Education & Another v Hoërskool Ermelo & Another**\(^{166}\)

*Hoërskool Ermelo* seems me to be one of the perfect places with which to begin to wind up this analysis of recent case law as viewed through the prism of experimentalism and flourishing. *Ermelo*, for that two-fold purpose, serves as the terminus point for a decentralized 15-year national experiment conducted by numerous stakeholders (the national government, the provincial governments, school governing bodies, principals, parents and learners) with respect to the question of whether South Africa and the Constitution are committed to single-medium schools that rebuff learners on the ostensible basis of cultural and linguistic autonomy. As we have seen in Chapter 6, the answer is ‘No!’ At the same time, the Constitutional Court and the national government, with its first additional language policies, have initiated a related if belated enquiries into the potential virtues of multilingualism as the basis for a society of truly equal citizens. With respect to individual flourishing, this new experiment hypothesizes that most learners are best served by not ‘reading the market’ and opting for English tuition alone. Instead, the new hypothesis could suggest that our learners will likely flourish in an educational environment that provides access both to mother-tongue instruction and what many parents believe to be the language of life-time opportunity.

*a*. **Procedural Issues and Substantive Issues**

As discussed at length in Chapter 6, *Hoërskool Ermelo* raised two discrete sets of issues. Did the Head of Department (HoD) of the Mpuamalanga Department of Education follow the correct procedures in addressing the language policy and the admissions criteria adopted by the School Governing Body of Hoërskool Ermelo? The Constitutional Court found – as is often the case in education cases – that the correct procedure had not been followed. Did the HoD possess the power, under s 22(1) of the South African Schools Act, to withdraw a function of the SGB if he had good reason to believe that such powers were not reasonably exercised? Yes. It did not follow, however, that the withdrawal of an SGB power could occur in the absence of due process. As a consequence, the HoD’s decision to alter the language policy of Hoërskool Ermelo – while substantively sound – was reversed because of procedural irregularities. The *Hoërskool Ermelo* Court did, however, invite the HoD to report back to the Court on the language needs of learners in the Ermelo school district before the 2010 school year. The invitation – found in the Court’s remedy – indicated the Court’s interest in ensuring that all learners received instruction in their language of choice where it was both reasonably practicable to do so and other critical desiderata of fairness and historical redress had been met. The Hoërskool Ermelo SGB was likewise invited to offer new proposals on its language policy in light of the Court’s finding that the current policy of the undersubscribed single-medium school was manifestly unconstitutional. It is to the meaning of this second finding that I now turn.
b. Flourishing and Shared Constitutional Interpretation

As previously noted in Chapter 6, the most litigated line of education cases (thus far) has turned on the ability of single-medium schools to rebuff students on ‘cultural’ and ‘linguistic’ grounds. In virtually every case, black learners had requested admission to single-medium, Afrikaans-speaking public schools and asked that they receive instruction in English. In virtually every case, the refusal of admission on ‘cultural’ and ‘linguistic’ grounds looked to be a place holder for exclusion on ‘racial’ grounds.

After a decade of experimentation with single-medium public schools and parallel- or dual-medium public schools, South African case law, education statutes, sector specific regulations and education department directives support the following three-fold proposition: (1) the Constitution clearly bars the refusal of admission on the basis of race; (2) linguistic and associational interests may occasionally trump equity concerns where there is no sign of overt discrimination and where learners who wish to receive instruction in another language, say English, Zulu or Sepedi, have meaningful access to (say, Sepedi-speaking, Zulu-speaking or English-speaking) schools that provide a roughly equal and generally adequate education as compared to the schools from which the students have been turned away; and (3) learners have no constitutional right to single-medium public schools under FC s 29(2).

The Constitutional Court’s decision in *Höërskool Ermelo* put that three-fold proposition beyond dispute.167 Deputy Chief Justice Moseneke’s opinion makes transparent the Court’s lack of patience with the school’s intransigence with respect to language policy – and its refusal of admission of black students who wish to be taught in English:

The case arises in the context of continuing deep inequality in our educational system, a painful legacy of our apartheid history. The school system in Ermelo illustrates the disparities sharply. The learners-per-class ratios in Ermelo reveal startling disparities which point to a vast difference in resources and of the quality of education. … And therefore, an unequal access to education entrenches historical inequity since it perpetuates socio-economic disadvantage. … [W]hite public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. … On the other hand, formerly black public schools have been, and by and largely remain, scantily resourced. … That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education. … Of course, vital parts of the ‘patrimony of the whole’ are indigenous languages which, but for the provisions of s 6 of the Constitution, languished in obscurity and underdevelopment with the result that, at high-school level, none of these languages have acquired their legitimate roles as effective media of instruction and vehicles for expressing cultural identity. … And that perhaps is the collateral irony of this case. Learners whose mother tongue is not English, but rather one of our indigenous languages, together with their parents, have made a choice to be taught in a language other than their mother tongue. This occurs even though it is now well settled that, especially in the early years of formal teaching, mother-tongue instruction is the foremost and the most effective medium of imparting education. … However, I need say no more about this irony because the matter does not arise for adjudication. For purposes of this case, the crucial provision is s 29(2) of the Constitution. … The provision is made up of two distinct but mutually reinforcing parts. The first part places an obvious premium on receiving education in a public school in a language of choice. That right, however,
internally modified because the choice is available only when it is ‘reasonably practicable’. When it is reasonably practicable to receive tuition in a language of one’s choice will depend on all the relevant circumstances of each particular case. These would include the availability of and accessibility to public schools, their enrolment levels, the medium of instruction of the school that its governing body has adopted, the language choices that learners and their parents make, and the curriculum options offered. In short, the reasonableness standard built into s 29(2)(a) imposes a context-sensitive understanding of each claim for education in a language of choice. … The second part of s 29(2) of the Constitution protects the right to be taught in the language of one’s choice. It is an injunction on the State to consider all reasonable educational alternatives which are not limited to, but include, single-medium institutions. In resorting to an option, such as a single or parallel or dual medium of instruction, the State must take into account what is fair, feasible and satisfies the need to remedy the results of past racially discriminatory laws and practices.\textsuperscript{168}

However, as noted in Chapter 6, the Deputy Chief Justice does not pin the possibility of learner flourishing solely upon their ability to secure instruction in English. In a remarkable aside, the Deputy Chief Justice questions whether the majority of South African learners are well-served by choosing English as their primary language of instruction. He contends that they would be better served by pursuing dual-medium instruction that embraces their African mother tongue.

Again: this ‘collateral irony’, as the Deputy Chief Justice puts it, is not meant to be ironic at all. The Deputy Chief Justice recognizes the possibility of a second lost generation of learners – not through the imposition of a language of instruction, but through an understandable misapprehension amongst many parents regarding the language instruction that will serve their children best. In reading ‘the market’, a significant percentage of parents have concluded that the flourishing of their children hinges on a mastery of English from the very entry of learners into school. The Deputy Chief Justice calls that reading into question. As I previously noted, in policy circles a consensus is building around the conclusion that the de facto default position of English as the primary language of instruction from primary school onwards has not served South African learners well. But the Deputy Chief Justice’s remark appeals to the two different conceptions of flourishing identified earlier – the traditional and the revolutionary. The Deputy Chief Justice is clearly concerned that the majority of young South Africans are, because of new form of hegemony (cultural, as opposed to political), losing touch with who they are and the communities from which they (can) draw meaning. He is also rightly alarmed by illiteracy and innumeracy rates that place South Africa 45th out of 45 developing countries and where only one out of three learners who begin grade one actually graduate from grade 12 with a high school diploma.\textsuperscript{169}

The causes of such woeful results cannot be traced to a single source. The Deputy Chief Justice is quite aware that students and teachers alike are ill served by a system that makes the already arduous task of teaching and learning that much more difficult. No revolutionary form of flourishing – where new vistas open up to learners once they have mastered a complex array of symbolic tools – can occur under conditions where the language used to convey these tools remains largely impenetrable.

A third, largely unstated ground for Moseneke DCJ’s remarks exist. He takes subtle aim at first-language English speakers. Just as Jonathan Jansen has criticized first-language Afrikaans-speaking communities for reinforcing their isolation and leaving their children ill
equipped to live a multi-lingual society,¹⁷⁰ so too must the Deputy Chief Justice be read as
calling the lassitude and commitment of white English speakers into question. Some seventy
years ago, T J Haarhoff, wrote:

There is increasing ignorance of the second language; ignorance brings a feeling of inferiority, and
that in turn brings aggressive assertion that it is a good thing to be unilingual and that strength
lies in isolationism. Let us save our children from isolationism. The adult, with all the worries of
a busy life and the handicap of an unfavourable environment, finds it difficult to acquire a new
language and to break down group barriers; to a child it is "child's play". The world is moving away
from the isolationist principle. … Fullness of life, educationally or spiritually, is not comparable
with the barbed-wire fences of racial politics. With the sun of a new world rising over the grandeur
of our limitless veld, the darkness of estranging barriers will yield; it will yield before the creative
inspiration of giving ourselves to South Africa – ourselves undivided to her undivided.¹⁷¹

The above words, written at a very different time, in vastly different context, contain a
contemporary resonance. Haarhoff and Malherbe can be read as maintaining that genuine
reconciliation, dignity and equal citizenship can only be achieved in multilingual,
heterogeneous societies when groups learn the language of the other groups with whom they
share political sovereignty. (That Haarhoff and Malherbe understood reconciliation, race and
the 'other' solely in terms of the English the Afrikaaner give their words a bitterly ironic bite.)

Seventy years later, the idea that understanding the 'other' through language retains its force
with respect to the as yet unfulfilled promise of national reconciliation and genuinely equal
citizenship. Only the players and the petitioners have changed. Most black South Africans have
done their share of heavy lifting when it comes to overcoming problems associated with race,
language and understanding the 'other'. The same cannot be said for most white South Africans.

However, now that black South Africans control the political levers of power, and possess
increased economic and social clout, this barrier to mutual understanding and equal concern
and respect is under challenge. Over the past several years, the state and the Constitutional
Court have turned their attention to public-school language policy. Although their respective
legal and policy aims differ somewhat in scope and target, their underlying motivations
remain much the same.

Both the Court and the government wish to ensure that the nine official African languages
are treated with same degree of respect accorded English and Afrikaans in our public schools.
Fair enough. It's taken long enough.

For sound pedagogical reasons, they want to ensure that mother-tongue instruction and
dual-medium tuition is offered from initial entry into our primary schools. At the same time,
all parties are aware that the state's purse, the availability of appropriately trained teachers and
the adequacy of existing textbooks across all eleven languages currently place cognizable and
constitutionally recognized limits on our capacity to deliver immediately upon this promise.

Despite how *Ermelo* and the 2012 First Additional Language Policy Statement may
read, both the State and our highest court clearly want School Governing Bodies to take
responsibility for the determination and the execution of language policy. Most SGBs have.

The bottom line is that if all citizens are to enjoy the full benefits afforded us by our
Constitution, then we need to secure for all learners an education that provides for that
possibility. By limiting instruction to English and Afrikaans, many learners are denied these basic entitlements. Second-class linguistic skills invariably re-entrench second-class status.

The state and the Constitutional Court understand that our radically heterogeneous society will never coalesce into a single nation until we are able to speak rationally and respectfully to one another. The new policies allow us to look inward and protect our particular community’s linguistic heritage, while demanding that we also look outward toward the broader South African landscape and come to appreciate that learning another language is essential if we are ever to truly understand one another and build a ‘rainbow nation’ truly deserving of the appellation.

Thus, as I noted earlier, as one experiment in education seems to have reached its denouement (the end of the autonomy of single-medium public schools), both the Court and the State propose a new experiment: multilingualism as a mechanism for both the transmission of knowledge to learners and the connection of learners to the communities from whence they come and to communities with whom they must inevitably engage. The inward looking and outward looking facets of Ermelo and the First Additional Language policy offer the possibility of flourishing in both its conservative strain and its revolutionary form.


Ermelo might have been a great place to end our analysis of the case law had Juma Musjid Primary School not come along. Juma Musjid Primary School tests – and expands – our notions of flourishing, shared constitutional interpretation and participatory bubbles in ways no other Constitutional Court judgment has to date.

The constitutional matter arose out of a dispute between the Juma Musjid Trust (Trust), the owner of the private property, the Member of the Executive Council for Education for KwaZulu-Natal (MEC), the School Governing Body (SGB) for Juma Musjid Primary School and the learners and parents at the school. The trust, a private entity, had for some time leased the land to the government. The government had, in turn, used the property for maintaining a primary school. The dispute arose when the Trust and the MEC of Education for KwaZulu-Natal could not conclude an agreement under the South African Schools Act regarding continued tenancy by the province and the school. The Trust then secured an eviction order in the High Court. The Supreme Court of Appeal upheld the order.

Unlike the courts below, the Constitutional Court was not so ready to allow private interests to trump public interests. In addition, the polycentric nature of the conflict – trust, school, SGB, teachers, parents and learners – made any possibility of a simple binary resolution impossible. So, instead of hearing the merits of the matter immediately, and because the new school year was relatively close at hand (April 2010), the Court issued a provisional order that directed the MEC to engage meaningfully with the Trustees and the SGB in an effort to resolve the dispute and permit the continued operation of the school. More importantly for my analysis, the Court framed the discussions to be had by all the concerned parties within the following normative rubric:
• The Trustees had a negative obligation in terms of FC s 8 (direct horizontal application) and a constitutional duty in terms of FC s 29(1) not to infringe the right of the learners to access to a basic education.

• Given that obligation, the trustees had acted reasonably in approaching the High Court for an eviction order – however its reasonable behaviour did not constitute sufficient reason for the High Court to grant the eviction order; the High Court had failed to consider properly the best interests of the learners and their right to a basic education.

• The MEC had a primarily positive obligation to provide access to schools with respect to the learners’ right to a basic education, and had thus far failed to discharge that duty.

• If meaningful engagement between the parties – subject to this framework – failed, the MEC was obliged to take steps to secure alternative placements for the learners. In addition, the MEC was required to file a report setting out, among other things, the steps that she had taken to ensure the learners’ right to a basic education had been secured.

The Constitutional Court then asked the parties to reach a resolution in light of the above gloss placed upon the constitutional and common-law rights and obligations of the parties. The parties could not meet the Court’s desiderata. As of 25 November 2010, the parties, having failed to reach an accommodation, reported back to the Court as to the steps that had been taken to discharge their various obligations. The Court first noted that the closure of the school had become inevitable. However, it then observed that the MEC’s report was insufficient to the assigned task of ensuring adequate placement for the learners in 2011. It requested a second report. Upon receipt of the second report, the Court reached the following conclusions: (1) the learners’ rights under FC s 29(1) had, finally, been satisfied, given that alternative arrangements for the placement of the children for the 2011 school year had been made; (2) given the alternative accommodation, the Court then granted the eviction order requested by the Trust and ordered the eviction to take place at the end of the school year – 11 December 2010; and (3) with the institutional comity that shared constitutional interpretation requires firmly in mind, the Court expressed its displeasure with MEC’s conduct in the matter and ordered the MEC to pay the (substantial) costs of the litigation in the High Court, Supreme Court of Appeal and the Constitutional Court.175

a. Flourishing

The Court made the connection between education and flourishing, and the material means required for flourishing, in the following manner:

The significance of education, in particular basic education for individual and societal development in our democratic dispensation in the light of the legacy of apartheid, cannot be overlooked. The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners. … [B]asic education is an important socio-economic right directed, among other things, at promoting and developing a child’s personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child’s
lifetime learning and work opportunities. To this end, access to school — an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution — is a necessary condition for the achievement of this right.\(^ {176}\)

However, it’s fair to say that one of the most compelling features of the judgment is the Court’s recognition that a variety of public and private actors have obligations — positive and negative — regarding the basic education of learners at primary and secondary public schools (through to the age of 15). Of course, the Court’s path-breaking finding is that the a private party — the Trust — had a clear obligation in terms of FC s 29(1) not to impair the access of learners to public schools. As a result, the eviction order granted by the High Court and upheld by the Supreme Court of Appeal had to be supplanted with an order that ensured that learners at the school had continued access to the school until alternative arrangements for their education could be put in place. But other parties, with different interests, also had their feet held to the fire. No party more so than the MEC. Her department had not only ignored a request by the Trust to transform the public school back into an independent Islamic school, but had repeatedly failed to pay its bills for use of the land and acted in bad faith in negotiations over an increased tariff that would allow the public school to continue operating in its current form — an Islamic-inflected public primary school. What of the SGB? Surely the role of community-managed school boards is to ensure that nine years of legal wrangling do not place the education of learners (usually their children) in jeopardy. Ultimately, belatedly, and under pressure from the Constitutional Court, the responsible parties were obliged to give students adequate time to finish the school year (the Trust) and to organize alternative schooling for 2011 (the MEC). The big takeaway is that we all — to some degree — have negative obligations and positive obligations to ensure that all learners have access to one of the primary material goods or capabilities that makes a life worth valuing possible — a basic education.

**b. Shared Constitutional Interpretation and Participatory Bubbles**

This case offers one of the best possible examples of how shared constitutional interpretation and participatory bubbles are meant to function — even when the parties to the polycentric process refuse to play nicely with one another. The Court created a framework, grounded in various constitutional norms (FC ss 8, 28 and 29), that allowed the various parties to creatively resolve the problem before them: ensuring continued access to a basic education. It did not prescribe the outcome. Given the circumstances, the school could have remained as it was (with proper payment to the Trust), become an independent school (as the Trust had previously requested) or wrapped up its affairs and found appropriate new placement for its learners (as turned out to be the case).

From the perspective of shared constitutional interpretation, all the parties, from the highest court in the land, to a provincial DoE, to an SGB, to a private trust, to individual learners, to the two amici (the Centre for Child Law and the Socio-Economic Rights Institute) had a voice in determining the best possible outcome under the circumstances. When the parties failed to move with alacrity, the Court pushed harder and ultimately secured a desirable outcome. While this participatory bubble may have burst, the lessons to be learned are forward and
lateral looking. So long as various parties remain within the existing flexible framework, new options may present themselves. Aside from the Court’s guarantee to learners, *Juma Musjid* does not prescribe how access to basic education under such complex circumstances is to be secured. What we do see is the *Juma Musjid* Court inviting all interested parties to come up with novel solutions (remember *Miranda*), while using its muscle to ensure that a baseline or core of the right (to basic education) is protected (again: remember *Miranda*).

20.  *Khumalo v Holomisa*  
As compared with *Ermelo, Juma Musjid* or *Joe Slovo I* and *Joe Slovo II*, *Khumalo v Holomisa* might appear to be an odd place to end our assessment of the fruitfulness of experimentalism and flourishing. It most assuredly is not.

a. **Facts and the Holding of Khumalo v Holomisa**

Bantu Holomisa, the leader of the United Democratic Movement, sued the *Sunday World* over an article that alleged that Mr Holomisa was involved with a gang of bank robbers and was therefore under police investigation. In the High Court, the *Sunday World* averred, by way of exception, that because the contents of the article ‘were matters in the public interest’ and that the respondent had failed ‘to allege in his particulars of claim that the article was false’, Mr Holomisa had failed to satisfy the requirements for a cause of action in defamation. The High Court dismissed the applicant’s exception. The High Court did so on the grounds that it was bound by the Supreme Court of Appeal’s decision in *National Media Ltd v Bogoshi*.

Given that there could be no appeal to the Supreme Court of Appeal in terms of a dismissal of an exception, the applicants had no choice but to seek leave to appeal to the Constitutional Court. To succeed, the applicants had to show that the common-law rules of defamation as they stood post-*Bogoshi* violated the Final Constitution. The applicants relied primarily on FC s 16. In the alternative, the applicants sought relief in terms of FC s 39(2). Either way, asserted the applicants, the role of the mass media in an open and democratic society vindicated their position that the current law of defamation had to be altered. The Constitutional Court rejected the applicant’s claims. While noting the value of a robust exchange of ideas in any democracy, the Court found that the Final Constitution’s commitment to human dignity – and thus to self-worth and reputation – was of greater import under the circumstances. The *Khumalo* Court held that the defence of reasonableness developed in *Bogoshi*, rather than a requirement that the plaintiffs prove an allegedly defamatory statement false, better struck the desired balance between these competing interests.

Changes in the law of defamation hold limited interest for an exercise designed to tease out the benefits of experimentalism and flourishing for our jurisprudence. It is the *Khumalo* Court’s break with a traditional mode of Bill of Rights adjudication – the state action doctrine – that warrants our attention. By exploding the cramped binary opposition of state and subject found in most constitutional democracies, the *Khumalo* Court’s reassessment of the vexed question of whether the common law of defamation was subject to the direct application of the substantive provisions of the Bill of Rights held out the promise that all citizen-subjects are responsible for the material enhancement of all other citizen-subjects.
and that holding private parties accountable for violations of constitutional rights would, in many cases, require a host of state and non-state actors to apply their minds in creative and instructive ways to polycentric social problems.

Recall, however, that the Khumalo Court had not only to break with constitutional traditions in Canada, Germany and the United States, but with its own initial pronouncement on the subject in Du Plessis v De Klerk. Justice Kentridge, writing for a majority of the Court in Du Plessis, had rejected direct horizontal applications of the substantive provisions of the Bill of Rights because the 'judiciary' was neither mentioned nor ostensibly bound by the Bill of Rights in terms of the Interim Constitution s 7(1) and that the binding of 'all law' in IC s 7(2) ostensibly referred solely to actions of the 'legislative and executive'. Together IC s 7(1) and IC s 7(2) were read to exclude emanations of law from the judiciary (in particular, rules of common law) and disputes between private persons (since no 'state actor' was allegedly present) from the direct application of the substantive provisions of the Bill of Rights. (Let's forget the sturm und drang surrounding the merits of the majority's many arguments in favour of a traditional, vertical reading of the reach of a Bill of Rights. In short, the traditional position maintains constitutions ostensibly concern themselves with power relations between the state and its citizens.180 That claim is patently false.)

So: Du Plessis effectively foreclosed debate on the direct application of the substantive provisions of the Interim Constitution's Bill of Rights to rules of common law governing private disputes. The drafters of the Final Constitution, in the interim, had reconsidered the Interim Constitution's provisional language on application.

In Khumalo, the Constitutional Court accepted the Final Constitution's invitation to broaden its conception of the law and the relationships to which the substantive provisions of the Bill of Rights apply directly. The application provisions of the Bill of Rights now read as follows:

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

8 (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.

8 (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court
(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

Unlike the Interim Constitution, the Final Constitution's Bill of Rights points unequivocally toward a much broader conception of direct application: FC s 8(1) states that the Bill applies to 'all law' and binds 'the judiciary'; FC s 8(2) states that the provisions of the Bill will bind natural and juristic persons where appropriate.

The Khumalo Court read these provisions in a rather idiosyncratic manner. The Khumalo Court held that, contrary to the applicants' contention, and the plain meaning of the text,
FC s 8(1) did not subject the law that governed disputes between private parties to the direct application of the substantive provisions of the Bill of Rights. It held instead that FC s 8(2) determined the conditions under which direct application of the substantive provisions of the Bill of Rights to disputes between private parties would occur. Under FC s 8(2), the substantive provisions of the Bill of Rights apply directly to disputes between private parties where a specific provision is interpreted by a court to bind the private party or non-state actor against whom the right is asserted. In the instant case, the *Khumalo* Court found that FC s 16 bound the private party relying upon the existing common-law rules of defamation. The signal difference between *Du Plessis* and *Khumalo* is that the *Khumalo* Court reads FC s 8(2) to mean that some of the specific provisions of the Bill of Rights will apply directly to some disputes between private parties some of the time.\(^{181}\) The *Khumalo* Court quite consciously crosses over the public–private divide. The text of the Final Constitution left it little choice.

Let’s forget the sturm und drang surrounding the merits of the Court’s textually mandated reversal of course.\(^{182}\) Post-*Khumalo*, the South African Constitution must be understood to recognize that the basic law concerns itself with more than traditional public power relations between the state and its citizens, and directly engages more complex issues regarding the exercise of private power or quite often polycentric ‘private–private–public’ disputes between a wide array of citizens, juristic persons, other denizens of South Africa, and the state.

**b. Slip Sliding Away?**

For almost seven years, the Constitutional Court neither confirmed *Khumalo* nor employed FC s 8(2). Where had the commitment to horizontal application gone? As it turns outs, the Court simply preferred to conduct its analysis under the interpretation provision of the Bill of Rights, FC s 39. FC s 39 (2) reads as follows: ‘When interpreting any legislation and when developing the common law and customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’ About the reach of FC s 39(2), the Constitutional Court, in *Carmichele*, wrote as follows:

> It needs to be stressed that the obligation of Courts to develop the common law in the context of the s 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in s 39(2) read with s 173 that where the common law as it stands is deficient in promoting the s 39(2) objectives, the Courts are under a general obligation to develop it appropriately. We say a ‘general obligation’ because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under s 39(2).\(^{183}\)

As to what the FC s 39(2) inquiry requires of any tribunal, the *Carmichele* Court wrote:

> [T]here are two stages to the inquiry a court is obliged to undertake … The first stage is to consider whether the existing common law, having regard to the s 39(2) objectives, requires development in accordance with these objectives. This inquiry requires a reconsideration of the common law in the light of s 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the s 39(2) objectives.\(^{184}\)
Note the word ‘objectives’. The amorphous nature of these ‘objectives’ has led, on more than one occasion, to thinly reasoned judgments. Moreover this preferred approach can, on occasion, fail to take constitutional rights – as opposed to common law rights – as seriously as they should. The *Thebus* Court’s gloss on FC s 39(2) obligation ‘to develop the common-law in the context of the s 39(2) objectives’ is even more perplexing. It turned out to be the thin edge of the wedge. Justice Moseneke, for the *Thebus* Court, writes:

It seems to me that the need to develop the common law under s 39(2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the ‘objective normative value system’ found in the Constitution.

Fulfilling FC s 39(2) objectives is not about direct challenges to laws that conflict with specific provisions of the Bill of Rights. That is why we have the various provisions of FC s 8. This gloss of the *Thebus* Court on FC s 39(2) offends the ‘no surplusage’ canon of constitutional interpretation (as articulated by O’Regan J) by making parts (if not the entirety) of FC s 8 redundant. The approach of the *Thebus* Court does not merely suffer from a lack of analytic precision. The over-determination of the textual bases for changing the common law contradicts the Constitutional Court’s own distinctions between (1) direct application and indirect application, and (2) those remedies that flow from findings of constitutional invalidity and those remedies that flow from a re-formulation or a re-interpretation of the law in light of the spirit, purport and objects of the Bill of Rights. If the Constitutional Court’s judgments in *National Coalition for Gay and Lesbian Equality v Minister of Justice* or *Khumalo* tell us anything, it is that FC ss 8(1) and s 8(2) engage rules of common law directly, and that remedies for any violation of a specific provision take place in terms of FC ss 172(a) and 172(b) or 8(3). The Constitutional Court in *Amod* addressed directly the distinction between changes to the common law via FC ss 8(2) and (3) and changes to the common law via FC s 39(2). The *Amod* Court writes:

Section 8(2) makes the Bill of Rights [directly] binding on natural and juristic persons … Section 8(3) requires Courts in giving effect to s 8(2) to ‘apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right …’ The development of a coherent system of law may call for the development of the common law under … s 39(2) of the 1996 Constitution to be done in a manner consistent with the way in which the law will be developed under s 8(2) and (3) of the 1996 Constitution … When a constitutional matter is one which turns on the direct application of the Constitution … considerations of costs and time may make it desirable that the appeal be brought directly to this Court. But when the constitutional matter involves the development of the common law, the position is different. The Supreme Court of Appeal has jurisdiction to develop the common law in all matters including constitutional matters. Because of the breadth of its jurisdiction and its expertise in the common law, its views as to whether the common law should or should not be developed in a ‘constitutional matter’ are of particular importance.

The *Amod* Court recognizes that the unitary system of law contemplated by the Final Constitution ‘may’ require both the development of the law as a result of FC s 39(2)’s indirect
application of the Bill of Rights as well as the development of the law that flows from the
direct application of the Bill of Rights. It is difficult to make any sense of this observation
unless FC s 8 analysis and FC s 39(2) analysis are different in kind.189

Extra-curial remarks made by Deputy Chief Justice Moseneke in 2009 reflected the by-
then obvious proposition that FC s 39(2) constituted the preferred mechanism for engagement
of disputes between parties governed by the common law – irrespective of whether a specific
substantive provision of the Bill of Rights could be directly applied. What he wrote in
support of this proposition was truly disconcerting:

In Khumalo v Holomisa, which was decided under the new Constitution, the Court refused the
invitation to overrule Du Plessis v De Klerk. It nonetheless decided that the right to freedom of
expression is of direct horizontal application, even when the invasion of the right could have been
occasioned by a person other than the state or one of its organs.190

The Final Constitution expanded expressly the direct application, in terms of FC s 8, of the
substantive provisions of the Bill of Rights to cover disputes between private parties governed
by common law. A unanimous Constitutional Court in Khumalo, on law and facts identical
in all meaningful ways to the law and facts at issue in Du Plessis, held, unequivocally, that
s 8 of the Final Constitution does what s 7 of the Interim Constitution did not. In terms of
ss 8(2) and 8(3), rules of common law governing disputes between private parties are subject
to the direct application of the specific substantive provisions of the Bill of Rights (where
appropriate).

Several questions arise. Obvious answers follow.

(1) Can the silence of the Court about the status of Du Plessis be read to mean that the central
holding of Khumalo did not overturn the central holding of Du Plessis? No.

(2) Can Du Plessis still be good law when the constitutional provisions upon which it was grounded
no longer exist, and have been completely supplanted by new provisions in the altered? No.

(3) Does not FC s 8(2) expressly reject the claim in Du Plessis that the Bill of Rights does not apply
directly to disputes between private parties governed by common law? Yes.

(4) Didn’t a unanimous Constitutional Court in Khumalo expressly recognize that the substantive
provisions of the Bill of Rights of the Final Constitution apply to private disputes, where
appropriate, through ss 8(2) and 8(3)? Yes.

(5) Is it still correct, as a matter of law, to say that Du Plessis was not overturned by Khumalo read
with the text of the Final Constitution? No.

(6) Should we be satisfied with the Deputy Chief Justice’s contention that the Constitutional
Court’s approach circa 2009/2010 to the development of the common law remains the same as
it did under the Interim Constitution? No.

The Deputy Chief Justice’s remarks are that much more disconcerting given that the
Technical Committee charged with drafting the Bill of Rights of the Final Constitution
expressly intended for FC ss 8(1) and 8(2) to capture all matters involving direct application
of a substantive provision of the Bill of Rights (including, specifically, the direct application
of substantive provisions to disputes between private parties governed by the common law).
FC s 39 was intended to be exactly what it says it is – a guide to interpretation of all law in
light of the spirit, purport and objects of the Bill of Rights.191
c. Back in Black: The Promise of 8(2) for Flourishing and Experimentalism

As it turns out, Du Plessis vs De Klerk is dead: as official doctrine anyway. In Governing Body of the Juma Musjid Primary School & Others v Ahmed Asruff Essay N.O. & Others, the Constitutional Court confirmed the holding in Khumalo, and held that one private party in a dispute with another private party governed by common law — a trust seeking to evict learners from a public school so that it might use the property more profitably — was subject to the formal terms of the Bill of Rights through FC s 8(2) — and could not deny learners access to a basic education in terms of FC s 29(1) (the right to a basic education) and FC s 28 (Children’s Rights) of the Bill of Rights. While the judgment expressly confirms the holding in Khumalo v Holomisa, it takes care to limit the duty of the private trust: while it may not negatively impair the learner’s right to a basic education, it is under no apparent positive duty to provide the means for that education. The positive obligation is borne by the state.

Juma Musjid holds out two distinct promises. First, by refusing to grant the Trust an eviction order that negatively impaired a learner’s right to a basic education at a public school, the Court holds private parties materially responsible for the material conditions necessary for natural persons to flourish. The Court writes: ‘basic education is … directed, among other things, at promoting and developing a child’s personality, talents and mental and physical abilities to his or her fullest potential.’ Second, by expanding the range of a right’s obligations to embrace private parties who might negatively interfere with the exercise of right, at the same time as it holds the state accountable for the discharge of a positive obligation, the Court in Juma Musjid forced the various parties — the Trust, the MEC, the SGB and the parents — to engage one another in a manner that ensured that they would arrive at a solution in which virtually all the parties’ rights were honoured and their duties discharged. The Trust — by honouring the FC s 29(1) rights of learners — ultimately secured its FC s 25 rights to property. The MEC — by finding new schools for its learners — discharged its statutory and constitutional obligations to its learners. The learners — by holding both the Trust, the MEC and the SGB accountable — were able to maintain their right of access to a basic education during 2010 and ensure that appropriate schools were found for them in 2011. The Court’s use of FC s 8(2) allowed it to craft a meaningful engagement order that compelled the parties to come up with an optimal resolution to a conflict that had dated back almost a decade. The experimentalist cast of the Court’s handling of the matter enabled the parties to arrive at optimal means to ensure that rights were protected at the same time as the resolution had the reflexive effect of telling other schools, MECs, SGBs and private property owners what they might legitimately expect the content of FC ss 25, 28, and 29 to be in future matters. So while some jurists and commentators might be inclined to view operational sections such as FC s 8 or FC s 39 as no more than guidelines as to how a court should think about rights and the development of the basic law, the Juma Musjid Court demonstrates that horizontal application still has teeth and can be used to promote the development and the capabilities of rights bearers at the same time as it compels various parties confronted with a seemingly intractable problem to come up with a creative solution.
Endnotes

1 See F Michelman ‘On the Uses of Interpretive Charity: Some Notes on Application, Avoidance, Equality and Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa’ (2008) 1 Constitutional Court Review 1, 3 (‘The aim is to learn. It is aggressively to learn what there is to be learnt from puzzles … interlocutors pose to us, by assuming there is method in their madness and doing our best to ferret that out, using everything else we know or can guess (in part from their likeness and kinship to us) about where they are coming from.’)


3 See A Sen Development as Freedom (1999); A Sen The Idea of Justice (2009) (In both works, Sens argues – pace Rawls – that we have no reason to assume that a lexical ordering or a priority of goods, norms or principles will apply across all individuals, publics, societies or states.) See also C Taylor 'The Diversity of Goods' in C Taylor Philosophical Papers II: Philosophy and the Human Sciences (1985).


6 See S Woolman & D Davis ‘The Last Laugh: Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and the Final Constitutions’ (1996) 12 South African Journal on Human Rights 361 (Contends that the Final Constitution tolerates reasonably significant differences in conceptions of the good (within the broad but substantive parameters of 'the good' reflected in the basic law) and commits the state to providing the material means for making these competing visions possible.)

7 See JS Mill On Liberty (1863)(Experiments in living enable individuals to discover lives that provide for a better fit – in large part by seeing the results of 'experiments in living' undertaken by others.)


9 See S Woolman & H Botha ‘Limitations’ in S Woolman & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, OS, July 2006) Chapter 34 (Limitations analysis gives the Court an opportunity to place its gloss on a constitutional right or norm while simultaneously inviting a co-ordinate branch of government to provide an alternative reading of the right.)

10 See C Sunstein Infotopia (2007)(On the biases present in deliberation that inevitably limit what we can expect of deliberative democracy.)

11 See R Thaler & C Sunstein Nudge: Improving Decisions about Health, Wealth and Happiness (2008) (Argues that social policy experiments can elicit information that will allow decision makers to create policies or structures that will 'nudge' individuals and groups into making better decisions); R Post & R Seigel ‘Roe Rage: Democratic Constitutionalism and Backlash’ (2007) 42 Harvard Civil Rights–Civil Liberties Law Review 375 (Contend that rights conflicts have the capacity to animate an otherwise passive citizenry, and in so doing promote more informed engagement regarding important issues.) Perhaps Post and Seigel are on to something. However, as Tony Judt notes, most contemporary western democracies witness plunging appearances at the polls over time. 'On Intellectuals and Democracy' (2012) 58 The New York Review of Books 7. Recent findings report that those persons inclined to discuss matters are less likely to be politically active. The former tend toward tolerance – and need not win. More intolerant citizens see the battle in terms of high stakes, and can be moved to vote in higher percentages by campaigns that employ demagogy and rely on lies both big and small.
Of course, as I have pointed out repeatedly – in this text and elsewhere – in many areas of law and social life, we do not want the state or other actors to experiment. Flourishing, and freedom, as Walzer notes above, often means embracing fully who we already are. Moreover, in constitutional orders with a justiciable Bill of Rights, an inevitable and desirable commitment to private ordering that allows other publics, and the individuals within them, the space and the ability to carry on living as they wish. Experimentalism is consistent with this commitment to flourishing and largely concerns itself with solving problems within the broader framework of the basic law, subordinate bodies of law and legal disputes. Of course, matters will invariably arise in which the commitment to experimentalism and flourishingknock heads – but only to the extent that some social actors will prefer to maintain the status quo and others will attempt to use the basic law to leverage change. Experimentalism seeks to ratchet down those conflicts by allowing the parties ultimately affected to work our solutions for themselves. Joe Slovo I and II, and Shilubana, as discussed below, offer opportunities to understand our evolving constitutional discourse in terms of both the overcoming of informational deficits in polycentric disputes and the normative legitimacy that resolution of those disputes secure.


See B Ackermann We the People (1991).


J Dugard ‘Court of First Instance? Towards a Pro-Poor Jurisdiction for the South African Constitutional Court’ (2006) 22 South African Journal on Human Rights 261 (Argues that the South African Constitutional Court has not functioned as an institutional voice for the poor because its jurisdictional requirements make access difficult if not impossible for indigent plaintiffs pressing fundamental rights claims – and suggests that this difficulty could be remedied if the Court made that greater use of its power to grant direct access.)


See, eg, R Thaler & S Sunstein Nudge (supra).


Prince v President, Cape Law Society and Others 2002 (2) SA 794 (CC), 2001 (2) BCLR 133 (CC).

One might argue that Pillay reflects a shift that takes difference more seriously. MEC for Education: KwaZulu-Natal & Others v Pillay [2007] ZACC 21, 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC).

See the discussion of the facts and the law at issue in Prince above in Chapter 1.

S Dersso The Need for Constitutional Accommodation of Ethno-Cultural Diversity in the Post-Colonial African State (2008) 24 South African Journal on Human Rights 505 (Addresses post-colonial nation building and constitutional discourse in Africa and draws on South African institutions and practices in sketching out an alternative constitutional framework that facilitates the accommodation of the interests and identity of members of various groups in the process of national integration.)
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28 See C Mbazira ‘From Ambivalence to Certainty: Norms and Principles for the Structural Interdict in Socio-Economic Rights Litigation in South Africa’ (2008) 24 South African Journal on Human Rights 1 (Offers justifications for the use of interdicts because they can elicit information from experts, interested parties not before the court, reports on progress from government officials and further constructive engagement between the parties.)

29 As the Court itself has come to appreciate, the interaction between rights interpretation, limitations analysis and remedies ought to be principled, but fluid. For example, the Prince Court could/should have found the state’s limitation unjustifiable for principled reasons, but then employed a structural interdict or an order for meaningful engagement that enabled the parties to arrive at a workable solution. Once the Court approaches matters thus, it frees itself of the dual burden of an arid, deferential separation of powers doctrine or grand theorizing about the meaning and the ambit of a given constitutional norm – say, freedom of religion. A more imaginative experimentalist take on remedies possesses the added benefit of extracting information from all interested stakeholders that might just place the Court’s ultimate decision on firmer footing.


31 S v Jordan (Sex Workers Education and Advocacy Task Force and others as Amici Curiae) 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC).

32 See ss 20(1)(aA) of the Sexual Offences Act 23 of 1957.

33 Jordan (supra) at para 16–17.


35 This critique of Jordan cannot be read as an implicit denial of women’s agency. While we must recognise that material and legal conditions exist that impair the ability of women to shape their preferred way of being in the world, and that such obstacles to agency ought to be removed, we should be leery of the argument that to live life within the transgressive frame of a brothel makes a woman’s life undignified or demonstrates a lack of agency. See Woolman ‘Dignity’ (supra) at § 36.5.


38 For more on the state’s obligations under ss 7(2), see Glenister v President of the Republic of South Africa & Others 2011 (3) SA 347 (CC); Democratic Alliance v President of the Republic of South Africa & Others 2012 (1) SA 417 (SCA).


40 See M Dorf & C Sabel Drug ‘Drug Treatment Courts and Emergent Experimental Government’ (1999) 55 Vanderbilt Law Review 831, 852 (‘Variations in nomenclature and precise details of their operations aside, treatment courts … share the same basic pattern. … In the treatment court, the plaintiff pleads guilty or otherwise accepts responsibility for a charged offense and accepts placement in a court mandated program of drug treatment … The judge and court personnel closely monitor
the defendant’s performance in the program and the program’s capacity to serve the mandated client. If progress in the treatment regime is unsatisfactory, courts offering various programs may require the offender to choose another, more intensive one. Upon successful completion of the treatment program the conviction is typically expunged. The drug court, however, will cease directing defendants to programs that show signs of incompetence and increase referrals to others that show greater promise. … In changing our conception of addiction and how treatment can respond to it, drug courts will likely reshape the background ideas that crucially influence what we regard as criminal behaviour and how we respond to it.

41 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) (‘Grootboom’).
44 For more on Rudolph I and Rudolph II, see City of Cape Town v Rudolph & Others 2004 (5) SA 39 (C), 2003 (11) BCLR 1236 (C), (2003) 3 All SA 517, 547 (C) (‘Rudolph I’); City of Cape Town v Rudolph & Others (unreported decision of the Cape High Court, 5 December 2005) (‘Rudolph II’).
45 See City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another [2011] ZACC 33, 2012 (2) SA 104 (CC), 2012 (2) BCLR 150 (CC) (On adequate shelter, a minimal minimum core and other recent housing cases, see Chapter 6.)
47 National Department of Housing Breaking New Ground (2011) (Department revisits its policies to deliver adequate housing in light of the criticism of the Grootboom Court and the evidence that the initial conception of Reconstruction and Development Programme housing had failed to take into account a variety of related needs of new home-owners – to be near places of employment, decent schools, hospitals and environments with access to adequate water, food and electricity.)
49 See JD Mujuzi ‘Don’t Send Them to Prison Because They Can’t Rehabilitate Them! The South African Judiciary Doubts the Executive’s Ability to Rehabilitate Offenders: A Note on S v Shilubane 2008 (1) SACC 295 (T) (2008) 24 South African Journal on Human Rights 330. The national government’s decision in 2011 to intervene with respect to the political and administrative functions of the province of Limpopo suggests that the Constitutional Court and any other court must be sensitive to the actual capacity of a municipality or a province to respond meaningfully to an order of engagement or a structural injunction. The repeated failures of the Eastern Cape with respect to the payment of social security grants has been met with calumny and contempt by the High Court and the Supreme Court of Appeal. See M Swart ‘Social Security’ in S Woolman & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, OS, March 2011) Chapter 54C. Failed provinces, or ineffective Chapter 9 Institutions, hold out little promise of making good on a bona fide commitment to experimental governance. They fail both as participants in an extended problem-solving exercise and as comparators for other state and social actors looking laterally for guidance as to ‘best practices’ in the discharge of constitutional and statutory obligations.
50 Minister of Health & Others v Treatment Action Campaign & Others (No 2) 2002 (5) SA 721 (CC) (‘TAC’).

53 TAC (supra) at para 135.

54 See C Sprague & S Woolman ‘Moral Luck: Exploiting South Africa’s Policy Environment to Produce A Sustainable National Antiretroviral Treatment Programme’ (2006) 22 South African Journal on Human Rights 337 (State’s best hope for discharging the duties imposed by the Constitution in terms of FC s 27 is a primarily non-juridical intervention: success is more likely to occur through the implementation of a socio-industrial policy that leverages existing industrial capacity and voluntary licences in a manner that generates price reductions and offers an uninterrupted sustainable local supply of ARVs.)


56 According to Courtenay Sprague, these numbers must be used, and viewed, with caution (email correspondence with Courtenay Sprague, 27 February 2008). For the source of these numbers, see F Hassan et al AIDS Law Project Monitoring Unit, Joint Civil Society Monitoring Forum’ (September 2006), available at http://www.alp.org.za/modules.php?op=modload&name=News&file=article&sid=318.


Even if I don’t offer a particularly full account of flourishing or capabilities, it seems clear that if health is impaired, then ‘most other human capabilities will remain out of reach’. Sprague (supra) at 6. Ruger, who argues that the state’s obligation to improve health ‘rests on the ethical principle of human flourishing – or human capability’, contends that: ‘Policies that deny antiretroviral drugs to patients with HIV/AIDS, as happens in sub-Saharan Africa and other parts of the world, are morally troubling not only because they constitute subminimal healthcare, reduce individuals’ opportunity for employment and require cosmopolitan duty … The moral concern is the reduced capability for physical and mental functioning or even for being alive. Deprivations in the capability to function rob individuals of the freedom to be what they want to be.’ JP Ruger ‘Ethics and Governance of Global Health Inequalities’ (2006) 60 Journal of Epidemiological and Community Health 998, 999.


See TAC (supra) at paras 112–113 (‘What this brief survey makes clear is that in none of the jurisdictions surveyed is there any suggestion that the granting of injunctive relief breaches the separation of powers. The various courts adopt different attitudes to when such remedies should be granted, but all accept that within the separation of powers they have the power to make use of such remedies particularly when the state’s obligations are not performed diligently and without delay. South African courts have a wide range of powers at their disposal to ensure that the Constitution is upheld. These include mandatory and structural interdicts. How they should exercise those powers depends on the circumstances of each particular case. Here due regard must be paid to the roles of the legislature and the executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, courts may and if need be must use their wide powers to make orders that affect policy as well as legislation.’)

Ibid at para 114.

C Mbazira ‘From Ambivalence to Certainty: Norms and Principles for the Use of Structural Interdicts in Socio-Economic Rights’ (2008) 24 South African Journal on Human Rights 1. Mbazira bashes the Constitutional Court for its general abstention from using structural interdicts to ensure that broad policy-based remedies are carried out. He notes, in addition, that structural interdicts possess the virtues of increased stakeholder participation and flexibility with respect to both the means and the ends reflected in the Court’s initial judgment. Neither administrative burdens nor the argument that the Constitutional Court is ill equipped to be a consistent ‘trier of fact’ (as circumstances change) seem particularly compelling.

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67 Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) (‘Port Elizabeth Municipality’). The usefulness of this case was brought to my attention by Professor Andre van der Walt. See A van der Walt Constitutional Property Law (2005).


69 Port Elizabeth Municipality (supra) at para 35.

70 Ibid at para 39.

71 Ibid at para 42.


74 [2001] ZACC 19, 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC)(‘Kydami Ridge’).

75 Does the Government have the same rights and responsibilities as other landowners – especially private owners? Or does the Government hold and dispose of all state land for the benefit of all members of the polity? One would have thought that the latter proposition was true (regardless of the outcome in this matter).


78 Kydami Ridge (supra) at para 6.

79 Ibid.

80 Ibid at para 111.

81 S Woolman ‘The Amazing, Vanishing Bill of Rights’ (2007) 124 South African Law Journal 762 (Lack of explanatory reach of the Court’s decisions undermines the value of the Court’s precedents, prevents state and non-state actors from orienting future actions in light of a discernable rule of law and thus undermines the rule of law itself) But see F Michelman ‘On the Uses of Interpretative Charity’ (supra) at note 1. Arguments from urgency do no work here. Even if an initial decision had to be taken, nothing prevented the Court from retaining jurisdiction and setting up engagement processes that might have arrived at more optimal solution down the line. Indeed, Joe Slovo I and Joe Slovo II indicate just how flexible the Court’s remedial powers are.


83 Kydami Ridge (supra) at para 112.

84 Ibid at 113.

85 Ibid at 115.

86 As I have already noted in Chapter 6 and the outset of this chapter, one can read the housing cases from Grootboom, Modderkloof, PE and Kydami, through to 51 Olivia Road and Abahlali and Blue Moonlight – as an ongoing experiment conducted by the Court as to how to build a jurisprudence of general principles (an exercise more essentialist than some experimentalists might like): from legality, to the rule of law, to rationality review, to reasonableness, to meaningful engagement (with teeth). While academics including myself have been quick to chastise the Chaskalson Court’s minimalist approach, perhaps a more charitable reading would have them establish basic, relatively uncontroversial principles first – can anyone take issue with a rather initial thin commitment to the rule of law? – and thereby allow more subtle developments of doctrine over time. Here then, the basic tenets of the experimental constitutional theory expounded here, and Sunsteinian minimalism could, properly understood, could be said to dovetail to a significant degree.

88 The facts and the law at issue in Fuel Retailers are described by Chief Justice Ngcobo as follows: ‘This application for leave to appeal against the decision of the Supreme Court of Appeal concerns the nature and scope of the obligations of environmental authorities when they make decisions that may have a substantial detrimental impact on the environment. In particular, it concerns the interaction between social and economic development and the protection of the environment. It arises out of a decision by the Department of Agriculture, Conservation and Environment, Mpumalanga province (the Department), the third respondent, to grant the Inama Family Trust (the Trust) authority in terms of section 22(1) of the Environment Conservation Act, 1989 (ECA) to construct a filling station on a property in White River, Mpumalanga (the property). Section 22(1) of ECA forbids any person from undertaking an activity that has been identified in terms of section 21(1) as one that may have a substantial detrimental impact on the environment without written authorisation by the competent authority. It was not disputed that the MEC Agriculture, Conservation and Environment, Mpumalanga, (the MEC) the second respondent, is the competent authority designated by the Minister. Before authorisation can be granted, a report concerning the impact of the proposed development on the environment must be furnished. The relevant authority has a discretion to grant or refuse such authorisation. In granting it, the relevant authority may impose such conditions as may be necessary to ensure the protection of the environment. … The Fuel Retailers Association of Southern Africa (incorporated in terms of section 21 of the Companies Act), the applicant, challenged the decision to grant authorisation in the Pretoria High Court on various grounds. However, the only ground that concerns us in this application is that the environmental authorities in Mpumalanga had not considered the socio-economic impact of constructing the proposed filling station, a matter which they were obliged to consider. In resisting the application on this ground the Department contended that need and desirability were considered by the local authority when it decided the rezoning application of the property for the purposes of constructing the proposed filling station. Therefore it did not have to reassess these considerations.’ Ibid at paras 1–5

89 On the ability, or lack thereof, of the Court to harmonize the three elements of the triple bottom line or sustainable development as mandated by s 24, see L Feris ‘Sustainable Development in Practice: Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province’ (2008) 1 Constitutional Court Review 235; D Tladi ‘Fuel Retailers, Sustainable Development & Integration: A Response to Feris’ (2008) 1 Constitutional Court Review 255.

90 Fuel Retailers (supra) at paras 44–45, 58–59, 61, 72, 74, 76 and 79–80. In BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment & Land Affairs, Judge Claassen held that the constitutional right to an environment is on par with the rights to freedom of trade, occupation, profession and property. 2004 (5) SA 124, 143 (W) (‘BP Southern Africa’). As such, when a court engages – often contemporaneously – rights to property, land, free trade and a healthy environment, the court must enter into a normative and often empirical assessment of how the rights can best be harmonized. If the rights cannot be harmonized, then the court must offer a compelling account of why one right must be given precedence over any other right. An ineradicable tension between FC s 24 and other rights is inevitable. Judge Claassen writes: ‘By elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road which will lead to the goal of attaining a protected environment by an integrated approach, [and] which takes into consideration inter alia socio-economic concerns and principles.’ Ibid at 144.

91 I don’t want to gild the lily. As I have noted elsewhere, while some informal pooling and distribution of information in FC s 24 cases will occur, in the absence of a proper system for collating all the information and deducing best practices based on the results, and then distributing that information to decision makers, the system may not be as efficient as possible in terms of learning from past experience. The Minister of Water Affairs and Forestry, in collaboration with NGOs, is probably best placed to provide the kind of watering hole that parties interested in FC’s 24(b)(iii) best practices require.
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94 Minister of Public Works & Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening) 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) at para 111.

95 Government of the Republic of South Africa & Others v Grootboom & Others 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 87.

96 Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) at para 39.

97 It must be noted that this novel approach to adjudication started to take shape in the last years of the Langa Court and thus came about after reassessments of doctrine by several justices appointed to the original 11 member bench of the Constitutional Court in 1995.


99 Ibid at para 16.

100 Ibid at para 15.

101 Ibid at para 19.

102 Ibid at para 14.

103 Ibid at para 20.


105 Of course, from the perspective of Blue Moonlight and recent 2011/2012 Constitutional Court cases discussed in Chapter 6, the jurisprudence looks to be ever more experimentalist when: (a) the Court establishes some minimum core content, say adequate temporary housing, that frame the engagement; and (b) that meaningful engagement can work effectively when occupiers receive decent representation. (The work of the Socio-Economic Rights Institute, the Centre for Applied Legal Studies and the Legal Resources Centre has been noteworthy in this regard.) In addition, and as I have noted in Chapter 6 and in this chapter, polycentric problem solving in this arena also requires the creation of positive relationships between counsel, municipalities, other organs of state, different spheres of government and private property owners. For a pre-Blue Moonlight discussion, see L Chenwi 'A New Approach to Remedies in Socio-Economic Rights Adjudication: Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others' (2009) 2 Constitutional Court Review 371.


108 The riots in Khutsong, Merafong and Durban reflect a conscious response to the underlying repression of pain and suffering experienced by the majority of South Africans under apartheid and in the 15 intervening years of post-liberation one-party dominant democratic rule. See T Madlingozi 'The Constitutional Court, Court Watchers and the Commons: A Reply to Professor Michelman on Constitutional Dialogue, “Interpretive Charity” and the Citizenry As Sangomas' (2009) 1 Constitutional Court Review 63, 68–71 citing, amongst others, D McKinley ‘Democracy and Social Movements in
SA’ (2004) 28 Labour Bulletin 39, 40. Madlingozi writes: ‘On 20 August 2007, the Court was hearing Merafong Demarcation Forum v President of the Republic of South Africa. After a long period of struggle in which they had employed both institutional and extra-institutional mechanisms of democracy, the people of Khutsong decided to take their case to the Constitutional Court. Why? “The government does not want to listen.” On that day more than 1 000 protesters gathered outside the court room toyi toyi and singing liberation songs. During the course of the day, things turned nasty when protesters started burning tyres, brandishing dangerous weapons and allegedly pelting the police with stones. For me, this episode vividly demonstrates the fragile state of South Africa’s constitutional culture. … Khutsong – during this period of struggle – is both a reminder of the fragility of South Africa’s new political order and an indictment of its ability to respond effectively to those persons and communities in the greatest need. As one of the leaders of the Khutsong anti-demarcation movement wrote: “The struggle of the people of Greater Merafong is not just about forceful incorporation into North West, but about fighting for truth from government, people’s rights and democracy.” Khutsong is not a singular, if continuous, event in a long but peaceful transition from a fascist apartheid state to a democratic constitutional order. Every week some poor community engages in illegal and often violent actions to back up demands for a more responsive government. … The time bomb ticking away inside our polity is the disillusionment of the overwhelming majority of South Africans with the politics and the policies of our post-apartheid democracy.’ Madlingozi (supra) at 68–71. On the corrosive effects of extended one-party dominant democratic rule, see S Choudhry “He Had a Mandate”: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy’ (2009) 2 Constitutional Court Review 1. For the best reading of the Constitutional Court in its first 10 years of operation within a one party dominant democracy see T Roux The Politics of Principle: The First South African Constitutional Court, 1995–2005 (2013).
rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights.’

118 Bhe (supra) at para 75.

119 Ibid at para 80.


121 See, eg, Richtersveld Community and Others v Aleckor Ltd & Another 2003 (6) SA 104 (SCA) at paras 85–105.

122 Bhe (supra) at para 84.

123 Bhe (supra) at para 89.

124 Ibid at para 83.

125 Ibid at para 86. Judge Hlophe employs a similar disabling strategy in *Mabuza v Mhathia, Mabuza v Mhathia* 2003 (4) SA 218 (C), 2003 (7) BCLR 743 (C). He recognizes the supremacy of the Final Constitution at the same time as he asserts the protean features of customary law that enable it to conform, as necessary, to the dictates of the Bill of Rights. His nuanced assessment of the role of ukumekela reconfigures siSwati marriage conventions in a manner that (a) refuses to allow ukumekela to be used by the groom’s family as a means of control over the bride, and (b) consciously places the husband and wife on an equal footing with respect to subsequent determinations of whether a valid marriage under siSwati customary law has taken place. Constitutional challenges to lobola should be able to exploit the schema developed in *Bhe* and *Mabuza*. Those familiar with and committed to customary law acknowledge that: (a) the conditions under which lobola served to unite families and create security for women and their children no longer obtain; (b) cash lobolo transactions, which result in the purchase of such transient goods as home furnishings, can hardly be said to benefit the clan or the community; and (c) the present practice of lobola serves the pecuniary interests of a few men. By showing that the spirit of lobola lies in its commitment to family cohesion and that the ‘distorted’ rules of customary marriage emphasise male domination at the expense of communitarian concerns, a party challenging the centrality of lobola in customary marriages can close the gap between constitutional imperative and customary obligation. Following *Bhe*, a court can feel confident that in so far as lobolo remains an obstacle either to an exchange of vows or to the disengagement from a failed relationship, the practice constitutes a violation of a woman’s rights to equality and dignity. More importantly for our immediate purposes, *Bhe* supports the proposition that neither the living customary law nor the Final Constitution can be squared with an institution that ultimately reduces to the purchase of a women’s reproductive capacity or to compensation for the loss of female labour in the father’s household. Following *Mabuza*, a court can ameliorate the burden of lobola by making its legal status as a marker of marriage contingent upon evidence of genuine mutual consent. The requirement of genuine mutual consent introduced by *Mabuza* means that lobolo can be waived as a condition for recognition of marriage. The *Mabuza* court makes clear that traditional institutions such as lobola can only survive as legally binding rites of marriage when shorn of all those asymmetries that reduce women to chattel. Even the South African Law Reform Commission recognizes the possibility that ‘payment or non-payment of bridewealth’ can be removed as a matter of legal consequence when assessing the validity of marriage, the spouses’ marital obligations or the custodial rights to children. The Law Reform Commission observes that in customary law, payment of bridewealth is often deferred and the status of a marriage is seldom placed in doubt through failure to pay timely. SALC Report on Customary Marriage I (supra) at para 4.3.1. It further observes that after promulgation of the General Law Fourth Amendment Act, husbands lost the traditional marital power they exercised over their wives. Act 132 of 1993, s 29. The facts and the holding of *Republic v Kadbi, Kisumu Ex Parte Navreen* provide a useful departure
point for analysis of religious rites of marriage. [1973] EALR 153 (High Court of Kenya). The High Court of Kenya was asked to enforce a Kadhi order that held that Islamic law required the return of a wife to her husband. The High Court rejected the request on the grounds that the ‘Kadhi order would … subject the [wife] to the effective dominion of the plaintiff to an extent constituting “servitude” … and in a manner inconsistent with the intention of s 73(1) of the [Kenyan] Constitution.’ Ibid at 161. While South African courts must treat non-Christian religious rites with a relatively high degree of solicitude, a South African court would, I think, be obliged to reach an identical conclusion under the Final Constitution. Compare Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening) 1999 (4) SA 1319 (SCA) and Ryland v Erols 1997 (2) SA 690 (C), 1997 (1) BCLR 77 (C)(Holding that Muslim religious rites of marriage are not presumptively contra bonos mores) with Ismail v Ismail 1983 (1) SA 1006 (A)(Holding that Muslim religious rites of marriage are contra bonos mores). The Final Constitution reflects the Lockean discomfort with using the profane power of the state to alter what others believe to be the contours of sacred space by subjecting its protection of customary law to FC s 31(2)’s proviso that a rule of customary law inconsistent with a provision of the Bill of Rights is prima facie unconstitutional, but not forcing a rule of religious community practice protected by FC s 15 and FC s 31 to operate under any such disability. See also Taylor v Kauritlag No & Others 2005 (1) SA 362 (W) [2004] 4 All SA 317 (W)(Court upheld the right of the Beth Din to issue a Cherem – an excommunication edict – against a member of the Jewish community who had violated the terms of the Beth Din’s child maintenance order, but refused to enforce the maintenance order itself.)


128 Bhe (supra) at para 235–238.

129 Minister of Home Affairs & Another v Faurie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC)(Faurie). See also Faurie v Minister of Home Affairs 2005 (3) SA 429 (SCA), 2005 (3) BCLR 241 (SCA) at paras 36–37 (No religious denomination would be compelled to marry gay or lesbian couples.)

For the actual order of the Court, see Faurie (supra) at para 162. The order, as it appears in the text above, was crafted by the Court for public consumption in its media summary. The entire media summary is available at http://www.constitutionalcourt.org.za/fourie/summary.

130 My use of the word ‘correct’ must come with a rider. The legitimacy that the Court provides for same-sex marriages comes with a cost that my colleagues in the South African legal academy have been quick to identify. They have, to a man and a woman, roundly criticized the Constitutional Court for effectively ratifying (and reinforcing) traditional, conservative views of same-sex relationships and family structures by kicking responsibility for rectifying wrongs back to Parliament. See P de Vos ‘The Inevitability of Same-Sex Marriage in South Africa’s Post-Apartheid State’ (2007) South African Journal on Human Rights 432. Pierre de Vos notes that the victory was not inevitable, but largely a function of the inclusion of ‘sexual orientation’ in the constitutional text and the careful public
impact litigation strategy of the National Coalition for Gay and Lesbian Equality. However, the victory did little to displace the ongoing systemic discrimination that homosexuals and lesbians face in South African society writ large. The decision holds out symbolic hope for broad-based social reform. I agree with Professor De Vos’ analysis, but can only point to the ‘long time coming’ view of how legal decisions realize social change. Fifty-four years passed between Brown v Board of Education and the election of Barack Hussein Obama for two consecutive terms as President of the United States. No one would claim that race relations in the United States are suddenly relationships between equals. (The Tea Party Movement’s recent success suggests the opposite is true amongst a statistically significant portion of the population.) At the same time, the symbolic 9–0 vote of the US Supreme Court in Brown set off a process of social change that has been slow, but dramatic. Just not dramatic enough. As to the success of the NCGLE strategy culminating in Fourie, Justice Edwin Cameron, Advocate Gilbert Marcus and Judge Fayeeza Kathree all confirmed the decision taken in the mid-90s to proceed carefully, and to build on expected success in easy cases, before bringing a challenge to various common-law rules and statutory provisions that barred gay and lesbian marriages. See ‘Notes on Public Impact Litigation: Sexual Orientation and Children’s Rights’ (Seminar on South African Institute for Advanced Constitutional, Public, Human Rights and International Law, April 2010, On file with author.) See also D Bilchitz & M Judge ‘For Whom Does the Bell Toll? The Challenges and Possibilities of the Civil Union Act for Family Law’ (2007) 23 South African Journal on Human Rights 466 (Act does little to disentrench existing norms around the meaning of ‘family’ – though the law possesses the power, if properly constructed, to disentrench existing heterosexual, and anti-homosexual, biases); R Robson ‘Sexual Democracy’ (2007) 23 South African Journal on Human Rights 409 (Ties reconceptualization of sexuality to the possibility for more profound forms of democratization in South Africa.)

Justice O’Regan, in a partial dissent, found that the Court’s clear commitment to ensuring that same-sex couples and opposite-sex couples receive the same treatment by the State required the Court to ‘read in words to section 30 of the Act that would … permit gays and lesbians to be married by civil marriage officers’ and to develop the common law to realize the same ends. Fourie (supra) at paras 169–170. Unfortunately, the Civil Union Act passed by Parliament retains a commitment to ‘separate but equal’ treatment of same-sex life partners that the Court held, quite clearly, to be manifestly inconsistent with FC s 9 and FC s 10. (While same sex partners may now have the same duties and responsibilities as opposite sex couples that enter civil unions, the status of the new institution – civil union – does not seem on par with that of marriage.) Parliament does not appear to have taken the Court’s invitation to revisit the marriage laws in light of the demands of the basic law as seriously as the Court might have liked.


Fourie (supra) at para 61 citing Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) at para 24 and S v Lawrance; S v Negal; S v Solberg 1997 (4) SA 1176 (CC) (1997 (10) BCLR 13-48) at paras 146–147.

Fourie (supra) at paras 90–98.

S Woolman ‘Seek Justice Elsewhere’ (supra).

2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC).

Shilubana (supra) at paras 54 and 55.

See Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Others [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241; Fedure
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For a critical take on Shilubana, see C Albertyn 'The Stubborn Persistence of Patriarchy? Gender Equality and Cultural Diversity in South Africa' (2009) 2 Constitutional Court Review 163. See also C Rautenbach, W du Plessis & G Pienaar 'Is Primogeniture Extinct Like the Dodo, or Is There Any Prospect of It Rising from the Ashes? Comments on the Evolution of Constitutional Law' (2006) 22 South African Journal on Human Rights 99; C Rautenbach 'Therapeutic Jurisprudence in the Customary Courts of South Africa (Traditional Authority Courts as Therapeutic Agents)' (2005) 21 South African Journal on Human Rights 323. If Traditional Authority Courts were intended to soften the transition to and conflict with the institutions of a western-style constitutional democracy, then we have good reason to doubt whether they have played such a role. Resistance to the Court's engagement with traditional norms seems to have increased over the intervening years. Whether a Constitutional Court led by somewhat more conservative Chief Justices will soften the conflict between deeply entrenched traditional norms and more progressive constitutional norms remains to be seen.

142 [2008] ZACC 8, 2008 (5) SA 94 (CC), 2008 (9) BCLR 865 (CC)('Nyathi I').
143 [2009] ZACC 29, 2010 (4) BCLR 293 (CC), 2010 (4) SA 567 (CC)('Nyathi II').
144 The minority in Nyathi I took issue with the need to put the state on such stringent terms. Nkabinde J noted that: 'The problem of non-compliance with court orders has frequently confronted our courts in recent times and various solutions have been devised to ensure the satisfaction of judgment debts. In some cases, courts have opted for contempt proceedings to enforce money judgments against the state.' The Justice cited Amani v Minister of Health and Welfare, Eastern Cape 2000 (4) SA 446 (TkH); East London Transitional Council v MEC for Health, Eastern Cape and Others 2001 (3) SA 1133 (Ck); [2000] 4 All SA 443 (Ck); Federation of Governing Bodies of South Africa (Gauteng) v MEC Education, Gauteng 2002 (1) SA 660 (T) at 678G-679H; Lombard v Minister van Verdediging 2002 (3) SA 242 (T). In other cases, structural interdicts have been granted. The Justice cited Magidimisi and Others v The Premier, Eastern Cape and Others Case No. 2180/04, 25 April 2006. The solutions in those cases appear to have been effective in satisfying the judgment debts in question. Nyathi I (supra) at para 95. The Justice then rehearsed Nugent JA's words on behalf of a unanimous Supreme Court of Appeal in MEC, Department of Welfare, Eastern Cape v Kate 2006 (4) SA 478 (SCA); [2006] 2 All SA 455 (SCA): 'It goes without saying that a public functionary who fails to fulfil an obligation that is imposed upon him or her by law is open to proceedings for a mandamus compelling him or her to do so. That remedy lies against the functionary upon whom the statute imposes the obligation, and not against the provincial government. If Jayiya has been construed as meaning that the remedy lies against the political head of the government department, as suggested by the Court below, then that construction is clearly not correct. The remarks that were made in Jayiya related to claims that lie against the State, for which the political head of the relevant department may, for convenience, be cited nominally in terms of s 2 of the State Liability Act 20 of 1957, though it is well established that the government might be cited instead. Moreover, there ought to be no doubt that a public official who is ordered by a court to do or to refrain from doing a particular act, and fails to do so, is liable to be committed for contempt, in accordance with ordinary principles, and there is nothing in Jayiya that suggests the contrary.' Kate (supra) at para 30. Justice Nkabinde further noted that, according to Nugent J's dictum: ‘... a judgment creditor is free to seek a mandamus against the public official who fails to comply with a court order. What the judgment creditor is precluded from doing is seeking committal of the state official concerned for failure to satisfy a judgment debt without first obtaining a mandamus because, in the view of the Supreme Court of Appeal, that would constitute the creation of a crime that does not exist under the common law. It must be stressed however that the remarks by the Supreme Court of Appeal must not be construed as meaning that a mandamus
cannot be sought against political heads of state departments. The remarks were made in the context of the case before that Court. It follows that the remedy of *mandamus* is available against any public official who is obliged to do something by a statute but fails to act promptly or diligently: *Nyathi I* (supra) at para 95.

*Nyathi II* (supra) at para 57.

Ibid.

This concern is hardly new. See M Swart ‘Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor’ (2005) 21 *South African Journal on Human Rights* 163. Swart contends that the Constitutional Court ought to be more ‘adventurous’ in dealing with government departments and officials who fail to execute court orders. She too cites *Kate* as an example of an appropriate remedy. How adventurous courts can be without guns, butter or budgets is a question well worth considering.


[2009] ZACC 16, 2010 (3) SA 454 (CC), 2009 (9) BCLR 847 (CC). As always, I am indebted to Michael Bishop and his account of this case and other related matters.

[2011] ZACC 8, 2011 (7) BCLR 723 (CC)(*Joe Slovo II*).

*ThuthELisha Homes v Various Occupants* 2008 JDR 0257 (C).

*Joe Slovo I* (supra) at paras 155–156, 180, 280 and 358.

Ibid at paras 238 and 244 (Ngcobo J, concurring).

Ibid at para 296 (O’Regan J, concurring).

Ibid at para 408 (Sachs J, concurring).

Ibid at para 407 (Sachs J, concurring)(‘[T]hose who have been compelled by poverty and landlessness to live in shelters, should be discouraged from regarding themselves as helpless victims, lacking the possibilities of personal moral agency. … The achievement of a just and equitable outcome required an appropriate contribution not only from the municipal authorities but from the residents themselves.’)


*Joe Slovo I* Order (supra) at para 11.

Ibid at paragraphs 114, 175, 260–261, 313, 326 and 409.

*Joe Slovo II* (supra) at para 24.

Ibid at para 37.

The notion that meaningful engagement might do some work in the formation of participatory bubbles is given credence by those opinions on the *Joe Slovo* bench that require the court-imposed engagement to be meaningful: failure to meet this requirement could result in a finding that the state had acted unreasonably in terms of FC s 26. (A failure on the part of a member of the community to make appropriate use of engagement structures might support a finding that she is owed no remedy that might better suit her needs.) However, the connection between meaningful engagement and participatory bubbles only makes sense on the thicker account of engagement offered by Justice Sachs. The thicker or the more demanding the engagement required, the more likely it is to generate the kind of information necessary to resolve a dispute more optimally. No party has an interest in sitting on information in such negotiations, only to have its silence ratified by a Court finding — against the party — that the engagement was meaningful and the settlement reasonable in terms of FC s 26. The notion of ‘engagement as bubbles’ is given greater purchase when it comes to a court order — signed by the entire bench — that (even while upholding the eviction) mandates ongoing, court-supervised discussions between the residents and the state in order to realize a mutually acceptable, if not pareto optimal, solution. The ongoing supervision and reports back to the Court is — as we saw in US drug treatment courts — one of the hallmarks of experimentalism in American constitutional law and emergent experimental governance in other non-constitutional bodies of law.
By retaining jurisdiction and supervision, a court can ensure that both parties operate within the rules of the game – reasonableness under FC s 26 – without imposing an outcome in a situation where the ‘facts’ on the ground are likely to determine whether one would find the state’s behaviour reasonable or unreasonable.


166 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC)(‘Ermelo’).

167 The High Court had heard the matter twice. Hoërskool Ermelo & Others v Departementshoof van die Mpumalanga [2007] ZAGPHC 4 (2 February 2007)(‘Hoërskool Ermelo I’); Hoërskool Ermelo & Others v Departementshoof van die Mpumalanga [2007] ZAGPHC 232 (12 October 2007)(‘Hoërskool Ermelo II’). In Hoërskool Ermelo I, Judge Prinsloo, of the Pretoria High Court, suspended a decision of the Mpumalanga education department to dissolve the school’s governing body and to replace it with a departmentally appointed committee. The dissolution would have enabled the Mpumalanga education department to alter the school’s language policy and allowed English-speaking pupils to receive instruction in English. On appeal, Transvaal Judge President Ngoepe, and judges Seriti and Ranchod, set aside the High Court ruling in Hoërskool Ermelo I. The Hoërskool Ermelo II court found that the Afrikaans-medium public school must admit English-speaking pupils. Of particular moment for the Hoërskool Ermelo II Court was the under-subscription of Hoërskool Ermelo. Given that Hoërskool Ermelo was operating at only half-capacity, the Full Bench found that it was ‘reasonably practicable’ – as contemplated by FC s 29(2) – for the high school to accommodate the 113 Grade 8 learners. The mere fact that all the classrooms were being employed and that the existing curriculum turned on the current availability of classrooms did not constitute sufficient grounds for excluding English learners and maintaining Hoërskool Ermelo as a single-medium Afrikaans-speaking public school. Equity, practicability and historical redress – the three express grounds for assessment of existing language policy in terms of FC s 29(2) – justified the transformation of Hoërskool Ermelo from a single-medium public school into a parallel-medium public school. The Supreme Court of Appeal reversed the judgment of the High Court in Hoërskool Ermelo I. Hoërskool Ermelo II. Hoërskool Ermelo & Another v Head, Department of Education, Mpumalanga, & Others 2009 (3) SA 422 (SCA) (‘Hoërskool Ermelo III’). The Supreme Court of Appeal found the that HOD lacked the requisite statutory authority to alter the SGB’s language policy. It did not contemplate the constitutional implications of the matter. The Constitutional Court upheld some aspects of the SCAs judgment – namely the rebuke of the HoD with regard to a brace of procedural irregularities that undermined the Department’s attempt to alter Hoërskool Ermelo’s language policies. At the same time, the Constitutional Court indicated that it wanted to hear – after appropriate consideration – how the HOD planned to engage the issue of a parallel-instruction school or an English-only instruction school in the Ermelo circuit. It also made clear that Hoërskool Ermelo must revisit its language policies in light of the Constitutional Court’s clear finding that the SGB did not possess the unmitigated authority to determine the school’s language policy and that it was obliged, in terms of FC s 29(2), to take the needs of all learners into account when it determined the language of instruction: the right to instruction in a language of choice (where reasonably practicable), fairness, feasibility and the need to remedy the results of past racially discriminatory laws and practices must play a critical role in their decision making.

168 Ermelo (supra) at paras 2, 46, 49–53.
169 B Fleisch Primary Education in Crisis (2010).
170 J Jansen We Need to Talk (2011).
171 TJ Haarhoff ‘Foreword’ in EG Malherbe The Bilingual School (1941).
172 [2011] ZACC 13, 2011 (8) BCLR 761 (CC). But see United Apostolic Faith Church v Boksburg Christian Academy 2011 (6) SA 156 (GSJ) at para 16 (‘Even if it were accepted that ownership of the property
remained vested in the English church or the governing body thereof, a person in bona fide possession of immovable property acquired a right in rem which gave rise to the right to apply for an eviction order. The church was clearly the bona fide possessor of the property and, as such, entitled to apply for the ejectment of others occupying it. The difference is that the learners here were deemed to lack a constitutional trump, in terms of FC s 29(1) vis-à-vis the property rights of the church.)

173 Juma Musjid (supra) at para 11 (‘The school was officially established in 1957 as a government-aided school, and a Madressa, an Islamic school established to offer education with a distinctive religious character, for children in Grades 1 to 9. During 1997, the Trust permitted the Department to enlist the school as a public school with an Islamic religious ethos on its property in terms of section 14(1) of the [South African Schools] Act.’)

The provisional order read: ‘Having heard argument on behalf of the applicants, respondents and amici curiae, and having considered the application for leave to appeal, the Court is satisfied that— (a) The Trustees (first to ninth respondents) have a constitutional duty to respect the learners’ right to a basic education in terms of section 29(1) of the Constitution; (b) Having regard to all the circumstances of the case, including this obligation, the Trustees acted reasonably in seeking an order for eviction; and (c) In considering the Trustees’ application and in granting the order of eviction, the High Court did not properly consider the best interests of the learners under section 28(2) and their right to a basic education under section 29(1) of the Constitution. … In view of the urgency of the matter, the following provisional order is made, for which reasons will in due course be furnished: (a) The Tenth Respondent, Member of the Executive Council for Education for the Province of KwaZulu-Natal (MEC), is ordered to engage meaningfully with the first to ninth respondents (Trustees) and the first applicant (School Governing Body) in an effort to resolve the questions arising from the dispute before the Court, and the options available for its resolution, including— (i) whether it is possible for the MEC to conclude an agreement in terms of section 14 of the South African Schools Act 84 of 1996 with the Trustees for the continued operation of the school; and, if not, (ii) what steps the MEC has taken to secure alternative placements for the learners enrolled at the school in accordance with the learners’ right to a basic education. (b) The MEC is required to file a written report with this Court by no later than Friday 8 October 2010 setting out— (i) the efforts undertaken in terms of paragraph (a) of this order; (ii) the conclusions to which the MEC has come; and (iii) the reasons for those conclusions. (c) In the light of the MEC’s report, the Trustees are granted leave to apply directly to this Court before Friday 29 October 2010, on the papers as suitably supplemented, and on notice to the other parties, for an order that will be just and equitable, including an order for eviction.’ Juma Musjid (supra) at para 3, fn 5.

174 The province had – in 1997 – denied the desire of the Trust to establish an independent Islamic school on the property. In addition, it had continually failed to make payments to the Trust for the use of the property from 2004 onwards – despite repeated undertakings to do so.

175 Ibid at paras 42 and 43. The Court also quoted, with approval, General Comment 13 of the UN Committee on Economic, Social and Cultural Rights, on the meaning of the right to education in terms of the ICESCR: ‘Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitation and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.’ ICESCR Committee General Comment 13 (21st Session, 1999) ‘The Right to Education (art 13)’ UN Doc E/C.12/1999/10 at para 1 cited at Juma Musjid (supra) at para 41.

Elsewhere I have offered several demurrals to the *Du Plessis* doctrine. S Woolman ‘Application’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31. As three dissenting justices in *Du Plessis* note, the text did not settle the debate. But it did lead the *Du Plessis* Court to the jurisprudentially untenable conclusion that while rules of common law that govern disputes between private parties are not subject to direct application of the substantive provisions of the Bill of Rights (because constitutions traditionally do not apply to relations between private parties), rules in statutes or regulations that govern disputes between private parties are subject to direct application of the substantive provisions of the Bill of Rights. So the ‘fact’ that a legal dispute is between private parties would appear to be a necessary but not a sufficient condition for the *Du Plessis* Court’s conclusion. Indeed, it is hard to know whether it should be called a ‘condition’ at all. As to whether the law governing a dispute between private parties was subject to direct application under the Interim Constitution, this was entirely and fortuitously contingent upon the form the law took. Embedded in the *Du Plessis* Court’s differential treatment of these two bodies of law is the premise that the common law – unlike legislation – protects a private ordering of social life that is neutral between the interests of various social actors. That premise is not only false. It runs directly against the commitment to flourishing (and the social democratic jurisprudence of experimentalism) articulated in these pages. Put slightly differently, abstention from constitutional review of common-law rules functions as a defence of deeply entrenched and radically inequalitarian distributions of wealth and power in South Africa by immunizing from review those rules of property, contract and delict that sustain those inequalitarian distributions. The differential treatment of the two bodies of law also rests on a traditional distinction between the public realm and the private realm. At a minimum, this distinction fails to recognize the extent to which the state structures all legal relationships. With the ineluctable erosion of the public–private divide, one of the last justifications for treating common law and legislation differently disintegrates as well. What we are left with is a doctrine that traditionally produces an incoherent body of decisions and that cannot explain why courts, perfectly capable of vindicating autonomy interests when asked to review statutory provisions governing private relationships for consistency with the Bill of Rights, prefer not to subject common-law rules governing private relationships to the same form of scrutiny.

The black letter law on application in terms of *Khumalo* takes the following form. FC s 8(1) stands for the following two propositions: (a) All law governing disputes between the state and a natural or juristic person is subject to the direct application of the Bill of Rights; (b) All state conduct that gives rise to a dispute between the state and a natural or juristic person is subject to the direct application of the Bill of Rights. FC s 8(2) stands for the following proposition: Disputes between natural and/or juristic persons may be subject to the direct application of the Bill of Rights if the specific right asserted is deemed to apply. FC s 8(3) stands for the following proposition: Where direct application of the right asserted occurs in terms of FC s 8(2), and the court further finds a non-justifiable abridgment of that right, then the court must develop the law in a manner that gives adequate effect to the right infringed. For reasons the judgment does not adequately explain, the *Khumalo* Court chose to ignore FC s 8(1)’s injunction that the Bill of Rights applies to ‘all law’ and binds ‘the judiciary’. One might have thought that such an explanation was warranted, given that it was precisely the absence of these phrases — ‘all law’ and binds ‘the judiciary’ — in a comparable section of the Interim Constitution that led the *Du Plessis* Court to reach the conclusion that the Interim Constitution’s Bill of Rights did not apply directly to disputes between private parties governed by the common law. The *Khumalo* Court claims instead that had it given FC s 8(1) a gloss that ensured that the substantive provisions of the Bill of Rights applied to all law-governed disputes between private parties — regardless of the provenance of the law — it would have rendered FC s 8(3) meaningless. That particular assertion is unfounded — and contradicted by the Court’s own s 8(3) jurisprudence. See Woolman ‘Application’ (supra). My preferred reading on application takes the
following form. FC s 8(1) covers ‘all law’ – regardless of provenance, form and/or the parties before the court. FC s 8(1) also covers all government conduct – by all branches of government and all organs of state – whether that conduct takes the form of law or reflects some other manifestation or exercise of state power. In sum, FC s 8(1) should be understood to stand for the following proposition: All rules of law and every exercise of state power are subject to the direct application of the Bill of Rights. FC s 8(2) covers dispute-generating conduct between private actors not ‘adequately’ governed by an express rule of law. There are two basic ways to read ‘not governed adequately by an express rule of law’. First, it could contemplate the possibility of a dispute over an aspect of social life that is not currently governed by any rule of law at all. Such instances will be rare. Indeed, there is good reason to believe that such instances do not exist at all. The second and better reading views non-rule governed conduct in a much narrower sense. In many instances, a body of extant rules – or even background norms – may be said to govern a particular set of private relationships. FC s 8(2) calls our attention to the fact that these rules of law may not give adequate effect to the specific substantive provisions of the Bill of Rights and may require the courts to develop a new rule of law that does give adequate effect to a particular provision in the Bill of Rights in so far as a dispute between private persons requires it to do so. In sum, FC s 8(2) should be understood to stand for the following proposition: While, on the Hohfeldian view, a body of extant rules – or background norms – will always govern a social relationship, those same rules will not always give adequate effect to a provision in the Bill of Rights. FC s 8(2) calls attention to the potential gap between extant rules of law and the prescriptive content of the Bill of Rights, and, where necessary, requires the courts to bridge that gap by bringing the law into line with the demands of the particular constitutional right or rights deemed to apply. If we decide that the right invoked engages the conduct in question and that the right has been unjustifiably infringed, then we move on to FC s 8(3). FC ss 8(3)(a) and (b) enjoin the court to develop new rules of law and remedies designed to give effect to the right infringed. Thus, where FC s 8(2) acknowledges gaps in existing legal doctrine, FC s 8(3) aims to fill those gaps. In sum, FC s 8(3) should be understood to stand for the following proposition: If the court finds that the right relied upon warrants direct application to the conduct that has given rise to the dispute, and further finds a non-justifiable abridgment of the right, then FC ss 8(3)(a) and (b) guide the court’s development of new rules of law in a manner that gives adequate effect to the right infringed. It may be, however, that the prescriptive content of the substantive provisions of the Bill of Rights does not engage the rule of law or conduct at issue. Two things can happen. A court can decide that the Bill of Rights has nothing at all to say about the dispute in question. A court can decide that although no specific provision of the Bill of Rights is offended by the law or the conduct in question, the Bill of Rights warrants the development of the law in a manner that coheres with the general spirit, purport and objects of Chapter 2. In sum, FC s 39(2) should be understood to stand for the following: Where no specific right can be relied upon by a party challenging a given rule of law or the extant construction of a rule of law, the courts are obliged to interpret legislation or to develop the law in light of the general objects of the Bill of Rights. See Woolman ‘Application’ (supra).
Court has not followed the logic of its own judgment. It would be surprising indeed if a statute governing private disputes were not held subject to the direct application of the Bill of Rights.)

Doctrinal tension generates a second objection. The Constitutional Court has constructed a powerful set of doctrines in which (1) every exercise of state power is subject to constitutional review, and (2) every law is subject to the objective theory of unconstitutionality. See Ingledew v Financial Services Board: In Re Financial Services Board v Van der Merwe & Another 2003 (4) SA 584 (CC), 2003 (8) BCLR 825 (CC) at para 20 (‘This court has adopted the doctrine of objective constitutional invalidity.’)

Much is rightly made of the Constitutional Court’s bold assertion in Fedsure, Pharmaceutical Manufacturers and their progeny that all law derives its force from the basic law – the Final Constitution – and that all law, and all conduct sourced in the law, must as a logical matter be consistent with the basic law. Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC); Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of The Republic of South Africa 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC). In its most general form, the doctrine of objective unconstitutionality holds that the validity or the invalidity of any given law is in no way contingent upon the parties to the case. If a provision of legislation would be deemed to be unconstitutional when invoked by an individual in a dispute between the State and an individual, then it must likewise be unconstitutional when invoked by an individual in a dispute between that individual and another individual. However, the Court’s differentiation between FC s 8(1) disputes that are invariably subject to the direct application of the Bill of Rights and FC s 8(2) disputes that are not invariably subject to the direct application of the Bill of Rights is logically incompatible with the doctrine of objective unconstitutionality. The Khumalo application doctrine relies upon the ability to distinguish constitutional cases – and thus the constitutionality of laws – upon the basis of the parties before the court. The doctrine of objective unconstitutionality denies the ability to distinguish constitutional cases – and thus the constitutionality of laws – upon the basis of the parties before the court. This contradiction is a direct consequence of the Khumalo Court’s refusal to give the term ‘all law’ in FC s 8(1) its most obvious construction and the Court’s ostensible preference for making FC s 8(2) the engine that drives the analysis of all disputes between private parties. Not even the good faith reconstruction of Khumalo can meet this second objection. The third objection flows from the Khumalo Court’s refusal to say anything about FC s 8(1)/s binding of the judiciary. Perhaps the most damming consequence of this structured silence is that it offends a canon of constitutional interpretation relied upon by Justice O’Regan in Khumalo itself: ‘We cannot adopt an interpretation which would render a provision of the Constitution to be without any apparent purpose.’ Khumalo (supra) at para 32. Not only does Justice O’Regan refuse to give the phrase ‘any apparent purpose’, we cannot, even on the good faith reconstruction, give it any apparent purpose. The good faith reconstruction gains its traction through a distinction between a constitutional norm’s range of application and that same norm’s prescriptive content. That creates the interpretational space to argue that while FC s 8(1) speaks to each specific constitutional norm’s range of application – and does not distinguish one genus of law from another – FC s 8(2) speaks to the prescriptive content of each specific constitutional norm and directs us to consider whether that prescriptive content ought to be understood to govern the private conduct of the private parties that constitutes the gravamen of the complaint. This good faith reconstruction does no work with respect to the phrase ‘binds the judiciary’ because the distinction between ‘range’ and ‘prescriptive content’ engages the relationship between constitutional norms and ordinary law. It does not speak to the provenance of a given law. The reason it cannot be recast in a manner that speaks to the differing concerns of FC s 8(1) and FC s 8(2) is that FC s 8(2) does not concern itself with our different law-making institutions – legislative, executive or judicial. What is left? A weak reading in which the judiciary is bound – not in terms of the ‘law’ it makes – but purely in terms of its ‘conduct’ (or ‘non-law-making conduct’). It seems to me to defy both logic and common sense to argue that when FC s 8(1) binds the legislature and the judiciary, it means to bind the actions of legislators or judges solely in their personal capacity. When we bind the legislature, we must bind
both the law it makes and the non-law-making actions it takes. The text offers no reason to treat the judiciary any differently. While we do want state actors – legislators and judges alike – to care about the manner in which they comport themselves, we care primarily about the law they make. But that is not what Khumalo says, nor can it be reconstructed in such a manner as to say so. The final objection to Khumalo's construction of FC s 8 turns on the style of the argument. In short, before Justice O'Regan decides whether to engage the applicant's exception to the action in defamation in terms of freedom of expression, she has already concluded: (a) that the law of defamation is in pretty good shape post-Bogoshi; (b) that freedom of expression is important but not central to an open and democratic society; and (c) that dignity – especially as viewed through the lens of reputation – is of paramount concern. Only after having reached these conclusions does Justice O'Regan decide that this matter warrants direct application of freedom of expression to the common law of defamation in a dispute between private parties. The judgment looks, in manner of delivery, much like the kind of judgment in which, under FC s 39(2), the common law is developed via indirect application of the Bill of Rights. The style of the judgment suggests that the Khumalo Court considers it relatively unimportant to engage this dispute as if, in fact, direct application takes place. Or more accurately, by packaging Khumalo as if it were simply a common-law judgment, the Khumalo Court intimates that the difference between direct application and indirect application of the Bill of Rights is minimal, if not entirely absent. It is this style or mode of reasoning that blocks the kind of experimentalism and flourishing jurisprudence that a bold horizontal application doctrine would invite. I might be inclined to accept this elision of the analytical processes required by FC s 8 and FC s 39(2) were it not for the fact that the Supreme Court of Appeal and the Constitutional Court have handed down judgments regarding constitutional jurisdiction, stare decisis and indirect application under FC s 39(2) that manifest a clear desire not to disturb settled bodies of common-law precedent and that cannot help but immunize a substantial body of apartheid-era decisions from reconsideration by lower courts. This claim requires some amplification. Leaving aside the problem of surplusage raised by our courts' occasional interchangeable use of FC s 8 and FC s 39(2), the Supreme Court of Appeal in Afrox, extending the reasoning of the Constitutional Court in Walters, has held that there is at least one critical difference between direct application under FC s 8 and indirect application under FC s 39(2). Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA)(‘Afrox’); Ex parte Minister of Safety and Security & Others: In Re S v Walters & Another 2002 (4) SA 613 (CC), 2002 (2) SACR 105 (CC), 2002 (2) BCLR 663 (CC)(‘Walters’). A High Court may revisit pre-constitutional Appellate Division precedent only where a party has a colourable claim grounded in the direct application of a substantive provision of the Bill of Rights. High Courts may not alter existing common-law precedent (whether pre-constitutional or post-constitutional) through indirect application under FC s 39(2). (The rest of our appellate courts' novel doctrine of constitutional stare decisis further constrains the High Courts' constitutional jurisdiction.) What happens when our appellate courts' marry this restrictive doctrine of stare decisis to an incrementalist gloss on indirect application in terms of FC s 39(2)? It spawns an application doctrine that effectively disables the High Court from undertaking meaningful constitutional review of existing common-law precedent (as well as all other constructions of law) and thereby protects 'traditional' conceptions of law and existing legal hierarchies. This observation about the manner in which our existing array of application doctrines – as well as related doctrines of stare decisis and constitutional jurisdiction – conspire to blunt the experimental and flourishing potential of the basic law is one of the strongest rejoinders to those jurists and commentators who have suggested that whether one relies upon FC s 8 (1) or FC s 8 (2), or FC s 39(2), the song remains the same: namely, how should the law governing a dispute be developed, re-formulated or re-interpreted? For the most compelling argument that I have, above and elsewhere, elevated form over function (offered by the same person who assisted me in making my argument as persuasive as it could possibly be), see F Michelman 'On the Uses of Interpretive Charity' (supra).
183 Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) ('Carmichele').

184 Ibid at para 40.


186 Thebus (supra) at para 28.

187 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at paras 90 and 96.


189 FC s 39(2), although not engaged expressly in Khumalo, now stands, under a secondary body of black letter law, for the following two propositions: (a) Where an asserted right is, under FC s 8(2), deemed not to apply directly to a dispute between private parties, the court may still develop the common law or interpret the provision of legislation in light of the more general objects of the Bill of Rights; (b) Even where a right is asserted directly, the court may still speak as if a finding of inconsistency or invalidity requires that a new rule of common law be developed in terms of FC s 39(2). See Minister of Home Affairs v National Institute for Crime Prevention 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC)(On the difference between how constitutional norms operate as values and how they operate as rules.) Professor Frank Michelman and I have been round and round about whether much turns on this conceptual confusion. I have, in large part, deferred to Professor Michelman's super-pragmatic account of s 39(2) jurisprudence – that sense can be made of it, and that it does not reflect a wholesale flight from substantive engagement with the specific provisions of the Bill of Rights. The later cases assayed in this chapter count as proof of the emergence of a more nuanced approach to rights analysis. At the same time, I maintain, and believe the decisions and the weight of academic authority show, that the Court's preference for s 39(2) 'objectives' analysis, over actual rights analysis, has allowed for a discomforting degree of thinness to persist in various areas of the Court's Bill of Rights jurisprudence. See Woolman 'Application' (2005)(supra); Woolman 'The Amazing, Vanishing Bill of Rights' (2007) (supra); Michelman 'On the Uses of Interpretive Charity' (2008)(supra); Woolman 'Between Charity and Clarity' (2010)(supra); Michelman 'Old Kibitzes Never Die' (2010)(supra).


191 See M Tushnet 'The Issue of State Action/Horizontal Effect on Comparative Constitutional Law' (2003) 1 Journal of International Constitutional Law 79. Tushnet thought, a decade ago, that two factors – with respect to South Africa – might influence the extent to which a given set of application provisions will be more or less likely to result in the constitutional transformation of existing bodies of private law: (1) a specialized Constitutional Court that lacks powers of general jurisdiction has a limited capacity to change non-constitutional bodies of law and concomitantly less control over courts of general jurisdiction; and (2) a commitment to strong social democracy – through either socio-economic rights or state policy or both – diminishes the impact of public–private distinctions in constitutional law because the ends of social transformation are likely to be secured through either socio-economic rights or government programmes. Tushnet was correct about proposition one, but, given the weakness of both remedial government programmes and the Court's socio-economic rights jurisprudence, incorrect about proposition two. See also S Ellmann 'A Constituitional Confluence: American State Action Law and the Application of Socio-Economic Rights Guarantees to Private Actors' in P Andrews & S Ellmann (eds) The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law (2001) 444 (Argues that a broad understanding of FC s 8(1)'s application of the Bill to organs of state, FC s 8(2)'s invitation to apply the Bill of Rights to private disputes, and the presence of socio-economic rights should narrow the gap between constitutional and non-constitutional bodies of law.) Despite Ellmann's apt reading of the text, the Court has invoked FC s 8(2) only twice.
Moreover, on the second time around, the *Juma Musjid* the Court went out of its way to make clear its view that the relationship between FC s 8(1) and FC s 8(2) reflects a justifiable distinction between public law and private law: even if the Bill of Rights applies to both bodies of law and both kinds of disputes.

192 See C Sprigman & M Osborne *Du Plessis is not Dead: South Africa’s 1996 Constitution and The Application of the Bill of Rights to Private Disputes* (1999) 15 *South African Journal of Human Rights* 25 (Authors looked relatively prescient for some time, and, until *Juma Musjid*, the Court’s continued reliance on FC s 39(2) provided empirical support for their claims.)

193 *Juma Musjid* (supra) at paras 57–59 (‘It is clear that there is no primary positive obligation on the Trust to provide basic education to the learners. That primary positive obligation rests on the MEC. There was also no obligation on the Trust to make its property available to the MEC for use as a public school. A private landowner may do so, however, in accordance with section 14(1) of the Act which provides that a public school may be provided on private property only in terms of an agreement between the MEC and the owner of the property. This Court, in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, made it clear that socio-economic rights (like the right to a basic education) may be negatively protected from improper invasion. [1996] ZACC 26, 1996 (10) BCLR 1253 (CC), 1996 (4) SA 744 (CC) at para 78. Breach of this obligation occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measures that diminish that protection. It needs to be stressed however that the purpose of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right. Its application also depends on the “intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the State or organs of State”. The Trust permitted the Department to enlist the school as a public school on its property with a distinctive religious character in accordance with sections 56 and 57 of the Act. It also performed the public function of managing, conducting and transacting all affairs of the Madressas in the most advantageous manner, including the payment of the costs of various items which the SGB and the Department ought to have provided. By making contributions towards expenses associated with the running of a public school, the Trust acted consistently with its duties: to erect, maintain, control and manage the school in terms of the Deed of Trust. Notably, counsel for the Trustees conceded during oral argument that the Trust had a duty not to impair the learners’ right to a basic education. This concession was properly made.’) On the obligation of private persons (natural and juristic) not to engage in actions that would negatively impair another person’s ability to exercise their socio-economic rights, the *Juma Musjid* Court cited, amongst other cases, *Jaftha v Schoeman & Others, Van Rooyen v Stoltz and Others* [2004] ZACC 25, 2005 (1) BCLR 78 (CC), 2005 (2) SA 140 (CC) at paras 33–34; *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail & Others* [2004] ZACC 20, 2005 (4) BCLR 301 (CC), 2005 (2) SA 359 (CC) at paras 68–71; *Minister of Health & Others v Treatment Action Campaign & Others (1)* [2002] ZACC 15, 2002 (10) BCLR 1033 (CC), 2002 (5) SA 721 (CC) at para 46; *Government of the Republic of South Africa & Others v Grootboom & Others* [2000] ZACC 19, 2000 (11) BCLR 1169 (CC), 2001 (1) SA 46 (CC) at para 34.

194 *Juma Musjid* (supra) at para 43.