Chapter Five

Experimental Constitutionalism in South Africa: Institutions and Doctrines

I speak without exaggeration when I say that I have constructed 3,000 different ‘theories’ in connection with the electric light, each one of them reasonable … Yet only in two cases did my experiments prove the truth of my theory.

Thomas Edison

[Meaningful engagement] is less costly, in both financial and emotional terms, and can only result in improved collectivism to tackle issues as a country . . . . It is preferable to settle all demarcation differences through open, frank, inclusive and transparent dialogue as opposed to the courts. . . . [When] all parties commit to co-operation as opposed to conflict there tends to emerge a progressive outcome that takes our country forward.

Landiwe Mahlangu
A. The South African Constitution as an Experimental Constitution

In this chapter, the rubber finally hits the road. So far I have defended the multi-pronged thesis that:

• (a) consciousness as experienced by radically heterogeneous selves, (b) social formations and (c) constitutional orders are best understood, and operate most effectively, when thought of in terms of trial and error and feedback mechanisms;

• the most successful of these entities are selves, associations and polities able to run as many experiments as possible, with results that both identify the best practices for realizing extant ends and work to shift the ends themselves towards ways of being in the world that we come to deem more and more optimal; and

• an experimentalist cast to theories of mind, social networks and politics are rendered more plausible when we reflect upon the fact that human beings never reach that imagined stasis of happiness, because life always works to disrupt that stasis.

We can now ask whether the institutions and doctrines identified with experimental governance are likely to improve decision making both within the halls of South African government and the broader, radically heterogeneous society of which we are members.

My first response is that we are already moving in that direction.

My second response is that the despondency felt by my fellow South Africans can be best addressed through the pragmatic, experimentalist tools that we already have at hand. Too much good will, too much skill exists within this land for us to squander the opportunity that we have now to re-think the ways we engage one another and the manner in which we go about solving the manifold problems that this ever-so-rich country faces. Pragmatists and experimentalists are, by nature, optimists!

In the chapter that follows I track quite explicitly the two dominant theses of experimental constitutionalism: (a) that virtually any constitutional democracy can accommodate a doctrine of shared constitutional interpretation; and (b) any modern democratic state – be it in the developed world or the developing world – can make use of the notion of participatory bubbles in order to resolve local problems and to share information about successful and unsuccessful attempts to work out solutions to similar problems across a nation. However, shared constitutional interpretation and participatory bubbles are but two facets of experimental constitutionalism (or what some now describe as ‘new governance’ theory). Chapter Four identified a number of other features of experimental constitutionalism that undergird this book’s analysis – reflexivity, the status of truth propositions in radically heterogeneous constitutional orders, chastened deliberation, destabilization rights, disentrenchment of private ordering through remedial equilibration, and flattened hierarchies rather than top-down systems of command and control. Where and when possible, these facets of experimental constitutionalism will inform this chapter’s analysis of South Africa’s own emergent experimental institutions and doctrines.

It is somewhat arbitrary to divide experimental constitutionalism up into two discrete, if dominant, components. Both notions rest on the dual assumption that multiple actors
applying their minds to similar problems in different ways will elicit greater information about the kinds of rule-based legal principles and more adaptive legal standards that ‘work’, and that by continually attempting to test what works best, we may, ultimately, come to change our consensus about the ends that we wish our polity (and the individuals in it) to pursue or to forswear.

The justification for this bifurcation lies in the difference of emphasis and purpose of each concept.

Shared constitutional interpretation tends to emphasize both the various spheres of government and how their relationship shapes our understanding and the content of the norms generated by our basic law. Shared constitutional interpretation succeeds when as many experiments as possible are run in as many publics and sub-publics as possible. The following section takes cognizance of the roles which Chapter 9 Institutions, participatory democratic fora and various organizations in civil society play in determining the shape of constitutional norms.

Participatory bubbles tend to emphasize the function of grass-roots movements, and often spatially and temporally more limited spaces of self-government. Such a description risks oversimplification. Bubbles will occur in the highest spheres of government – Parliament and the Constitutional Court. Bubbles must occur in the upper tiers of government because we want our representatives and our judges to pool information and to take cognizance of what works best when local actors fix problems that affect them directly. The substantial overlap of shared constitutional interpretation and participatory bubbles is borne out by the appearance of Chapter 9 Institutions in the discussion of both conceptual frameworks.

In the next section on shared constitutional interpretation, we will see what minor adjustments to existing doctrine create: (1) courts that employ an invigorated limitations analysis open up the manner in which facts are assessed and promote a more fastidious approach to rights interpretation; (2) a deeper understanding of the principle of democracy and its relationship to rights interpretation; (3) an appreciation for the role Chapter 9 Institutions have to play in giving various constitutional norms greater content; (4) how socio-economic rights litigation has, perhaps by its very nature, led to the acceptance of various features of shared constitutional interpretation without any grand theorizing by the Constitutional Court as to its virtues; and (5) the promise that provincial constitutions (might) offer with respect to fundamental rights guarantees and to political structures not afforded by the Final Constitution.

In the section on participatory bubbles, the adjustments to (existing) doctrines required by experimental constitutionalism encompass: (1) an understanding of constitutional jurisdiction that facilitates more challenges to common-law doctrines that inhibit radical reformation; (2) rules of procedure that promote greater access to court for those who wish to pursue fundamental rights challenges; (3) the creative use of such remedies as structural injunctions and meaningful engagement, and a shift from rights essentialism and automatic remedialism to remedial equilibration; (4) cost orders that promote broader participation in constitutional litigation; (5) an enhanced role for public participation in legislative processes; and (6) greater
roles for Chapter 9 Institutions with respect to investigation, information sharing and norm setting.

B. Shared Constitutional Interpretation

1. Limitations Analysis

   a. Theory

   Important invitations to engage in shared constitutional interpretation can be found in the interpretation clause, the remedies clause and the limitations clause of the Bill of Rights. However, the emphasis of this work on the resolution of polycentric social conflicts justifies an initial narrowing of focus to the phrasing, structure and meaning of the limitations clause.²

   The limitation clause directs a court to ask whether a given law of general application constitutes a reasonable or justifiable infringement of a fundamental right. As I have argued elsewhere, the clause is something more than an effort to soften the (putative) counter-majoritarian dilemma created by a justiciable Bill of Rights.³ One the one hand, it invites the legislature or the executive to try again if previous efforts to solve a particular socio-legal problem are found to be constitutionally infirm. On the other hand, it reminds the courts that they are obliged to take the law-making efforts of the co-ordinate branches seriously and to afford them a significant degree of latitude.

   The holdings in *Miranda* and *Dickerson* – and *Satchwell I and II*⁴ – suggest how we are to understand the relationship between these two propositions. First, the mere re-assertion by Parliament or the executive of the exact legal position found to be unconstitutional by the Constitutional Court warrants no judicial solicitude. Second, as in *Fourie* or *Joe Slovo II*, the law-making efforts by Parliament or the Executive to address the same issue in a different way, and in a manner not obviously (or entirely) at odds with the previous findings of the Court, warrants judicial solicitude.⁵

   Perhaps the clearest articulation of a standing invitation to share power with respect to constitutional interpretation occurs in *First Certification Judgment*.⁶ While the Constitutional Court states that its mandate with respect to the certification of the Final Constitution is legal and not political, the role it carves out for itself is not dissimilar from that articulated by the US Supreme Court in *Miranda*. Its job was to say, in quite general terms, what the Interim Constitution – specifically the 34 Constitutional Principles – allowed. Within those extremely generous parameters, the Constitutional Assembly was said to be free to craft any constitution it liked. To put it differently, the Constitutional Court recognized that the Constitutional Assembly could draft a well-nigh infinite number of constitutions that complied with the 34 Constitutional Principles. It was not the job of the Constitutional Court to say which of these legally compliant Final Constitutions was to be preferred.⁷

   b. Practice

   In a typical piece of commercial or private law litigation, a court will decide preliminary issues, interpret the facts in terms of the applicable law and render a decision. Despite the fact
that the scope of judicial discretion is often extensive as to factual determinations, and only constrained by the (quite expansive) bounds of analogical reasoning, it rarely occasions major complaints. Most judicial decisions in private litigation are accepted for two reasons relevant for this argument. First, commercial actors accept the possibility of an adverse outcome. Second, courts are credited with a degree of generalized knowledge that legitimates their factual conclusions.

A similar degree of deference attaches to judicial opinions that are able to tie well-entrenched social mores to constitutional rights. Traditional constitutional law adjudication bears a sufficient resemblance to ordinary conceptions of the judicial function to escape excessive criticism. But not all constitutional cases present straightforward application of principle to problem.

For example, a piece of super-ordinate legislation — the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) — is designed to give content to FC s 9 (the equality clause) in a manner that enables the state and private actors to challenge existing structures of authority, domination and tyranny within private institutions. PEPUDA's Equality Courts must acknowledge the revolutionary intent of the legislation at the same time that they demonstrate their appreciation for the fact that many social practices protected by the Constitution amount to ‘fair’ discrimination. Progressive readings of PEPUDA — and concomitant incursions into the private ordering of individual and communal relationships — will raise, quite crisply, questions about the possibility for judicially initiated social change. Cases such as Prince and Jordan pose dilemmas for traditional models of adjudication because courts comfortable with zero-sum outcomes tend to link their analysis of a complex nexus of facts and law with an often equally challenging assessment as to whether an effective remedy exists. The burden of assessing complicated fact scenarios and the judiciary’s innate resistance to imposing novel solutions on the body politic has, in a range of similar cases, led the Court to accept the state's justification for the law as it currently stands.

The three-part structure of Bill of Rights analysis provides the courts with a measure of relief. By explicitly separating out the process of (a) defining the ambit of a right, (b) determining the appropriateness of any limitation, and (c) fashioning an appropriate remedy, the Bill of Rights avoids creating a binary world where the outcome of the dispute is tied entirely to rights essentialism. For example, in American constitutional law, several types of law deemed to limit the equal protection clause or the freedom of speech clause are likely to be invalidated under a strict scrutiny standard. The three-part structure of South African Bill of Rights analysis, as practised, has enabled the Constitutional Court to avoid such rigid categories. While the Court has often resisted giving rights sufficiently definitive content (that would guide other actors), nothing in the text or this theory of experimental constitutionalism demands such avoidance. A relatively precise, if nuanced, approach to limitations analysis actually creates the space for a fairly fastidious treatment of rights analysis.

A more emphatic embrace of an experimentalist approach would enable a South African court to use the open-ended, fact-driven framework of limitations analysis (in concert with
a commitment to remedial equilibrium) to invite litigants – and other stakeholders – to participate more directly in the vetting of possible solutions to the legal problem confronting the court. Such an invitation to the parties to get their hands dirty enables the courts to overcome both their limited administrative capacity and their often enervating reliance on traditional answers. More importantly, the invitation to the parties to expand the basis of their competing claims from zero-sum outcomes to solutions in which all parties believe they may benefit enables courts to reap the problem-solving benefits inherent in well-directed collective action.

An experimentalist perspective on limitations analysis 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. This experimentalist perspective also recognizes how exceedingly difficult it is to discover the right answer – or remedy – from an outsider’s perspective. The notion of a single right answer in a complex context – in advance of any attempt to mediate the competing positions – is itself suspect. As Susan Sturm has observed in connection with workplace discrimination, changes in legal doctrines shape people’s expectations. The new legal doctrine thereby reconstructs identities, beliefs and behaviour. Such an evolutionary process – a function of the law as an experimental feedback mechanism – can gradually transform the nature of the problem as originally perceived.

Confronted with complexity, the task for the courts is neither to undertake Herculean quests for perfect theoretical answers nor to retreat into the political quietism of deference to administrative decisions and private ordering. An experimentalist perspective possesses two important advantages. First, by acknowledging the difficulty of finding the right answer, ex ante, courts with a problem-solving perspective must create mechanisms (including legal doctrines) that gather relevant information, generate proposed reforms and relay feedback quickly. Second, given the potential for the unintended consequences which flow from adaptive processes (and preferences) triggered by shifting legal principles, a problem-solving perspective implements each set of solutions tentatively and is ready to modify its solutions on the basis of new empirical evidence.

Over the past several years, the Court has demonstrated a willingness to seek out critical information from organizations not initially party to the litigation. In cases such as Juma Musjid, the Court recognized that if it didn’t possess all the relevant facts, it could neither arrive at just conclusion nor fashion an adequate remedy. The Juma Musjid Court invited the Centre for Child Law and the Socio-Economic Rights Institute as true friends of the court to provide Brandeis briefs on the actual conditions faced by learners caught up in a longstanding quarrel between a School Governing Body, a private trust that owned the land upon which the school was located and a provincial Department of Education that had failed both to adequately follow procedure and to safeguard the needs of learners.

Joe Slovo I and Joe Slovo II offer even further evidence of a Court willing to recognize the unintended consequences that flow from adaptive processes triggered by shifting legal principles, and to modify its solutions on the basis of new empirical evidence (as supplied by the various parties to the matter). The flexibility and reflexivity on display in Joe Slovo I and Joe Slovo II is noteworthy. The Joe Slovo I Court exhibited a firm normative hand in constructing
the participatory bubble that would shape subsequent (fact-driven) negotiations. It then
gave its imprimatur of approval to an outcome that would enable community dwellers to
secure better housing elsewhere. A Joe Slovo II Court was then somewhat surprised when the
multiple parties to the litigation returned and stated that they wished to alter the previous
order because they had discovered, through ongoing negotiations and further analysis of
the lay of the land, that the original settlement would have sub-optimal outcomes for
all parties concerned. With some quite understandable hesitation, the Joe Slovo II Court
recognized that the adaptive process it had initiated had to be followed through to its logical
conclusion: changing an initial settlement where that settlement failed to solve the problem
that originally seized the Court. The Joe Slovo I and Joe Slovo II Courts reflect an institution
that truly shares constitutional interpretation with coordinate branches of governments and
its citizens.

The decade-long line of cases from Ntuli to Steyn to Shinga demonstrates just how flexible
the Court has become and the extent to which it abides by Lord Aktin's credo: 'Finality is
a good thing, but justice is better.' The Constitutional Court shifts over these three cases
from a semi-arid separation of powers doctrine to a more rough and tumble engagement
with Parliament over the kinds of amendments to the Criminal Procedure Act that would
vouchsafe a fair trial.

Early on in its existence, the Constitutional Court demonstrated a significant reluctance
to alter its original orders because of the standard trope that the uncertainty which would
ensue from the possibility of such variance would leave the litigants and society at large
incapable of determining the appropriate course of action in the future. The question of
how long a ruling would remain good law clearly vexed a court consciously developing a
robust rule of law jurisprudence. In Ntuli II, the Court held that the principle of finality
in litigation meant that an intolerable degree of uncertainty would arise if courts could
be readily approached to reconsider final orders declaring provisions of statute invalid. 21
Still, the Ntuli II Court left open the door to the reconsideration of final orders. It
wrote: 'For the purposes of this judgment [the Court is] prepared to assume that in an
appropriate case an order for the suspension of the invalidity of the provisions of a statute
may subsequently be varied by a Court for good cause. But if this is so, such a power,
… would be one that should be very sparingly exercised.' 22 It declined, on this basis, to
grant the requested extension by Parliament to cure the infirm provisions in the Criminal
Procedure Act. The Court's finding of invalidity, as promised, kicked in. 23 In declining
Parliament's request for an extension for the extension beyond the 17 months already granted, the Ntuli II
Court wrote:

[This Court] has had to ask counsel to establish how much time will be necessary, and to make
an order in the light of such information and its own evaluation of what may be necessary. In
future more will be required. It is the duty of the Minister responsible for the administration
of the statute who wishes to ask for an order of invalidity to be suspended, whether under the
interim or the 1996 Constitution, to place sufficient information before the Court to justify the
making of such an order, and to show the time that will be needed to remedy the defect in the
legislation. This should be done with due regard to the importance of the fundamental rights
enshrined in the Constitution, and to the fact that it is an obligation of the government to ensure that such rights are upheld and that the suspension of rights consequent upon the difficulties of the transition is kept to a minimum. This Court has the responsibility of ensuring that the provisions of the Constitution are upheld and enforced. It should not be assumed that it will lightly grant the suspension of an order made by it declaring a statutory provision to be invalid and of no force and effect or, if it does so, that it will allow more time than is necessary for the defect in the legislation to be cured.24

In S v Steyn, the Court demonstrates that it has drawn a number of lessons regarding institutional comity from its decisions in Ntuli I and Ntuli II.25 Once again, the constitutionality of ss 309B and 309C of the Criminal Procedure Act, now amended by Parliament, seized the Court.

Parliament, on the Steyn Court’s account, had failed (wilfully) to see the damage that a finding of invalidity might do the court system as a whole. In the absence of 'hard data' that ought to have been provided by Parliament with respect to the ability of the courts to handle an increasing caseload, the Court refused to grant an immediate declaration of invalidity. This time, however, it did not give Parliament a leisurely 17 months to fix the problems. The Court expressly noted the 17-month suspension granted in Ntuli I had proved of benefit to no one. In Steyn, it gave Parliament five months to get its house and the Criminal Procedure Act in order. The Court noted, again, that Parliament had failed to offer any evidence that more time was required.26

By the time that Shinga v the State & Another (Society of Advocates, Pietermaritzburg Bar, as Amicus Curiae); O’Connell & Others v the State arrived at the courthouse steps, the Constitutional Court was more than passingly familiar with the various provisions of the Criminal Procedure Act at issue.27 Over ten years, three important developments had taken place. The Court itself – through its interactions with lower courts and Parliament – had a better grip on the problems associated with appeals from Magistrates’ Courts to the High Court. That familiarity enabled the Court to assess for itself which provisions were beyond redemption and which could be ameliorated without a finding of unconstitutionality. As a result, the Court could hand down judgment on the constitutionality of the provisions under scrutiny and not feel obliged to consult Parliament by deferring its order of invalidity.

2. The Principle of Democracy and its Relationship to Rights Interpretation

I have described in the preceding pages an approach to rights, limitations and remedies analysis that simultaneously answers deep questions about institutional comity in a constitutional democracy and adumbrates an analytical framework that responds to concerns about judicial usurpation of legislative prerogatives and the alleged inability of courts to resolve polycentric social problems. What I have not yet described is how our courts go about determining the normative content necessary for rights, limitations and remedies analysis.

The normative content for such interpretation, at least in part, turns on the phrase ‘an open and democratic society based on human dignity, equality and freedom’. Determining the meaning of this phrase is fraught with difficulties as old as political theory itself. There are, for starters,
the tensions between democracy and rights, between equality and freedom, and the deeply contested nature of each of these five terms.

For the most part, the Court has viewed the four other values (found in FC s 36 and FC s 39) largely through the lens of human dignity. According to the Court, dignity provides a common measure of value which can help bridge the division between equality and freedom, between negative and positive rights, and between individual and collective forms of mutual concern and respect. However, a close examination of the Court’s jurisprudence reveals that dignity does not adequately address all conflicts of right, value and interest nor does a reliance on dignity appear to do justice to those out-groups whose participation in our democratic decision making remains marginal at best.

It is particularly surprising that the Constitutional Court has not done more to develop the meaning of ‘openness’ and ‘democracy’ – two features of our society that clearly demarcate the boundary between apartheid South Africa and post-apartheid South Africa. (But that is not to say that they have said nothing compelling at all.) A greater elaboration of the meaning of ‘an open and democratic society’, and a closer connection of these values to dignity (especially dignity qua self-governance), might result in a jurisprudence more inclined to accommodate plurality and difference and therefore, the heterogeneous forms of flourishing to be found in our republic. Similarly, an engagement with ‘democracy’ may strengthen our commitment to securing spaces in which ‘counter-publics’ or sub-publics can challenge dominant ideas and engage in alternative discourses.

In this section, I consider the possibility of a complementary understanding of the ‘big five’ values underlying the Bill of Rights that flows from a greater appreciation for the kind of democratic society to which the Final Constitution commits us. It is an understanding of democracy that, consistent with a commitment to shared constitutional interpretation, loosens the Gordian knot of most facile characterizations of the counter-majoritarian dilemma.

In United Democratic Movement v President of the Republic of South Africa, the Constitutional Court issued a challenge of sorts to the academic community: tell us what ‘democracy’ means, and more importantly, tell us how it ought to inform, in a principled manner, our understanding of various provisions in the text of the Final Constitution. Some South African academics, and in particular, Theunis Roux, have done just that. Roux pulls together the political theory out of which our particular South African conception of democracy arises, the textual provisions of the Final Constitution that shape that conception, and the extant case law of our courts to generate a ‘principle of democracy’. I will not rehearse all of Roux’s arguments in support of that principle here. I will, however, draw down on several of his arguments, especially those that serve part (2) of his ‘principle of democracy’.

The argument that lends the greatest force to a theory of shared constitutional interpretation is Roux’s contention that, read together, FC ss 7(1), 36(1), and 39(1) ‘structure the way in which the tension between rights and democracy is to be managed in South African constitutional law’. FC ss 36(1) and 39(1) require a value-based approach to fundamental rights analysis and limitations analysis in part because they invoke the same linguistic trope – ‘an open
and democratic society based upon human dignity, equality and freedom. However, Roux’s connection of the oft-ignored FC s 7(1) to both fundamental rights interpretation (FC s 39) and limitations analysis (FC s 36) enables me to make four critical points.

First, FC s 7(1) reads: ‘The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.’ Notice that democracy is treated as an independent value. Notice that the values of human dignity, equality and freedom are ‘democratic’ values. At a minimum, the language of FC s 7(1) should give pause to those interpreters of the basic law who privilege, reflexively, the value of human dignity. One can press this point further and argue that FC s 7(1), in fact, reverses the spin placed by the Constitutional Court on the phrase ‘an open and democratic society based upon human dignity, equality and freedom’. It makes a democratic society, and not dignity, foundational.

Second, it is unnecessary to read the language of FC s 7(1) in a manner that privileges democracy over dignity. Roux rightly suggests that we should be just as wary of overly simplistic reductions (rights service democracy) as we are chary of claims that rights and democracy stand in irreconcilable tension with one another (the counter-majoritarian dilemma). I think that it is enough to suggest, as Roux does, that FC s 7(1) delinks the phrase ‘an open and democratic society’ from ‘human dignity, equality and freedom’. That is, whereas the phrase ‘open and democratic society based upon human dignity, equality and freedom’ suggests a miasma of big ideas that could exhaust the entire universe of modern political theory, delinking the two phrases forces the reader of FC ss 36(1) and 39(1) to stop and to attend to the meaning, as well as the desiderata, of an ‘open and democratic society’. Even if it does nothing else, by reading FC s 7(1) together with FC s 36(1), we are forced to concede that the principle of democracy is of equal weight as the value of dignity when it comes to the justification of a limitation of a fundamental right.

Third, Roux’s arguments support my contention that balancing is an inapt metaphor for limitations analysis. Such metaphors block one from drawing the conclusion to which FC s 7(1) has already committed us: namely, that rights stand not in opposition to democracy, but that they are, instead, constitutive of it. Without the rights to equality, dignity, life, belief, expression, assembly, association, voting, political party membership, citizenship, access to information, access to courts and just administrative action, we could not enjoy a meaningful democracy. These rights are themselves the preconditions for an ‘open and democratic society’.

Fourth, the principle of democracy gets read back into these rights. The virtues of belonging and participating – identified first and foremost with democracy – attach not just to the political realm, but to an array of associational forms – religious, traditional, linguistic, commercial, labour, intimate, cultural – that are part of, but not identical to, our political order. Although Roux might not make this fourth claim, I do. It is an appreciation for these democratic values of membership and participation that underwrites my defence of pluralism, marginal social groups and oppositional counter-publics. We should value pluralism, and thus marginal social groups and oppositional counter-publics, not simply
because they serve as reminders of the emancipatory potential of robust democratic discourse, but because these groups, and others like them, are where democracy takes place every day for the vast majority of us.38

Finally, no one can gainsay Roux’s contention that ‘no South African political system claiming to be democratic would be worthy of that name unless it respected the democratic values which the Bill of Rights affirms’.39 This view firmly reinforces my own view about the relationship between courts, legislatures and citizens in a regime of shared constitutional interpretation. In such a regime, as in the political system contemplated by FC ss 7(1), 36(1) and 39(1), neither the courts nor the political branches of government have a privileged position with regard to the making and re-making of our basic law.

3. Socio-Economic Rights

The Final Constitution contains a sizeable portion of the world’s remarkably small number of genuinely justiciable socio-economic rights. These rights run from housing to health care, from water and food to social security, from children’s rights to the specific material entitlements of prisoners.40 The content of these rights has been fleshed out by the courts in a number of important cases.41 For my immediate purposes, we can extract the following principles from this complex body of jurisprudence:

- Socio-economic rights do not, generally speaking, embrace an entitlement to the immediate award of a remedy in the event of a breach (the rights of children and the right to a basic education are interesting anomalies);42
- Most socio-economic rights simply require the state to progressively realise the access to a particular good for individual members of the polity and to do so within ‘available resources’;43
- Whether the state has discharged its duty to progressively realise a right will be evaluated by the courts in terms of the ‘reasonableness’ of the plan;44
- To be found reasonable, a comprehensive and co-ordinated programme to realise access to a particular socio-economic right: (1) must ensure that ‘the appropriate financial and human resources are available’; (2) ‘must be capable of facilitating the realisation of the right’; (3) must be reasonable ‘both in their conception and their implementation’; (4) must attend to ‘crises’; (5) must not exclude ‘a significant segment’ of the affected population; and (6) must ‘respond to the urgent needs of those in desperate situations’;45
- The requirement to respond to persons ‘in desperate situations’ has given socio-economic rights (at least with respect to housing) some degree of minimum core content.46

One cannot find a better express example in South African jurisprudence of shared constitutional interpretation regarding the meaning of fundamental rights than our extant socio-economic rights jurisprudence. The Constitutional Court has refused, as a general matter, to identify a minimum core (content) for each socio-economic right.47 (In this respect, our socio-economic rights jurisprudence reflects a marked departure from the jurisprudence of the UN Committee on Social, Economic and Cultural Rights.) Instead, the Court has set out, with the odd exception, general norms that govern the progressive realization of socio-
economic rights and that leave the political branches ample room to experiment with policies that give effect to those rights.48

The invitation by the Court to the political branches to assist it in shaping the contours of socio-economic rights has been accepted by the legislature and the executive in a number of different domains. (It has been resisted in others.) Perhaps the best example of a principled dialogue between the courts and the political branches — as I will discuss at greater length in Chapter 6 — can be found in housing policy. After the Constitutional Court handed down its decision in Grootboom in 2001, the government was obliged to revisit its housing policy. The first important consequence of this review — for my theoretical purposes — is that the National Department of Housing eventually generated a new policy document — Breaking New Ground — that quite consciously echoes the language of Grootboom and reorients government imperatives in light of the general norms articulated by the Court.

The relative open-endedness of many of the Grootboom norms ensures that the Court will likely accept good faith government efforts to execute the policies enunciated in Breaking New Ground. That said, the Constitutional Court will not accept policy pronouncements alone as evidence of good faith. Where, as in Modderklip, the state makes no meaningful effort to accommodate the housing rights, property rights and procedural rights of citizens, the Court will not only find the government conduct unconstitutional, it may take, as it did in Modderklip, the highly unusual step of imposing constitutional damages.49 Shared constitutional competence has its limits. A refusal by the political branches to take seriously the Court’s gloss on the Final Constitution will result in a revocation of the initial invitation.

In the second important development in housing law under FC s 26, the Constitutional Court has crafted a doctrine that it calls ‘meaningful engagement’. The 51 Olivia Road Court’s ingenuities distinguish the matter from virtually all of its housing case predecessors.50 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 various legal and constitutionally accepted justifications for its order, the most fascinating part of the decision — from the perspective of experimental 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’.51 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 held that a municipality must simultaneously determine where they are to be otherwise accommodated. The right to adequate 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 or some other sphere of government is obliged to engage the effected parties. Moreover, the result of such engagement must be tangible: mere formal notices or even public hearings will likely be deemed insufficient. 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.\(^52\)

To engage meaningfully all 63,000 evictees in a systematic fashion,\(^53\) 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. The obligation placed upon the state did not mean that the occupants could employ obstructionist tactics to delay a move. The Court warned that '[e]ngagement is a two-way process'\(^54\) that 'will work only if both sides act reasonably and in good faith'.\(^55\) Consistent with the precepts of experimental constitutionalism, the 51 Olivia Road Court places a premium on sharing (or 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. In sum, the enforced settlement obliged the parties to produce a range of housing alternatives for 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.

As doctrine, meaningful engagement has shown legs in housing, education and political participation cases. The Court used the doctrine to dispose of its next meaningful housing matter – Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others.\(^56\) Whether the doctrine of 'meaningful engagement' has sufficient content to do the experimentalist work it promises is a matter taken up in greater detail, and on a case-by-case basis, in Chapters 6 and 8. (The Court's most recent housing judgment at the time of the completion of writing (Blue Moonlight) suggests that the doctrine may have the kind of long-twitch muscle to allow it to go the distance.\(^57\))

### 4. Chapter 9 Institutions

In Grootboom, the Constitutional Court made a modest contribution towards the design of peculiarly South African experimental institutions. It did so by charging the South African Human Rights Commission (SAHRC) with the dual responsibilities of monitoring compliance with the Court’s order and of facilitating information gathering about housing policy. (That the SAHRC failed to discharge its mandate is another (not inconsequential) matter.) Good reasons exist – as the decade after Grootboom suggests – for the Court to retain jurisdiction to ensure implementation of an order in such matters. The SAHRC or some other party charged with monitoring compliance would not have to waste valuable time and resources in launching a fresh application in the High Court. If we are to take
the pooling of information seriously, then the assistance provided by government agencies or independent institutions operating outside the courtroom must be fed back into the system. That suggests that reports regarding the efficacy of a court-sanctioned plan occur with some regularity.

There is absolutely no reason why other Chapter 9 Institutions Supporting Constitutional Democracy – the Commission on Gender Equality, the Public Protector, the Auditor-General, the Commission for the Promotion and the Protection of the Rights of Cultural, Religious and Linguistic Communities, or the Independent Electoral Commission – cannot play similar roles with regard to their areas of competence. Chapter 9 Institutions do, without prompting by the Constitutional Court, often undertake institutional roles commensurate with a commitment to experimental constitutionalism.\(^5\) (Unfortunately, the straitened circumstances of these institutions, and the often outright hostility of the government toward their efforts, have curtailed their ability to provide the polycentric fora and feedback that might assist the state and its citizens in solving some of the many problems this 18-year-old republic daily confronts. Should the Public Protector really find herself in a position in which she must request special protection from the police because a significant number of the police force’s members are under investigation?)

\(a. \text{ Auditor-General}\)

By virtue of its position as ‘the supreme audit institution of the Republic’,\(^5\) the Auditor-General must produce financial audits and compliance audits with respect to all national and provincial departments, all municipalities, all public entities and a host of other institutions.\(^6\) The filing of these audits with Parliament and the National Treasury is meant to ensure the proper use of public funds.\(^6\)

These audits – some 1,600 annually – provide critical information about how various arms of government are managing their budgets, enable the legislature (and the judiciary) to exercise meaningful oversight over the executive,\(^6\) and offer the promise of a government that operates in an accountable, transparent and equitable manner.\(^6\) As the Constitutional Court noted in *President of the Republic of South Africa v South African Rugby Football Union*, the Final Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability. The constitutional goal [of ensuring that the administration observes fundamental rights and acts both ethically and accountably] is supported by a range of provisions in the [Final] Constitution … [including the establishment of] the Auditor-General whose responsibility it is to audit and report on the financial affairs of national and provincial State departments and administrations as well as municipalities.\(^6\)
The Auditor-General’s powers extend beyond the coercive power of shame and embrace the threat of forensic audits. Its reports and its forensic audits expose malfeasance, corruption and incompetence in the discharge of public office that enable other law enforcement agencies to launch criminal investigations. Existing case law suggests that the Auditor-General may even possess standing to seek rescission of decisions or contracts that manifest fraud.

As a general rule, the Auditor-General carries out audits, but does not opine on the merits of particular government programmes. However, while the Auditor-General will not ‘question policy laid down by the legislative and executive authority, the arrangements for the implementation thereof, the controls applied, the cost incurred and the results achieved are all legitimate subjects for auditing.’ In other words, although the government’s ‘objectives’ fall beyond the purview of the Auditor-General, the Auditor-General can interrogate the means that the government employs to realize its objectives. When it comes to the expenditure of public monies, the Auditor-General has an obligation to state whether the financial audits and the compliance audits reflect a problem with the implementation of a policy or the delivery of services.

In my ideal world of shared constitutional interpretation, the Auditor-General is a gigantic feedback mechanism. It tells us what works in government and what doesn’t. (When only seven municipalities in an entire country (as of 2011) receive a clean audit, we know that something has gone terribly awry.) In addition, the Auditor-General’s power to shed light on the efficacy of policy implementation plays a significant role on the future formation of policy and the discharge of constitutional duties. These Auditor-General’s reports – and the problems the reports identify – have a critical role to play in the creation of a polity committed to the rule of law and for the restoration of society’s faith in a government of, by and for the people. The power of these reports to shame some government officials into taking appropriate action is reflected in a brace of cases that have arisen out of normal audits and forensic investigations. It is also echoed in constructive responses to criticism from the Auditor-General and promises to root out sources of corruption and inefficiency. More worrisome, of course, has been the need for the National Government to intervene in provincial and municipal affairs when the Auditor-General has reached the conclusion that local officials cannot discharge their responsibilities.

Some might contend that the Auditor-General’s ability to assess the efficacy of policies is limited to waste – and not waste that can be fixed, but waste rooted in corruption or systemic deficiencies in the state’s SCM policies and its ability to manage its assets and liabilities. If, the argument continues, the Auditor General is not pooling the information uncovered into reports that can be used by the state to remedy those systemic problems, then one might be inclined to ask whether its reports are as forward and lateral looking as we might expect from an emergent experimental institution.

The critique suggests that for the information to be valuable from an experimental perspective, the Auditor-General must make it so. Why should that be? First, repeated reports of malfeasance regarding the same institutions and political structures are sent to Parliament virtually every year. Second, Parliament possesses the power to interrogate public officials, assess the value of policy initiatives and turn the spigots on or off. With respect to municipal fiscal failures at alarming rates, the Auditor-General’s reports indicate which municipalities ought to be placed under provincial or national control.
Yes, it’s true that a sophisticated central clearing house would be more valuable from an experimentalist perspective. But it’s equally true that when such vast amounts of information enter the public domain, private actors can determine where not to invest, and the national government (and to a lesser extent provincial government) can decide which organs of state are failing and thus in greatest need of further state intervention. Finally, South African citizens can decide for themselves whether the state is genuinely committed to keeping up its end of the social contract.

The courts have reinforced this power to shame – and to reconstruct policy – by expressly recognizing that the Auditor-General is the most appropriate arbiter of disputes over the use or the misuse of public funds. In *Glenister v President of the Republic of South Africa & Others*, the Court identified the Auditor-General as one of several institutions designed to prevent rent-seeking behaviour and outright corruption from undermining both democratic rule and the obligation of the state to fulfil the promise of the Bill of Rights. Whether the directly accountable branches of government – Parliament and the provincial legislatures – will heed the Auditor-General’s words – or reduce it over time to the role of a mere Cassandra) remains to be seen. However, the public response to the Auditor-General’s 2009 scathing report regarding the general incompetence and the rent-seeking behaviour of the police force, and the Auditor-General’s conclusion that an underfunded, unskilled police force could not discharge its constitutional responsibility to protect the general population suggests that at least one of the Chapter 9 Institutions has been allowed to discharge its responsibilities.

b. Public Protector

Like most ombudsmen around the globe, the Public Protector monitors the conduct of state officials and agencies with the aim of ensuring an effective and ethical public service. The office reflects, in both conception and execution, a profound improvement upon its precursor: the Advocate-General. The Advocate-General’s brief was limited to investigations into the unlawful or the improper use of public money. The Public Protector’s brief, as initially adumbrated in the Interim Constitution, and as now determined by the Final Constitution and the Public Protector Act (PPA), is to watch the watchers and to guarantee that the government discharges its responsibilities without fear, favour or prejudice.

The Public Protector’s role in a scheme of shared constitutional interpretation can be profitably compared with the duties discharged by the judiciary. Courts handle discrete disputes about law and conduct – even as they craft general norms designed to govern the behaviour of the state and private actors. They rely on correct procedure and solid, sometimes intricate, legal argument. Courts are not, however, designed to handle the large number of complaints that arise from simple misunderstandings or bureaucratic red-tape, nor do they lend themselves to the resolution of injustices that turn more on under-capacity than illegality.

The Public Protector occupies a middle space in the politico-constitutional landscape. It assists the courts by addressing those complaints about the administration of justice that fall beyond the courts’ purview. It assists the legislature by monitoring the performance of the executive and answering those complaints that elected representatives are unable to address.
The Public Protector performs these functions, in theory at least, free from political
pressure. It is not, however, entirely independent. For while the Public Protector enjoys
priority over other institutions in the exercise of its functions, it must still often act together
with the courts, the executive and other Chapter 9 Institutions to fulfil its mandate.
One of the most common criticisms levelled against the Public Protector is that the institution
lacks the power to make binding decisions. In point of fact, the ability of the Public Protector to
investigate and to report effectively – without making binding decisions – is the real measure
of its strength. Stephen Owen explains this apparent paradox as follows:

Through the application of reason, the results are infinitely more powerful than through the
application of coercion. While a coercive process may cause a reluctant change in a single decision
or action, by definition it creates a loser who will be unlikely to embrace the recommendations
in future actions. By contrast, where change results from a reasoning process, it changes a way of
thinking and the result endures to the benefit of potential complainants in the future.

The publication of the Public Protector’s findings can shame a body into accepting the validity
of its recommendations. Its reports to Parliament should enable the national legislature to
exercise effectively its oversight function and shape important debates on policy and budgetary
matters. Nothing prevents law enforcement agencies from acting on the Public Protector’s
findings. Thus far, our Public Protector has had sufficient funds (especially when supported
by other government agencies) to maintain the high standards of investigation and reporting
required in order function as a ‘voice of reason’. The Public Protector has, as a result, fulfilled
its role in a scheme of shared constitutional interpretation by ensuring that the members of
the executive ‘understand’ their constitutional responsibilities and that the other branches of
government – the courts and the legislature – ‘understand’ when those norms are not being
fulfilled in practice.

The current Public Protector, Thuli Madonsela, has demonstrated just how effective
thorough investigations of public officials and the consequent shaming of members of cabinet
can be. In March 2011, she released a damning report on irregularities related to the lease of
two properties by the SAPS in Pretoria and Durban. The report – Against the Rules – strongly
suggests that the leases for the buildings were executed because of an untoward relationship
between SAPS National Commissioner Bheki Cele and a private property owner. However, the
Public Protector’s findings of a potentially corrupt relationship are not nearly as important as
her conclusions regarding the manifold constitutional breaches reflected in this ‘property deal’.

With respect to the SAPS, the Public Protector identified the following constitutional and
statutory improprieties:

1. ‘Although the SAPS did not sign the lease agreement, its involvement in the procurement process
   was improper, as it proceeded beyond the demand management phase and it further failed to
   implement proper controls, as required by the PFMA and relevant procurement prescripts.’
2. ‘The SAPS failed to comply with section 217 of the Constitution, the relevant provisions of the
   PFMA, Treasury Regulations and supply chain management rules and policies. This failure
   amounted to improper conduct and maladministration.’
3. ‘The conduct of the accounting officer of the SAPS was in breach of those duties and
   obligations incumbent upon him in terms of section 217 of the Constitution, section 38 of the
The Selfless Constitution

PFMA and the relevant Treasury Regulations. These provisions require from an accounting officer to ensure that goods and services are procured in accordance with a system that is fair, equitable, transparent, competitive and cost effective. This conduct was improper, unlawful and amounted to maladministration.94

Based upon these findings, the Public Protector recommended that the National Treasury determine whether there had been any wasteful expenditure, that the Minister of Police should take action against the responsible official and that the SAPS should take steps to ensure that the same types of contraventions do not occur again.95 One can take some solace in the fact that the Public Protector’s report ultimately resulted in the dismissal of two senior members of cabinet.

c. Complementarity, Reflexivity and Inclusivity in Constitutional Norm Generation

Jonathan Klaaren offers astute observations regarding the status of the SAHRC and other Chapter 9 Institutions that resonate strongly with my more general theses about shared constitutional interpretation and participatory bubbles.96 He notes that:

[T]he six institutions listed and established in terms of FC s 181(1) are not mere creatures of statute. As creatures of the Final Constitution, the SAHRC and the other Chapter 9 Institutions enjoy a status and an authority that can potentially override unconstitutional legislative provisions.97

In short, Chapter 9 Institutions have the power to find legislation ‘inconsistent’ with the terms of the Final Constitution. (It does not follow that these institutions have the power to declare, in terms of the supremacy clause in FC s 2, law or conduct to be constitutionally infirm.98)

Klaaren observes that since both ‘the SAHRC and the Constitutional Court are designed to protect and to promote respect for human rights’, a principle of complementarity governs the relationship between the Chapter 9 Institutions, the courts and other branches of government.99 According to Karthy Govender, complementarity should be understood as follows:

[I]nternational standards require that the [national human rights] institutions do more than simply function as a surrogate court of law. Their role is to actively protect and promote human rights and not to exist simply as an investigative mechanism which reacts to human rights violations. The institutions must work systematically and holistically towards the attainment of internationally recognized human rights.100

The Constitutional Court, in New National Party, acknowledged this role of Chapter 9 Institutions in determining the contours of South Africa’s constitutional order. Then Deputy President Langa wrote, on behalf of the Court, that ‘[t]he Constitution places a constitutional obligation on [all] … organs of state to assist and protect the [Independent Electoral] Commission in order to ensure its independence, impartiality, dignity and effectiveness’.101

FC s 181 through FC s 194 identifies a fourth indispensable branch of government with responsibility for determining the meaning of the Final Constitution. The other branches of
government have an obligation not only to take heed of the warnings of Chapter 9 Institutions, but a duty to take their interpretations of the basic law seriously.\footnote{102}

5. **Provincial Constitutions**

A danger exists when one is in the thrall of a theory of any given kind. One is apt to see evidence for it everywhere.

Take provincial constitutions. The Constitution invites provinces to draft constitutions of their own.\footnote{103} While a provincial constitution may not contradict the Final Constitution, it can offer protections that the Final Constitution does not.\footnote{104} In addition, provinces may alter some of the provincial legislative and executive structures and procedures established by the Final Constitution.\footnote{105} These constitutional invitations may seem relatively trivial. But they still afford the provinces the space to experiment with fundamental rights and political institutions. Such experiments could, in theory, influence decisions taken in other provinces or by the national government.

Only two provinces have attempted to craft provincial constitutions. The Western Cape succeeded. KwaZulu-Natal failed.\footnote{106}

The Western Cape Constitution has made little difference. It would be something of a stretch to claim, for example, that the Democratic Alliance’s control of the province and the Cape Town metropole is a function of subtle changes in provincial architecture.

As for KwaZulu-Natal, it failed twice in the mid to late 1990s to contrive a text that would pass constitutional muster. Slightly more recent efforts largely died out as the ANC asserted political dominance over the province, while the efforts of the IFP to use a constitutionally mandated ‘King’ to block the ANC’s ascension simultaneously withered.

Given the centralization of power in the NEC of the ANC, provincial constitutions must, for the time being, be viewed as failures in experimental design. Whether, at some moment in the future, when the ANC no longer controls the national government, eight of nine provinces and most of the major metropoles, provincial constitutions will be able to fulfil their potential as experimental institutions must be viewed as an entirely speculative query. (Indeed, at the time of writing, the failure of several provinces to discharge adequately their duties has led to a different set of questions about institutional design: whether we should have nine provinces at all.)

C. **Participatory Bubbles**

Because my naturalized account of the self and the social takes seriously the limits on our capacity for rational reflection and collective deliberation, it is inaccurate and obscurantist to ground our politics in an alleged capacity of individuals and groups to engage in profound reflection over critical existential questions. (Again: politics as reasoned discourse remains a lovely ideal even as we recognize – doctrinally and institutionally – that it is not common practice.) My naturalized account of the self does not deny our capacity to engage in meaningful deliberation. In fact, without a commitment to unearthing ‘the truth’ and what we call the scientific method, neither experimentalism nor flourishing would make any sense at all.\footnote{107}
Other non-experimentalist constitutional theorists acknowledge our significant limitations with regard to rational deliberation. Bruce Ackerman has offered an understanding of error correction and political change that is restricted to critical constitutional moments. However, rather than concentrating on earth-shaking moments of crisis, the design proposals here concentrate on narrow, subject matter-specific, and often time-sensitive, institutional contexts.

The physical metaphor of bubbles is meant to convey three qualities of small-scale institutional processes. First, participatory processes become a natural part of ongoing social interactions. They originate when challenges to a given institutional 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 deliberation. Bubbles only enclose a small amount of space – both in terms of the issues debated and the number of participants. Third, bubbles are ephemeral. After satisfactory resolutions emerge from participatory processes, the raison d’état for a particular process of engagement ceases to exist. Participants can return to their more routine lives.

But the virtue of participatory bubbles need not be too modestly cast. As we saw in our discussion of drug treatment courts and family courts in the United States, the information produced in these bubbles has the capacity both to shape the means by which we pursue particular ends and to alter the very ends we pursue as we see what works best.

1. Remedies

a. Theory

Conflicting interpretations of the application of constitutional principles to the practices of a given institution or person leads to litigation. Those parties challenging existing norms seek to make the institutional practices or personal conduct consonant with their preferred interpretation of a norm. One solution in such circumstances, as Owen Fiss has argued, is for the courts to initiate a process of structural reform. In these court initiated processes, ‘the judge tries to give meaning to our constitutional values in the operation of those organizations’. The preferred tool for such judicial intervention is, as Fiss suggests, a structural injunction. Structural injunctions permit courts to engage in a ‘long, continuous relationship between the judge and the institution: it is concerned not with the enforcement of a remedy already given, but with … shaping the remedy itself’.

A number of South African scholars have argued in favour of greater use of structural injunctions. They recognize that one of a structural injunction’s virtues is that it does not assign the task of constitutional interpretation exclusively to the courts. Structural injunctions should, preferably, create the space for determination of the meaning of constitutional principles by members of a given political (or private) institution and the citizen-stakeholders challenging the institution’s authority. Within such a bubble, all those whose interests are at stake (within reasonable limits) are offered a chance to participate in the process of norm setting and problem solving. Furthermore, an injunction so fashioned maximizes the legitimacy of the process by ensuring a greater degree of openness to competing points of view and placing the parties within the process on a more or less equal footing.
The promise of such a process is genuinely meaningful engagement. 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’. Participatory bubbles facilitate processes of institutional reform that proceed within the vocabulary and the norms of the relevant institutions and communities, instead of via imposition by judicial authority. The reflexive stance of the bubbles’ participants should both foster a deeper commitment to active citizenship and enhance individual and group aptitudes for experimentation and error correction.

The foregoing discussion should make clear why participatory bubbles are important experimental feedback mechanisms. First, they enable state 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 experimentation and experiences of their predecessors. Third, the outcomes ought to have an additional knock on effect. The outcomes should create incentives for political institutions to open up their decision making processes to affected stakeholders in advance of conflict so as to seek out non-adversarial solutions.

Of course, courts called upon to perform limitations analysis and to fashion remedies cannot avoid settling conflicts that are not readily susceptible to deliberative solutions. Here again experimental constitutionalism offers the inspired proposal of provisional adjudication. Provisional adjudication puts alternative possible remedies to the test of experience without necessarily elevating such remedies to the level of established doctrine. Provisional adjudication promises two additional benefits. It may facilitate compromise: affected parties may learn from practical experience and adjust their beliefs and conduct accordingly. It gives parties that may still feel aggrieved with a particular outcome the opportunity to experiment with a constitutionally permissible remedy of their own making. A loss may be just as likely to generate a creative response as a positive outcome.

b. Practice

In the beginning, the Constitutional Court’s approach to structural injunctions (or similar remedies) was lukewarm at best. The Constitutional Court stated that although a structural interdict might be an appropriate and valid remedy for some constitutionally infirm law or conduct, it repeatedly stressed that such an order must only be made where it is ‘necessary’.

Up to and through 2004, the Court remained reluctant to employ this remedy. Times change. From 2005 onwards, the case law reflects a significant softening of this stance – and an acknowledgement that it might serve the ends of an experimentalist constitution.

Reluctance was never refusal. The Constitutional Court employed a fairly stringent structural interdict in *August v Electoral Commission*. After finding that both the Department of Correctional Services and the Independent Electoral Commission had failed to take the requisite steps to ensure that prisoners could exercise their constitutionally enshrined entitlement to the franchise, the *August* Court turned its attention to the appropriate remedy for this constitutional infirmity. It wrote:
The Commission must therefore make the necessary arrangements to enable them to vote. This Court does not have the information or expertise to enable it to decide what those arrangements should be or how they should be effected. During the hearing of this matter, counsel for the Commission was invited to indicate what arrangements for registration and voting would best suit the Commission in order to assist the Court in making a precise order. The Commission did not provide the information. The determination of what arrangements should be made remains a matter pre-eminently for the Commission. It is important that there should be certainty as to what these arrangements will be. In the light of the fact that this Court is not in a position in the circumstances of the present case to give specific direction as to what is to be done, it is appropriate that the Commission be required to indicate how it will comply with the order that has been made.119

The Court then ordered the Commission to deliver an affidavit that stated the manner in which the Commission would comply with its edict.120 The Constitutional Court followed August with a similarly strict structural interdict in matter that once again engaged the disenfranchisement of prisoners: Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others.121

Lower courts followed suit. In Kiliko and Others v Minister of Home Affairs and Others, the Cape High Court heard an application by asylum seekers from the Democratic Republic of the Congo.122 The application contended that the procedures adopted by the Western Cape refugee reception office were unlawful and unconstitutional.123 Van Reenen J concluded that the policy of limiting the number of asylum applicants to twenty per day constituted an unjustifiable infringement of the FC’s 10 and the FC’s 12 rights to dignity and to freedom and security of the person. As to the remedy, Van Reenen J held that the present case was an appropriate one for the granting of a structural interdict. The interdict required the respondents to provide the Court with a report on improvements to the reception of asylum seekers in the Western Cape. According to Van Reenen J, the purpose of the order was to ‘ensure that the manner in which the respondents receive and process applications for asylum in the future does not offend against any of the State’s obligations under international law, the Constitution and statutes’.124

In Centre for Child Law v MEC for Education, Gauteng, a High Court in the Transvaal Provincial Division handed down an invitation that goes significantly beyond the standard form of a structural interdict.125 Having found that the school of industry and the MEC in question had failed to provide the most basic living conditions for its charges – and having found that they had thus violated FC s 28, FC s 10 and FC s 12 – Judge Murphy put the school and the MEC on the strictest of terms. His order begins by requiring that the state arrange for the immediate provision of sleeping bags that would ensure sleeping temperatures of no lower than five degrees Celsius. The order then requires that:

a. The MEC provide, within a month of the decision, a plan to ensure perimeter and access control to the school;

b. The MEC and the school create, within a month of the decision, a quality assurance programme, in concert with relevant government bodies and non-governmental organizations, designed to ensure appropriate residential care and treatment;
c. The MEC, the school and a multi-disciplinary task team (made up of child care experts) produce, within a month of the decision, a report on their initial findings and the progress made in the intervening period;

d. The MEC and the school put in immediate place psychological and therapeutic support structures to ensure the well-being of the students;

e. The MEC would appear in court, five weeks after the judgment, to describe the aforementioned plans and how it intends to go about their implementation;

f. The applicants participate in the construction of the aforementioned plans and that they retain the ability to return to court seeking appropriate relief for any failure to carry out the court's order.

While legitimate doubts have been raised as to whether a structural interdict was the appropriate remedy in Kiliko, the facts of Centre for Child Law – for the straitened circumstances of the children in question – did not afford the High Court much latitude. However, the Centre for Child Law is also quite clear that the order handed down has at least as much to do with its great displeasure with the state. Judge Murphy writes:

While I am minded to commend the first respondent for its concessions about the poor state of affairs, I express the concern, I am sure shared by many, about the bureaucratic prevarication intrinsic to the department’s litigation strategy. Section 195(1) of the Constitution requires the public administration to respond to public needs quickly and effectively. Increasingly one is witness to public statements made by politicians and community activists about the slow pace of the delivery of social services to the vulnerable and marginalized sectors of our society. There is a growing sense arising in the general public that bureaucrats are failing us. I therefore venture the tentative suggestion that in many cases government departments defend litigation against them unnecessarily, and in doing that, use resources that might be better applied elsewhere.126

After detailing the parlous state of affairs at the school, and noting that the state had abdicated its responsibility to provide even marginally better care for these children than their parents currently could, Judge Murphy proceeded to announce the need for a structural interdict:

The need for a developmental quality assurance process is patently obvious. Matters appear to have come adrift at the school. They need to be remedied immediately. The process is a useful, investigative, diagnostic and remedial tool which will identify organizational weaknesses and a way forward. Given the dilatory and lackadaisical approach taken so far, it is a good idea that this court retains a supervisory role to ensure progress. Violations of constitutional rights invite innovative remedies and the present case calls for such.127

The High Court’s order creates the conditions for a paradigmatic participatory bubble. While the High Court finds that the general norms set out in FC s 10, FC s 12 and FC s 28 have been violated, the judge has left it up to the parties – under his supervision – to work out a plan that will leave all parties better off. Should this initial plan fail to provide the requisite levels of redress, the court retains the jurisdiction to ensure that the requirements of FC s 10, FC s 12 and FC s 28 are met. Thus, though the judgment stands as a scathing indictment of bureaucratic lassitude, it also invites the state and the school to meet their respective obligations. Moreover, by requiring the state to engage non-state actors in the construction of its plans, the court’s invitation enables it to draw upon expertise it simply does not possess.
and allows it to avoid the articulation of principles that might look pretty on paper but wind up being rather empty in practice.

The High Court’s creative response is also consistent with the idea of remedial equilibration introduced in Chapters 3 and 4. Although the Centre for Child Law court is not engaged in the disentrenchment of private ordering that reinforces the stratification of South African society, it does employ remedies that enable the various parties to the case to arrive at the best ‘fit’ between state capacity, non-state actor capacity and the needs of the affected children. The High Court eschews both rights essentialism and automatic remedialism.

In 2005, the Constitutional Court suggested that it might be inclined to use reflexive and polycentric forms of engagement to mediate constitutional conflicts and to adudge the (provisionally) true meaning of various constitutional norms. The Constitutional Court began its shift with a detailed supervisory process in *Sibiya v The Director of Public Prosecutions, Johannesburg*. In the absence of government action to revise the sentences of people still sitting on death row after the death penalty was abolished, the Court was pressed to devise an appropriate form of relief. The Court required the government, and the responsible minister, to provide all pertinent information on all prisoners still on death row, to explain why their sentences had not yet been altered, and to alter the sentences post haste. As Michael Bishop notes, the Court did not justify its supervision of the process in its original judgment, but later explained that it was based on ‘the delay that had occurred since [the death penalty was declared unconstitutional] coupled with the pressing need for the sentences to be replaced’.

The shared process of review was, quite notably, both engaged and flexible:

The Court eventually considered five reports by the government until the process was finalized. The first report set out the number of sentences that still needed to be converted while each subsequent report indicated what steps had been taken and what still remained to be done. The entire Court considered in detail each report and identified what problems remained and ordered a further report to be made. At the completion of the process, the Court issued a judgment reflecting on the supervisory process in generally positive terms.

The *Sibiya* Court draws four conclusions from its experience with supervisory orders: '(a) Successful supervision requires that detailed information be placed at the disposal of a court; (b) Supervision entails a careful analysis and evaluation of the details provided; (c) Supervision cannot succeed without the full co-operation of others in the process; (d) Courts should exercise flexibility in the supervisory process.' Bishop also offers another insight into this collaborative process. He surmises that the Court was pleased that it did not have ‘to substitute its own opinion for that of the government, but merely to ensure that the government completed a process to which it had already committed itself’.

A myriad of subsequent cases over the past five years reflect the Constitutional Court’s increased level of comfort in creating remedial structures designed to realize the best empirical and normative outcome possible. In housing cases, from *Occupiers of 51 Olivia Road* to *Joe Slovo I and II* to *Blue Moonlight*, the Court has demonstrated a remarkable propensity to allow the parties – including interveners and amici – to work out a veritable pareto-optimal outcome for themselves. More compelling still is the Court’s willingness to allow the parties
Flexible settlements are not all that’s new and noteworthy. In two education cases, *Ermelo* and *Juma Musjid*, the Court has alighted upon mechanisms that ensure that what appears to work in terms of the order delivered at the end of an initial judgment continues to work over time. In *Ermelo*, the Court required both the school governing body and the provincial department of education to report back to the Court at regular intervals so it could assess the progress the parties had made in realizing learners’ right to receive an adequate basic education. In *Juma Musjid*, the genius of the Court’s shaping of the bubble of parties lies (a) in its willingness to treat the applicants and the respondents (learners and a private trust) as natural and juristic persons engaged in a horizontal dispute over the right to a basic education, and (b) in its invitation to the Centre for Child Law and the Socio-Economic Rights Institute into a dauntingly complex polycentric matter requiring subtle non-partisan analysis. Here too, the Court requested feedback from the state and other parties regarding the manner in which learners had been accommodated.

In *Nyathi I* and *II*, the Court confronted a challenging set of cases that raised both technical financial issues regarding the payment of debts and subtle institutional politics. Instead of treating the cases in a binary fashion – outright winners and abject losers – the Court solicited participation from a broad array of parties. The Court 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. Finally, the Court requested that the state report back and provide an account of all the outstanding judgment debts on its books and adumbrate a plan as to how the state would acquit itself of such arrears in the future.

2. **Rules and Procedures in Constitutional Matters**

The rules and procedures of the Constitutional Court reflect another, perhaps less obvious, set of court-created participatory bubbles. Rules and procedures regarding direct access, legal aid referrals, intervenors and amici all enhance the quality of the information available to the court and the normative legitimacy of its decisions. The greater participation and reflexivity these rules and procedures allow further enables the Court to more closely approximate an experimentalist’s agenda of rolling best practices.

As Kate Hofmeyr notes, ‘direct access applications are increasingly being used by parties where the relief they seek is substantially similar to the relief sought by other parties in a matter already before the Constitutional Court’. The Constitutional Court is inclined to grant many of these applications where the applicants’ submissions relate to substantive issues that are already before the Court and where the insights offered by the applicants may help to resolve difficult issues before the Court. The Court is especially interested in submissions that help it to fashion more appropriate remedies or enable it to fill in doctrinal gaps in matters already before the Court.
Legal aid referrals also possess the capacity to enhance the quality of the Court’s deliberations by increasing the amount of litigation. In two decisions, De Kock v Minister of Water Affairs and Forestry and Mnguni v Minister of Correctional Services, the Constitutional Court, despite refusing to grant direct access to the unrepresented applicants in both cases, directed the Registrar to bring the judgments to the attention of the Law Society of the Northern Provinces. The purpose of this procedure is to ensure that unrepresented applicants have the capacity to raise ‘important yet difficult issues which may well require adjudication’ by the Court.

Interveners represent – in terms of Constitutional Court Rule 8 – a second class of party that may enhance the Court’s critical capacity. In Minister of Public Works and Others v Kydami Ridge Environmental Association and Another (Mukhwevho Intervening), an application was made by an Alexandra flood victim – who was offered temporary accommodation at Leeuwkop – for leave to intervene as a party. The Court noted the applicant’s ‘direct and substantial interest in the proceedings’ – the test articulated in the case law surrounding rule 12 of the Uniform Rules of Court – and determined that it entitled him to be joined.

On its face, Rule 8 envisages leave being sought from the Court by a party wishing to intervene in proceedings before it. By adding the requirement that leave be sought, the Court would appear to retain the discretion to determine the right of a party to intervene. However, the Court’s own doctrine of objective unconstitutionality should limit that discretion. Despite the apparent desuetude of this doctrine, the Court reaffirmed its existence in National Director of Public Prosecutions v Mohamed NO and recommitted itself to its original articulation in Ferreira v Levin NO Others:

a statute is either valid or ‘of no force and effect to the extent of its inconsistency’. The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach.

The class of applicants with a direct and substantial interest in a declaration of invalidity that reaches the Constitutional Court for confirmation is potentially vast. (Indeed, the Court often speaks, quite rightly, of all South Africans as having an interest in the outcome of every constitutional matter because all constitutional matters engage the basic principles of a just and fair political order.) As I have argued elsewhere, while the specific circumstances of the original applicants – or those seeking to intervene – may shed further light on some of the implications of the impugned law or conduct, the doctrine of objective unconstitutionality, logically, makes the position of the applicants and interveners immaterial to the Court’s ultimate determination.

While such a logical consequence of the doctrine may trouble a court concerned with the manner in which it controls its docket, the doctrine takes seriously the demands for increased stakeholder participation required by theories of experimental constitutionalism.

Amici constitute – in terms of Constitutional Court Rule 10 – a third class of party that may enhance the Court’s informational resources and participatory legitimacy. While the
Constitutional Court regularly warns amici that they incur unique responsibilities,146 this warning is generally softened by the Court’s express recognition of the invaluable role the amicus curiae play in broadening – and thereby reshaping – the Court’s analysis.147

At the same time that we recognize the virtues of inviting the participation of these additional parties, we need to acknowledge the mixed results. On the one hand, the Constitutional Court loves interveners and amici and has embraced extremely broad principles of standing. On the other hand, the Court has not made it easier for impoverished individuals to secure direct access. The Court has not adopted the Indian Supreme Court’s creative and caste-sensitive practice of accepting postcards from the impecunious as applications for a hearing on the papers or in the court. The mechanism for sorting, filtering and litigating legal claims on behalf of those persons in our society without the means to carry a battery of attorneys and advocates all the way up to the Constitutional Court (99% of us) has become the responsibility of a small coterie of legal NGOs and committed members of the bar steeped in public law advocacy. As Jackie Dugard notes, an individual without the good fortune to find such support has no chance whatsoever of having her claim heard.148

3. Costs
149

In ordinary civil litigation, the general rule is that costs orders should indemnify a party against expenses that were incurred as a result of litigation that he should not have been required to initiate or to defend. As Michael Bishop has written: ‘The rationale behind the rule in civil litigation is that, if a private person is brought to court to defend a claim with insufficient merit, it would hardly be fair to expect him to pay legal costs simply to defend an action that, objectively, ought not to have been brought in the first place.’150

However, the Constitutional Court has departed from the loser pays approach in a number of extremely significant ways. In many instances it does not award costs to a successful defendant. Why? Because, given the nature of constitutional litigation, the matters raised are important to the entire commonweal and not just the parties before the Court. This practice makes complete sense if the respondent is a government entity.151 A sphere of government or an organ of state that successfully defends law or conduct alleged to be unconstitutional has not, in fact, incurred unnecessary expenses. The Court has made it clear that all parties – especially the most impecunious South Africans – ought to be able to bring challenges designed to vindicate fundamental rights.152 As Bishop observes, the rationale for this significant departure from the rule in civil litigation is two-fold.153 First, all constitutional matters, even when initiated to serve the immediate needs of individuals, always reflect a public interest in the creation and the maintenance of a legal order that conforms to the requirements of the basic law. Second, the capacity to vindicate one’s common-law rights has, unfortunately, long been dependent in commonwealth jurisdictions on one’s available resources. The Constitutional Court’s approach to costs mitigates the very real, and often insuperable, fiscal barriers to effective vindication of constitutional rights by and for all South Africans.

For the purposes of this chapter, the departure from the ordinary rule in civil litigation is important for two additional reasons. First, though some might think the proposition a bit...
tendentious, the relaxation of costs orders enhances the chances for experimental constitutionalism to gain some traction in South Africa. It enables poor applicants (assisted by a limited number of legal NGOs and committed attorneys and advocates working pro bono), who might not otherwise get to court, to launch challenges that force the judiciary and the state to make an assessment as to whether law or policy reflects best practices and conforms to basic dictates of justice. A negative finding should force both the judiciary and the state to consider alternative means of pursuing constitutional imperatives. Second, flourishing is, in the South African legal order, inextricably bound up with the vindication of fundamental rights. Individuals and communities incapable of asserting their constitutional rights because of the costs and the risks that attach to litigation are individuals and communities far less likely to flourish. The Constitutional Court’s relaxed position on cost orders with respect to successful respondents (ie, the state) and unsuccessful applicants (ie, the citizens) ensures that more of an admittedly limited class of less-well-off applicants will have their fundamental rights challenges heard.

4. **Constitutional Jurisdiction**

In a number of cases, the Constitutional Court and the Supreme Court of Appeal have deployed the doctrine of *stare decisis* in a manner that dramatically curtails the ability of High Courts to use the Bill of Rights, generally, and FC s 39(2), in particular, to develop the common law or to re-interpret legislation in ways that depart from Constitutional Court, Supreme Court Appeal, or Appellate Division precedent. In short, the Courts’ doctrines make it difficult for lower courts to revisit incorrect decisions and to revise them accordingly. The existing doctrine on constitutional precedent undermines efforts to make the basic law part of a more effective rights-based feedback mechanism.

The Constitutional Court in *Walters* restricted its conclusions about *stare decisis* to precedent handed down by the Constitutional Court, the Supreme Court of Appeal and the Appellate Division in the (rather ambiguously described) ‘constitutional era’.154 The Supreme Court of Appeal in *Afrox* extended binding precedent – backwards – past the very beginning of even the most controversial understanding of the ‘constitutional era’.155 The *Afrox* Court recognized that High Courts could retain constitutional jurisdiction for any direct attack on a rule of law grounded in a pre-constitutional decision of the Appellate Division. However, where a High Court is persuaded that a pre-constitutional decision of the Appellate Division should be developed, through FC s 39(2), so that it accords with the spirit, purport and objects of the Bill of Rights (true indirect application), its hands are tied.156 The High Court is bound to follow the pre-constitutional decisions of the Appellate Division.

As Danie Brand and I have argued elsewhere, the problems with *Walters* and *Afrox* on the issue of *stare decisis* and the constitutional jurisdiction of the High Courts are legion.157 What is particularly troublesome for the purposes of a theory of experimental constitutionalism is that the Constitutional Court and the Supreme Court of Appeal have said that FC s 39(2) is the appropriate vehicle for development of the common law – both directly and indirectly – but that the High Courts may not disturb settled precedent through FC s 39(2).158 This result effectively bars our trial courts from offering litigants new opportunities to explore the meaning of our basic law and the most effective ways of realizing its ends. The most obvious
solution – and one consistent with the commitment to shared constitutional interpretation – is to relax the rule on precedent grounded in FC s 39(2) and permit High Courts to hear, at a minimum, direct (as opposed to indirect) constitutional challenges to precedent established under apartheid.

5. Public Participation in Law Making

As one might expect, and as Theunis Roux has discussed elsewhere, the Final Constitution’s most obvious commitment to democracy is to be found in the provisions dealing with the powers and functions of Parliament, provincial legislatures and municipal councils. Of particular import for any discussion of participatory bubbles is the extent to which the Final Constitution creates space for participation by minority parties and the general public and the degree to which the need for direct participation has been recognized by the Court.

For starters, FC s 57(1)(b) provides that the National Assembly may ‘make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement’. In De Lille & Another v Speaker of the National Assembly, the Cape High Court held that the ‘suspension of a Member of the Assembly from Parliament for contempt is not consistent with the requirements of representative democracy [in FC s 57(1)(b), read with FC s 57(1)(a) and FC s 57(2)(b)]. The primary grounds for the High Court’s conclusion was that such a sanction not only hurt the Member of Parliament in question, but also his or her party and those [members] of the electorate who voted for that party who are entitled to be represented in the Assembly by their proportionate number of representatives’. As Roux recognizes, De Lille’s gloss on FC s 57(1)(b) ‘is a classic instance of what John Hart Ely has called the “democracy-reinforcing” function of judicial review.

FC s 57(2)(b) states that the National Assembly’s rules and orders must allow for participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy. This language is rehearsed with respect to the procedures of the National Council of Provinces, provincial legislatures, and municipal councils. Two important decisions have been handed down on minority party participation in the proceedings of a municipal council and its committees (in terms of FC s 160(8)). In Democratic Alliance v ANC & Others, the reconstitution of three committees of the City of Cape Town was challenged under FC s 160(8). The applicant, a minority political party, alleged that its representation on the City’s reconstituted executive committee and two other committees was adversely disproportional to the number of seats it held in the municipal council. In oral argument, counsel for the applicant conceded that FC 160(8)(b) participation requirement would be satisfied by a first-past-the-post system in which the majority party took all the seats on the executive committee. The decision turned on the court’s interpretation of FC s 160(8)(a). FC s 160(8)(a) provides that parties must be ‘fairly represented’ on committees of the Municipal Council. On this issue, the Cape High Court held that FC s 160(8)(a) confers a right to participate in such committees, rather than a right to demand that the composition of each committee be proportional to the parties’ representation in the municipal council.
The Constitutional Court had an opportunity to consider FC s 160(8) in *Democratic Alliance & Another v Masondo NO & Another*.\(^1\) In *Masondo*, the issue was whether a mayoral committee established under s 60 of the Local Government: Municipal Structures Act\(^2\) was a committee as contemplated in FC s 160(8). Langa DCJ, writing for the majority, held that it was not. The Court found that the functions of mayoral committees under the Structures Act were ‘executive’ not ‘deliberative’,\(^3\) and that since a mayoral committee was not elected by the municipal council, but appointed by the executive mayor, it was not a committee contemplated by FC s 160(8).\(^4\)

The real action, however, lies not in the majority opinion but in Justice O’Regan’s dissent. O’Regan J agreed that FC s 160(8)(b) connotes simple majority rule. However, she felt obliged to dissent because, on her reading of FC s 160(8)(a), the Final Constitution requires a procedure in which the views of minority parties should at least be taken into account. In O’Regan J’s view, ‘the obligation of fair representation means that [majority] decisions [under FC s 160(8)(b)] are made only once the interests of non-majority parties have been aired’.\(^5\) O’Regan J summarized her position as follows:

> [S]ection 160(8)(b) is clear that the principle of fair representation is always subject to democracy and the will of the majority. Members of the mayoral committee must therefore submit to that principle, as must all councillors. The principle established by section 160(8) is a principle which requires inclusive deliberation prior to decision making to enrich the quality of our democracy. It does not subvert the principle of democracy itself.\(^6\)

As Roux observes, O’Regan J’s dissent echoes the theoretical literature’s accepted view on the value of participation in political decision making. While deliberation ought not to override the commitment to majority rule – and no democratic regime ‘should be beholden to the impossible ideal of decision making by consensus’ – ‘deliberation and participation in decision making are stressed for the contribution these processes can make to better informed and more legitimate decisions’.\(^7\) Justice O’Regan’s dissent emphasizes the value of participation at the same time as it recognizes that this virtue can, when a decision must be taken, become counterproductive.

Although a minority in *Masondo*, O’Regan J’s view ultimately carried the day in *Matatiele II* and *Doctors for Life*.\(^8\) *Matatiele II* and *Doctors for Life* provide a much more expansive and nuanced understanding of FC s 59(1)(a), FC s 72(1) and FC s 118(1). The *Matatiele II* Court was asked whether the Twelfth Amendment to the Final Constitution was unconstitutional because it re-demarcated the boundary of the municipality of Matatiele, removed it from KwaZulu-Natal and placed it in the Eastern Cape, without sufficient public consultation.\(^9\)

Justice Ngcobo, writing for a majority of the *Matatiele II* Court, held that a provincial legislature, whose provincial boundary is being altered, is required by the Final Constitution to approve such an alteration. Moreover, when a provincial legislature takes a decision of this nature, it clearly invokes its law-making powers. As such, the provincial legislature is required to facilitate public participation in its decision making process. The Court’s test for sufficient facilitation is that of reasonableness: a standard not to be dismissed lightly given that the Court could have lowered the threshold to that of mere rationality.\(^10\)
When determining whether a provincial legislature has acted reasonably, the Constitutional Court will have regard to factors such as the intensity of the impact of the legislation on the public. Ngcobo J writes:

The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to ensure that the potentially affected section of the population is given a proper opportunity to have a say.\textsuperscript{181}

Ngcobo J found that Matatiele II satisfied the factual predicate required by the test: the proposed amendment would have moved an entire, identifiable community from one province to another province. Moreover, the consequences of the proposed amendment were more than symbolic. The move of the municipality from KwaZulu-Natal to the Eastern Cape would have significant effects on the provision of welfare payments, health services and education to the constituents of Matatiele. (No one would argue that KwaZulu-Natal benefits from a more professional civil service. The Eastern Cape, on the other hand, is an unmitigated disaster. Its administrative failure has led to the direct constitutionally mandated intervention of the national government. Population flows out of the Eastern Cape and into KwaZulu-Natal have been so significant that they could have played a role in the 2012 ANC presidential nomination process.) Given the test to be applied, and the salient facts, the Court concluded that KwaZulu-Natal, in not holding any public hearings or inviting any written submissions, had acted unreasonably. As a result, that part of the Twelfth Amendment that altered the boundary of KwaZulu-Natal was declared unconstitutional.

In Doctors for Life, the Constitutional Court was asked to address a comparable question: whether the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment Act were unconstitutional because they had been passed without the requisite level of public participation. Ngcobo J, again writing for a majority of the Court, began by noting that the National Council of Provinces (NCOP) enabled the provinces to have a say in the national law-making process. NCOP delegations are generally obliged to secure voting mandates from their respective provincial legislatures. This direct influence of the provincial legislatures on their NCOP delegations meant that both Parliament and the provincial legislatures had a constitutional obligation to facilitate public involvement. Once again, the Court in Doctors for Life employed a reasonableness test for determining whether citizens possessed a meaningful opportunity to be heard in the making of law.

The papers and oral argument made it abundantly clear that although the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment Act had – as Bills – generated great public interest, and the NCOP had decided that public hearings would be held in the provinces, in the end, the majority of the provinces did not hold hearings. Given that the majority of provinces, and the NCOP itself, had failed to hold public hearings, and thus abdicated their respective responsibilities to provide the opportunity for the public participation contemplated by FC s 72(1)(a), the Doctors for Life Court held that both pieces of legislation had failed the test for reasonableness and were, consequently, constitutionally infirm.

For my purposes, Matatiele II and Doctors for Life stand for the proposition that public participation is not a good because it enhances deliberation, but rather that public participation – depending upon the issued concerned – will elicit information deemed critical
for decision making in a robust constitutional democracy. Moreover, the kind of participation contemplated by the Matatiele II and Doctors for Life Courts resonates quite profoundly with previous discussions about the nature and the purpose of participatory bubbles: better data and greater legitimacy. Public participation in South Africa – after Matatiele II and Doctors for Life – is meant to address specific problems that have a direct bearing on the lives of the would-be participants. Once the contested matter has been resolved, the bubble bursts and legislators and citizens alike return to other matters that occupy them.182

6. Chapter 9 Institutions

I have discussed above the manner in which Chapter 9 Institutions share constitutional competence for interpreting the Final Constitution. However, it may well be that in a one-party dominant democracy, with an extremely thin civil society, the most important role of the Chapter 9 Institutions is to create space for debate, discussion, mediation, negotiation and reconciliation between all South Africans with an interest in a pressing public issue. These organizations can, when effective, play a critical part in resolving disputes between the state and citizens as well as conflicts between private parties. The disputes are often of limited duration and easy disposition. Marginal voices are heard. Claims by discrete and largely disenfranchised minorities are treated seriously. Resolutions – even nonbinding resolutions – allow many of the participants to leave feeling at least partially vindicated.

Take the Public Protector. The Public Protector must take those steps necessary to make its ombudsman services ‘accessible to all persons and communities’.183 While meaningful access dictates that the services provided be free – which the Public Protector’s services are – they must also be geographically accessible and expeditiously dispatched. The Public Protector has offices in every province and a national office in Pretoria.184

More importantly, although aggregate numbers of complaints and resolutions can suggest an overwhelmed and understaffed Public Protector’s office, the public appears to be getting good value for money. In 2002, 10% of finalised cases found in favour of the complainant. In 99% of these cases, the state rectified the wrong.185 When a well-founded and properly registered claim is made, the Public Protector appears to be a very accessible and a highly effective alternative to the courts.187

The South African Human Rights Commission (SAHRC) and the Commission of Gender Equality (CGE) have held regular hearings about legal and political issues of moment. Together, these institutions have created participatory bubbles in which various constituencies can engage one another in public debate regarding current crises and deeper fissures in South African society.

As Cathi Albertyn notes, the CGE’s (previous) range of monitoring activities – and its invitations to a broad range of state and social actors – went beyond mere report writing and entered the realm of law and policy making:

Although the scope of the Commission’s monitoring function extends across the entire spectrum of the state and civil society, much of its work has been aimed at the state. It has been especially engaged in the development of the government’s legal and policy framework. In 1998, it commissioned an audit of discriminatory legislation to identify gaps in laws. It has also made regular submissions to
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the South African Law Commission and to Parliament on laws affecting gender equality, including customary laws. More recently, it has addressed the issue of implementing law through the idea of an Annual Report Card of progress by various government departments. The Commission has evaluated the participation of women in politics, and the gender policies of political parties. It has monitored national and local elections to assess the participation of women in political parties and in voting. … [T]he CGE’s oversight responsibilities capture relationships within civil society. The CGE monitors traditional practices that are harmful to women: it has conducted research and engaged in dialogue with communities and traditional leaders on issues such as witchcraft and virginity testing. The CGE has also developed a particular focus on gender equality in the private sector. It has recently undertaken a survey of the sector and produced a report entitled ‘Best Practice Guidelines for Creating a Culture of Gender Equality in the Private Sector’.

The CGE’s activities enabled it to undertake a broad array of short-term and long term problem-solving activities that require some form of polycentric decision making. The independence of the CGE enabled it to attract participants from multiple sectors of society. Finally, the absence of the need for a final resolution of a conflict has enabled the CGE to assist the courts and the legislature in general norm setting without being beset by the zero-sum outcomes of constitutional litigation. At the time of writing, however, the CGE’s status remains unclear. The lack of government support and shortage of qualified personnel has left the CGE’s ability to discharge it experimental constitutional mandate in doubt.

The SAHRC’s range of activities is equally broad. Indeed, its subject matter competence, human rights, knows (virtually) no limits. With respect to its monitoring activities, Jonathan Klaaren writes:

The investigations undertaken by the Commission reflect proactive enforcement of human rights. The Commission has produced, at the end of its investigations, reports on a wide range of topics: from the effect of road closures on the right to movement to the conflict between the right to equality and the freedom to associate. These investigations, and the subsequent reports, have occasionally provoked intense controversy. The Investigation of Racism in the Media led to the issuance of subpoenas by the SAHRC and equally unusual litigation-like responses from members of the media. The Commission’s early reports on the lack of respect for the rights of non-nationals in post-apartheid South Africa and on the conditions of detention at an official repatriation facility, Lindela, were greeted with harsh words by government and department officials (especially the Department of Home Affairs).191

But report writing constitutes the least provocative and the least innovative of the SAHRC’s constitutionally mandated activities. The SAHRC’s brief embraces the protection of human rights through mediation, adjudication, litigation, and interpretation and enforcement. It is, moreover, empowered to undertake these activities through a ‘variety of dispute resolution mechanisms’. Each power and each of these dispute resolution mechanisms enables the SAHRC to tailor its responses both to problems and the affected constituencies. Given the mediating role that the SAHRC plays between state and civil society and between groups within civil society, its emphasis has been on finding solutions to problems that leave all parties better off and able to return to the rest of their lives heard, if not entirely happy.
Unfortunately, the SAHRC, like other Chapter 9 institutions, has been denuded by the government’s persistent underfunding, an absence of truly qualified appointments and the resistance to policy recommendations inconsistent with the firmly entrenched interests of the ruling tripartite alliance. Fortunately, the government has yet to implement the 2007 Asmal Report’s recommendation that Parliament radically rationalize the Chapter 9 Institutions. The report would have collapsed seven independent institutions into a single umbrella body. It is better, it seems, to let them slowly expire without any attempts by the state at resuscitation.) While many Chapter 9 Institutions may have as yet failed to fulfil their anticipated role in fleshing out civil society and deepening our democracy, the Public Protector and the Auditor-General have – with occasional assistance from other branches of the security forces – at least been able to reveal systemic corruption and widespread bureaucratic incompetence.

Endnotes

1. It is worth connecting again the parallel structures of consciousness as trial and error with the political structures of trial and error. See, eg, PA Howard ‘The Neural Mechanisms of Learning from Competitors’ (2010) 53 (2) Neuroimage 1 (‘Learning from competition is not learning to act like your competitor, it is learning not to act like your competitor when they fail.’) Howard may be correct with respect to the winnowing effect of competition and its ability to identify practices, policies and laws that fail to achieve our desired ends. However, because governance and politics are quintessentially about the search for the provision of common goods, most of us want to see the state and other actors identify best practices for all concerned.

2. In two-stage Bill of Rights analysis, if the party challenging a law should lose at the first stage, a demonstration that a right has been abridged, then the litigation never moves on to the second stage, limitations analysis. However, the Constitutional Court prefers do the majority of its heavy lifting under the limitations clause. Limitations analysis allows the Court to arrive at a conclusion as to a law’s infirmity or constitutionality based largely on the facts before it and without having to determine the actual contours of the right. For a critique of this notional approach to rights analysis, as opposed to a value-based approach to rights analysis, see S Woolman ‘The Right Consistency: Benaish v Ernst and Young’ (1999) 15 South African Journal on Human Rights 166. The other mechanism that allows the Court to avoid determining the actual content of a right is s 39(2). See S Woolman ‘The Amazing, Vanishing Bill of Rights’ (2007) 125 South African Law Journal 762. Under s 39(2), the Court need only develop the common law or interpret a statute in light of ‘the spirit, purport and objects of the Bill of Rights’.


4. In Satchwell v President of the Republic of South Africa II, the Constitutional Court was asked to assess the constitutionality of a statutory and regulatory framework almost identical to one that it had declared unconstitutional only a year earlier in Satchwell v President of the Republic of South Africa I. 2003 (4) SA 266 (CC), 2004 (1) BCLR 1 (CC)(‘Satchwell II’); 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC)(‘Satchwell I’). In Satchwell I, the Constitutional Court had declared ss 8 and 9 of the Judges’ Remuneration and Conditions of Employment Act unconstitutional because they discriminated against homosexual judges’ same-sex partners. The Satchwell I Court ordered that the words ‘or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support’ be read into the provisions after the word ‘spouse’. Subsequent to the judgment in Satchwell I, Parliament promulgated a new Act, the Judges’ Remuneration and Conditions of Employment Act. This Act took no notice of the Satchwell I Court’s order. In Satchwell II, the Constitutional Court refused to accord Parliament any deference, declared the new provisions discriminatory, and read into the new
legislation the words ‘or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support’.

5. Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others, Amicus Curiae); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC); Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others [2009] ZACC 16, 2010 (3) SA 454 (CC), 2009 (9) BCLR 847 (CC); Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others [2011] ZACC 8.


7. S Woolman ‘Humility, Michelman’s Method and the Constitutional Court: Rereading the First Certification Judgment and Reaffirming a Distinction between Law and Politics’ (2013) 24 Stellenbosch Law Review – (forthcoming). What is true of the certification process must certainly be true of the normal process of law making and judicial review. The role of the Constitutional Court is not to find optimal solutions, but to stake out a range of constitutional solutions. One way in which the courts recognize their role and their obligation to share responsibility for constitutional interpretation is in terms of a remedy of temporary validity. While Parliament or another branch of government goes about redrafting an infirm piece of legislation, the courts may, in the interest of good governance, suspend a declaration of invalidity. See M Bishop ‘Remedies’ in S Woolman & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, OS, June 2008) Chapter 9. Matthew Chaskalson and Dennis Davis ask whether the Constitutional Court did not narrow the space for constitutional design created by the Interim Constitution’s 34 principles when it rejected the first text drafted by the Constitutional Assembly. See M Chaskalson & D Davis ‘Constitutionalism, the Rule of Law and the First Certification Judgment’ (1997) 13 South African Journal on Human Rights 430. The 34 principles certainly did not demand special super-majorities for the amendment of the Bill of Rights or the removal of the Auditor-General or Public Protector. But as I argue in the article above, the Court’s intervention hardly counts as political in the conventional sense. The First Certification Judgment Court, acting with appropriate humility, simply confined its objections to obvious gaffes and those provisions necessary if, in fact, the Final Constitution was to vouchsafe judicial review under a justiciable Bill of Rights and the basic law’s express commitment to the rule of law.

8. The Makwanyane Court, despite the ANC’s longstanding opposition to capital punishment, enjoyed no more than 30% support from the general public on this issue and others circa 1995. 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC)(Makwanyane). The Court in 2012 enjoys roughly the same level of support. Despite occasional threats made by the Executive not to abide by a decision – see Treatment Action Campaign – and intermittent attempts to bring the judiciary within the executive’s remit, the Court has maintained a significant degree of autonomy. Whether it retains such autonomy turns to a great extent on future appointments. (The most recent spate of selections for this apex court bodes ill.) While that prospect may fill avid court watchers with concern, it’s pretty much constitutional politics as usual. That’s another point in favour of experimental constitutionalism: it does not place all of its eggs in the judicial basket. Indeed, it emphasizes the desirability of norm generation processes that take place outside the courtroom and beyond the confines of the legislature.


11. In such circumstances, the illegitimacy of the conduct challenged is less than clear. The problem of putting private institutional norms to the PEPUDA test bears a good deal of similarity to what
Professor Susan Sturm has identified as the ‘second generation’ problems of protecting workers’ civil rights from discrimination in the workplace in the United States. See S Sturm ‘Second Generation Employment Discrimination: A Structural Approach’ (2001) 101 Columbia Law Review 452. In the context of employment discrimination, Sturm observes that the most pressing problems have evolved from obvious, intentional discrimination of yester-years: “first-generation” problems exemplified by “smoking guns” such as the sign on the door [declaring] that “Irish need not apply” or the rejection [of an applicant] explained by the comment that “this is no job for a woman”. Ibid at 459–60. Instead, individuals from historically disadvantaged groups in America and South Africa encounter discrimination that ‘involve[s] social practices and patterns of interaction among groups within the workplace that, over time, exclude non-dominant groups’, which is reinforced by ‘structures of decision making, opportunity, and power’. Ibid at 460. My account owes much to Susan Sturm’s insights on the differences between traditional models of adjudication concerned with findings of liability and adjudication geared towards the creative structuring of remedies to systemic problems. See S Sturm ‘The Promise of Participation’ (1993) 78 Iowa Law Review 981, 987–991, 1002–1010. My embrace of remedial equilibrium reflects the recognition that such discrimination is difficult to attack successfully in a constitutional order committed to a significant degree of private ordering. See S Woolman ‘Seek Justice Elsewhere’ (supra).

15. This recognition is one of the hallmarks of the sociological concepts of complexity and emergence. To observe that social systems are complex is not tantamount to rejecting the possibility of systematic, scientific understanding. Rather, as Lee McIntyre notes, complexity relates to our knowledge of the world at a particular level of description. It does not rebut the possibility of (social) scientific explanations at another level. See L McIntyre ‘Complexity and Social Scientific Laws’ (1993) 97 Synthese 209.
16. See Strurm ‘Second Generation’ (supra) at 452.
17. See Dorf ‘The Domain of Reflexive Law’ (supra) at 399–400 (Observes the dynamic character of social change resulting from new legal protections.) As the partial success of ‘rational expectations’ theory in macroeconomics demonstrates, some adaptive processes can be modelled very effectively (some of the time). See also S Sheffrin Rational Expectations (1996). However, there are good reasons for doubting whether models of similar precision can be designed for contexts as diverse and unpredictable as personal intimacy (Jordan) or religious worship (Prince). The experimentalist approach, however, does demand that one size of social scientific inquiry fit all.
18. See Dorf ‘Legal Indeterminism and Institutional Design’ (supra) at 960–970. See also J Klaaren ‘A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socio-Economic Rights’ (2005) 27 Human Rights Quarterly 539 (Drawing on experimentalist principles in EU regulatory regimes, Klaaren suggests that the SAHRC could be responsible for gathering and disbursing information regarding the government’s progress in fulfilling the promise of socio-economic rights.)
20. Ray Babari Lal v King Emperor (1933) 60 IA 354, 361.
22. Ntuli II (supra) at para 30.
23. See *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) SACR 94 (CC), 1996 (1) BCLR 141 (CC) (*Ntuli I*). (Constitutional Court declared unconstitutional s 309(4)(a) of the Criminal Procedure Act 51 of 1977. The provision provided that a person who was serving a period of imprisonment imposed by a lower court could only prosecute any review of those proceedings if a judge had certified that there were reasonable grounds for review.)

24. *Ntuli II* (supra) at paras 41–42.

25. *S v Steyn* 2001 (1) SA 1146 (CC), 2001 (1) SACR 25 (CC), 2001 (1) BCLR 52 (CC) (*Steyn*).

26. Ibid at para 46.

27. 2007 (4) SA 611 (CC), 2007 (2) SACR 28 (CC) 2007 (5) BCLR 474 (CC) (*Shinga*).


29. The dissenting judgment of Sachs J in *Prince* resonates with Roux’s understanding of democracy, and sounds themes similar to my own thoughts about the relationship between democracy and the other values that ought to inform limitations analysis. In his dissent in *Prince*, Sachs J stressed the need in an ‘open and democratic society’ faced with seemingly intractable conflicts – between the state and religious communities – for a ‘reasonable accommodation’ of interests. This accommodation requires mutual recognition and ‘a reasonable measure of give and take from all sides’. Sachs J, not surprisingly, finds that the majority’s refusal to carve out an exemption for bona fide religious use of cannabis offends this very principle. The majority judgment, he writes, ‘puts a thumb on the scales in favour of ease of law-enforcement, and gives insufficient weight to the impact the measure will have, not only on the fundamental rights of the appellant and his religious community, but on the basic notion of tolerance and respect for diversity that our Constitution demands for and from all in our society’. The majority’s suppression of cultural and religious differences harms not only the individuals and the communities concerned, but society as a whole. He continues: ‘[F]aith and public interest overlap and intertwine in the need to protect tolerance as a constitutional virtue and respect for diversity and openness as a constitutional principle. Religious tolerance is accordingly not only important to those individuals who are saved from having to make excruciating choices between their beliefs and the law. It is deeply meaningful to all of us because religion and belief matter, and because living in an open society matters.’ For Sachs J, freedom of belief and the freedom to express such belief are fundamental not only to the freedom and the dignity of the believers concerned, but also to the pluralism and the openness that are the lifeblood of a radically heterogeneous democracy. Democracy, Sachs J seems to be saying, presupposes the capability of marginalized and vulnerable minorities to challenge the normative closure into which political communities tend to lapse. A political community can only remain free if it values plurality and difference, and allows out-groups to disturb and to challenge deeply held majoritarian beliefs and practices. For this reason, the critical challenge for our constitutional democracy consists ‘not in accepting what is familiar and easily accommodated, but in giving reasonable space to what is unusual, bizarre or even threatening’. See *Prince v President of the Law Society of the Cape of Good Hope* 2001 (2) SA 388 (CC), 2001 (2) BCLR 133 (CC) at paras 146, 147, 155–156 161, 170 and 172. Sachs J’s views on openness carried the day on same-sex marriage in *Fourie*. The Court remarked that ‘[t]he 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’. *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others, Amici Curiae); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) at para 95. See also S Woolman ‘I Am Large’: Sachs, Whitman and Democracy’ (2010) 25 (1) SA Public Law 57.

30. See *Matatiele Municipality & Others v President of the RSA & Others* 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (CC) (*Matatiele II*).

31. The Constitutional Court has, in *Matatiele II* and *Doctors for Life*, given greater content to the principle of democracy. They have as yet not tied that understanding closely to their analysis of fundamental
This principle, in its clearest form, holds: 'Government in South Africa must be so arranged that the people, through the medium of political parties and regular elections, in which all adult citizens are entitled to participate, exert sufficient control over their elected representatives to ensure that: (a) representatives are held to account for their actions, (b) government listens and responds to the needs of the people, in appropriate cases directly, (c) collective decisions are taken by majority vote after due consideration of the views of minority parties, and (d) the reasons for all collective decisions are publicly explained. (2) The rights necessary to maintain such a form of government must be enshrined in a supreme-law Bill of Rights, enforced by an independent judiciary, whose task it shall be to ensure that, whenever the will of the majority, expressed in the form of a law of general application, runs counter to a right in the Bill of Rights, the resolution of that tension promotes the values of human dignity, equality and freedom.' See Roux ‘Democracy’ (supra) at § 10.5(b) (Italics removed.) The Court has begun to provide an answer of its own to the question posed in UDM.

Within the last several years, a number of justices have articulated accounts of ‘democracy’ that suggest that Roux’s principle was nascent, and is now ascendant, in our constitutional jurisprudence. Roux notes that in her powerful dissent in New National Party v Government of the Republic of South Africa, ‘O’Regan J stressed the centrality of the right to vote with respect to the consolidation of South African democracy, remarking that: “The right to vote is foundational to a democratic system. Without it, there can be no democracy at all”’. Roux (supra) at § 10.5(c) quoting New National Party v Government of the Republic of South Africa 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 122. O’Regan J’s dissent, Roux continues, ‘also supports the second element of the principle of democracy … [It] is integral to the Final Constitution’s conception of democracy that rights be capable of trumping the will of the majority where such a result better serves “the democratic values of human dignity, equality and freedom”.’ Roux (supra) at § 10.5(c). Roux acknowledges that Sachs J’s remarks in Masondo ‘articulate many of the elements of the principle of democracy that [this chapter has] argued [are] immanent in the constitutional text’. Roux (supra) at § 10.3(c) citing Democratic Alliance v Masondo 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC) at paras 42–43. The Constitutional Court, in Doctors for Life, articulated an account of democracy that closely approximates Roux’s reading of the Final Constitution. In Doctors for Life, Sachs J writes: ‘True to the manner in which it itself was sired, the Constitution predicates and incorporates within its vision the existence of a permanently engaged citizenry alerted to and involved with all legislative programmes. The people have more than the right to vote in periodical elections, fundamental though that is. And more is guaranteed to them than the opportunity to object to legislation before and after it is passed, and to criticise it from the sidelines while it is being adopted. They are accorded the right on an ongoing basis and in a very direct manner, to be (and to feel themselves to be) involved in the actual processes of law-making. Elections are of necessity periodical. Accountability, responsiveness and openness, on the other hand, are by their very nature ubiquitous and timeless. They are constants of our democracy, to be ceaselessly asserted in relation to ongoing legislative and other activities of government. Thus it would [make] a travesty of our Constitution to treat democracy as going into a deep sleep after elections, only to be kissed back to short spells of life every five years.’ Doctors for Life (supra) at para 231.

Roux (supra) at § 10.3(c).

Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others [2008] ZACC 10, 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC). For a nuanced analysis of the case and its
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38. The Constitutional Court itself has, for the moment, come around to this very position. In Fourie, the Court remarked that ‘[t]he 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’. Fourie (supra) at para 95.

39. Roux (supra) at § 10.3(c).


42. See Soobramoney (supra); Grootboom (supra); TAC (supra).
43. See Soobramoney (supra).
44. See Kboss (supra) at para 43 (‘In determining reasonableness, context is all-important. There is no closed list of factors involved in the reasonableness enquiry and the relevance of various factors will be determined on a case by case basis.’)
45. See Grootboom (supra) at paras 39–46, 52, 53, 63–69, 74, 83.
47. For the two leading monographs on the subject, see D Bilchitz Poverty and Fundamental Rights (2006) (Steadfastly defending minimum core arguments); S Liebenberg Adjudicating Socio-Economic Rights under a Transformative Constitution (2010) (Nudging the Court toward a notion of ‘substantive reasonableness’).
48. Pace Marius Pieterse, this invitation is not simply a function of the Court’s gloss on FC s 26 and FC s 27. The text of both rights are crafted in a manner that gives the government ample space to decide what policies meet the constitutional desiderata of ‘progressive realization’. The Court’s gloss on FC s 26(2) and FC s 27(2) might be said to narrow the space within which government can determine the content of the rights to housing, health, food, water and social security. See M Pieterse ‘Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services’ (2006) 22 South African Journal on Human Rights 473; e-mail correspondence with Marius Pieterse (14 March 2007). On the other hand, Kathleen Noonan, Charles Sabel and William Simon have, somewhat remarkably, identified the open-endedness of the Court’s jurisprudence with the kind of politics required by experimental constitutionalism. Noonan, Sabel & Simon ‘Child Welfare’ (supra). This troubling proposition underscores the dangers of undertaking comparative constitutional law. Noonan, Sabel and Simon are insufficiently critical of Grootboom and TAC. Neither case leveraged forward- and lateral-looking change as far as one might have hoped. As we shall see in Chapter 6, however, the ‘meaningful engagement’ cases litigated nearly a decade later more closely approximate their expectations.
49. In Modderklip, the Supreme Court of Appeal had found that the state’s failure to act on the occupation of private land by an informal settlement amounted to an expropriation under FC s 25(1) read with FC s 7(2) and ordered the state to compensate Modderklip Boerdery for the violation. Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae) 2004 (6) SA 40 (SCA), 2004 (8)
BCLR 821 (SCA). See also Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another 2001 (4) SA 385 (W). The Constitutional Court declined to decide the case on the same basis. The Modderklip Court relies instead, for reasons that cannot be interrogated here, on FC s 1(c) and FC s 34. No longer simply a stand-alone principle, FC s 1(c) and the rule of law doctrine, when read with the right of access to courts, FC s 34, generates the proposition that the rule of law, properly conceived, imposes an 'obligation on ... the state to provide the necessary mechanisms for citizens to resolve disputes that arise between them'. See, further, Chief Lesapo v North West Agricultural Bank and Another 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC). The Chief Lesapo Court hints at some of the concerns raised in Modderklip. Mokgoro J writes that FC s 34 and the rule of law doctrine are 'foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help.' Ibid at para 22. However, it is one thing to inveigh against individualized acts of self-help, and quite another to find the state culpable for the social disintegration that follows from a generalized failure of the state's legal dispute mechanisms to resolve conflict effectively. But the bold assertion in Modderklip is not that FC s 34 secures for the citizenry the legal institutions required to mediate conflict. Now read in concert with FC s 1(c), FC s 34 requires more than 'the mere provision of the mechanisms' for dispute resolution. President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC)('Modderklip') at para 42 (emphasis added). It demands that the state take 'reasonable steps ... to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law'. Ibid (emphasis added). If such language alone is not striking enough – the spectre of a Zimbabwe-like constitutional crisis looms large – then three subtle shifts in language are. The access to courts is no longer primarily concerned with the existence of formal legal structures. It is now concerned with 'effective remedies'. Effective remedies turn our attention to substantive outcomes. Substantive outcomes are to be measured by the state's compliance with rather murky notions of the 'reasonable steps' required to turn back the forces of entropy. It also seems clear that this new reasonableness test is not derived from FC s 34. It flows from FC s 1(c) and our commitment to the rule of law. As Justice Langa writes: 'The precise nature of the state's obligation in any particular case and in respect of any particular right will depend on what is reasonable, regard being had to the nature of the right or interest that is at risk as well as on the circumstances of each case.' Ibid at para 43. FC s 1(c) will tell us, in the context of various rights, what reasonable, substantive steps the state – and the courts – must take to maintain order. The challenges of meeting such a reasonableness requirement in similar kinds of cases are not to be underestimated. Although the Court describes these circumstances as extraordinary, they are, indeed, the circumstances in which many South Africans find themselves now. See Modderklip (supra) at paras 46–49 ('[C]ourt orders must be executed in a manner that prevents social upheaval. Otherwise the purpose of the rule of law would be subverted by the very execution process that ought to uphold it. ... The circumstances of this case are extraordinary in that it is not possible to rely on mechanisms normally employed to execute eviction orders. This should have been obvious to the state. It was not a case of one or two or even ten evictions where a routine eviction order would have sufficed. To execute this particular court order and evict tens of thousands of people with nowhere to go would cause unimaginable social chaos and misery and untold disruption. In the circumstances of this case, it would also not be consistent with the rule of law. The question that needs to be answered is whether the state was, in the circumstances, obliged to do more than it has done to satisfy the requirements of the rule of law and fulfil the [FC s] ... 34 rights of Modderklip. I find that it was unreasonable of the state to stand by and do nothing in circumstances where it was impossible for Modderklip to evict the occupiers because of the sheer magnitude of the invasion and the particular circumstances of the occupiers.') (Emphasis added.) In the space of several paragraphs, the Modderklip Court has moved from an apparently procedural gloss on the rule of law – consistent with the legality principle enunciated in Fedsure and Pharmaceutical Manufacturers – to something far more robust. The state – in order to comply with
the dictates of the rule of law doctrine – must create and maintain courts that provide ‘effective remedies’. Again, the rule of law requires not just any remedy, but an effective remedy. What is an effective remedy? An effective remedy must reflect a serious attempt to prevent ‘large-scale disruptions in the social fabric’ and their attendant ‘chaos and misery’. Failure of the state to plan adequately for such contingencies risks censure by the courts. Moreover, such censure is no longer limited to a terse statement at the end of a judgment castigating the responsible minister for a failure to discharge constitutional obligations. A failure to take those reasonable steps necessary to safeguard the rule of law may result in an award of constitutional damages against the state. In South Africa, we are concerned, not with mere violations of freedom of contract – as was the US Supreme Court in \textit{Lochner} – but with state action or inaction that risks ‘large-scale disruptions in the social fabric’. See S Woolman ‘My Tea Party, Your Mob, Our Social Contract: Freedom of Assembly and the Constitutional Right to Rebellion in \textit{Garvis v SATAWU (Minister For Safety & Security, Third Party)}’ 2010 (6) SA 280 (WCC) (2011) 27 South African Journal On Human Rights 346. The Constitutional Court has retained, for itself, the right to intervene when it believes such disruptions pose an imminent and pronounced danger to the general welfare of the commonweal. Such a danger revealed itself quite recently in \textit{Glenister v President of the Republic of South Africa}. (2011) ZACC 6, 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC). The failure to provide adequately independent security services compromises the state’s ability to ensure governance under the rule of law and protection, in terms of s 7(2), of those fundamental rights necessary to secure our democracy. In one of its most dramatic statements regarding South Africa’s crony capitalist order, the Court suggests that this abrogation of our social contract reflects a more general failure to protect the security, safety and pursuit of happiness of most South Africans. The Marikana massacre of some 34 striking miners by the police nearly a year later in 2012 bears out the Court’s (and Public Protector’s and Auditor General’s) concern about an inadequately trained, poorly supervised and corrupt police force. According to both government officials and independent analysts, the police force lacks a functional chain of command. Officers cannot issue instructions to the rank and file and expect them to be followed. (Conversation with Steven Sachs regarding the Johannesburg Metropolitan Police Department, 1 June 2012). See also \textit{South African Association of Personal Injury Lawyers v Heath} 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at para 4 (‘Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution … If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state.’) What all of these cases share in common is the fear of a Hobbesian war of all against all.

50. \textit{Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & others}; [2008] ZACC 1, 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (CC) (‘Occupiers’).

51. Ibid at para 16.

52. Ibid at para 15.

53. Ibid at para 19.

54. Ibid at para 14.

55. Ibid at para 20.


58. Parliament’s consistent under-funding of Chapter 9 Institutions and an executive policy of malign neglect make effective operation of these institutions difficult, if not impossible. See H Corder, S Jagwanth & F Soltau ‘Report on Parliamentary Oversight and Accountability’ Report to the Speaker of the National Assembly (1999), available at www.pmg.org.za/docs/2001/viewminute.php?id=811 (accessed 10 January 2005) (Corder Report). Corder, Jagwanth and Soltau write that: ‘In their submissions to us, many constitutional institutions have also pointed out that the present arrangement may result in a very low priority being given to constitutional institutions as government departments may be slow in recognising the interests of an institution which does
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not form part of the core business of the department. The very direct control by the executive of constitutional institutions can have a devastating effect on the independence and credibility of these offices. ... In the first place, to make institutions dependent on budget allocations received through the very departments that they are required to monitor is not desirable. Secondly, these institutions must be seen by the public to be independent and free of the possibility of influence or pressure by the executive branch of the government. Approval by the executive of budgets, or other issues such as staffing, is thus inconsistent with independence, as well as the need to be perceived as independent by the public when dealing with their cases. This executive power could render impotent state institutions supporting constitutional democracy through the potential denial of both financial and human resources. Furthermore, the special constitutional features of these institutions are not recognised as executive priorities. 'Corder Report' (supra) at paras 7.2 and 7.2.1. The Corder Report suggests that, at a minimum, the budget of each Chapter 9 Institution be subject to a separate vote—a vote distinct from that for the budget for the department with line authority, and a vote distinct from that for the budget of other Chapter 9 Institutions. Ibid at para 7.3. To meet other constitutional imperatives, the Corder Report advocates the passage of legislation—an Accountability and Independence of Constitutional Institutions Act—and the creation of a parliamentary oversight committee—a Standing Committee on Constitutional Institutions. Ibid at paras 1.1, 7.3, 7.4, 8. Parliament has not acted on any of the Corder Report recommendations. Other Chapter 9 Institutions have noted this failure to act with dismay. See B Pityana ‘South African Human Rights Commission Presentation to the Justice Portfolio Committee—Budget Review and Programmes 2001/2002’ (8 June 2001), available at http://www.sahrc.gov.za (accessed on 11 January 2005). Chairperson Pityana writes: ‘After five years of operations, it is very discouraging to have to report that questions about the independence of the Commission have not been resolved. ... National Treasury continues to relate to the Commission through the Justice Department. This means that we have no direct means of having queries and problems resolved. ... Since inception, the Commission has constantly raised concerns about the manner in which its budget was set. We pointed out ad nauseum that at no stage was there a proper assessment of the mandate of the Commission and the appropriate level of resources necessary to execute the mandate.’ Ibid at 4–5. For more on the under-funding of Chapter 9 Institutions, generally, and the under-funding of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, in particular, see S Woolman & J Soweto-Aullo ‘Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities’ in S Woolman & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, OS, March 2005) Chapter 24F. Such under-funding is one of the rate-limiting factors with respect to experimental constitutionalism in South Africa.

59. PAA s 1 defines ‘the supreme audit institution of the Republic’ as ‘the institution which, however designated, constituted or organized, exercises by virtue of the law of a country, the highest public auditing function of that country’. Public Audit Act 25 of 2004.

60. See FC s 188. Unlike most of the other Chapter 9 Institutions, the unique legislative environment within which the Auditor-General operates makes this institution the most likely to retain its independence and to discharge its responsibility to ensure that our government fulfils its mandate to operate in an accountable, transparent and equitable manner. Whilst the breadth of its investigatory powers may distinguish the Auditor-General from other Chapter 9 Institutions, the most unique feature of the Auditor-General is its fiscal independence. The Auditor-General’s ability to generate significant revenue streams from fees charged for audit services ensures that it has the money necessary to discharge its constitutional duties. These financial resources immunize the Auditor-General from some of the budgetary pressures that have undermined the independence of other Chapter 9 Institutions. See PAA s 36; Office of the Auditor-General Activity Report for 2003–2004 RP 211/2004 (2005)(Activity Report) 11. However, the fiscal independence promised by these fees is only as good as the ability or the willingness of the audited entities to make good. Local government
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has been notorious for its failure to pay its statutorily required fees. See L Loxton ‘Fakie Seeks R100m from Municipalities’ Business Report (12 March 2003).

61. See, eg, Lebowa Mineral Trust v Lebowa Granite (Pty) Ltd 2002 (3) SA 30 (T)(enabling legislation for Trust requires annual audit by Auditor-General and tabling of report before the legislature); Esack No & Another v Commission on Gender Equality 2001 (1) SA 1299 (W), 2000 (7) BCLR 737 (W)(Commission transactions subject to audit by Auditor-General); New National Party of South Africa v Government of the Republic of South Africa 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 77 (Court notes that the Independent Electoral ‘Commission’s necessary expenditure is to be defrayed out of money appropriated by Parliament … and its records are to be audited by the Auditor-General. Comprehensive reporting duties are imposed on the Commission and in particular it is required annually to submit to Parliament … an audited statement on income and expenditure and a report in regard to its functions, activities and affairs in respect of such financial year.’) See also I Rautenbach & E Malherbe Constitutional Law (2002) 212.

62. The lack of a meaningful distinction between legislative authority and executive authority in our parliamentary democracy places severe constraints on Parliament’s oversight capacity.

63. See Rail Commuter Action Group & Others v Transet Ltd t/a Metrorail & Others 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at para 72 (‘Accountability of those exercising public power is one of the founding values of our Constitution and its importance is repeatedly asserted in the Constitution.’ The Court cites FC ss 1, 41(1) and 195(1)(f) in support of this proposition.) See also South African Association of Personal Injury Lawyers v Heath 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at para 4 (‘Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution … If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state.’)

64. President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at para 133.

65. See Office of the Auditor-General Activity Report for 2003–2004 RP 211/2004 (2005) 23 (Activity Report) (‘Forensic auditing is an independent process aimed at preventing or detecting economic crime in the public sector. The process mainly comprises an objective assessment of the measures instituted by accounting officers and other relevant role players to prevent and detect economic crime, but it can also include economic crime investigations when this is appropriate and seems necessary … [T]he term “economic crime” is used to describe various crime categories, including fraud, forgery, theft and other contraventions of applicable statutes (eg, corruption).’)

66. The term ‘corruption’ here is to be broadly construed. As Sole notes, ‘[c]orruption may vary from the clearly illegal – such as fraud – to more subtle forms of unethical rent-seeking, patronage and abuses of power that may be just as damaging to the social fabric of a nation.’ S Sole ‘The State of Corruption and Accountability’ in J Daniel, R Southall & J Lutchman (eds) State of the Nation: South Africa 2004–2005 (2005) 86. Sole suggests the following definition – one that fits the broad brief of the Auditor-General’s office: ‘Corruption is the wilful subversion (or attempted subversion) of a due decision making process with regard to the allocation of any benefit.’ Ibid at 87. See, generally, J Hyslop ‘Political Corruption: Before and After Apartheid’ Conference on State and Society in South Africa (University of the Witwatersrand 2004) 17 (‘[G]overnment policy [has] encouraged rent-seeking behaviour by black entrepreneurs through the economic preferences they were given through a whole gamut of policies, especially those relating to the awarding of state contracting and corporate ownership. The tendency of such policies [is] to create a climate in which the line between legal forms of rent-seeking and outright corruption and cronyism [is] … blurred.’) Nothing much has changed in the intervening decade. See S Woolman ‘Security Services’ in S Woolman & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, RS3, May 2011) Chapter 23B (Covers the investigations of the police for this kind of malfeasance undertaken by the Public Protector, the Auditor-General and the Special Investigations Units during 2009, 2010 and 2011.)
69. The Auditor-General in its Report on the Financial Statements of the Provincial Administration of the Northern Cape found that only one of 17 provincial departments warranted an unqualified financial audit report – seven were qualified and nine had disclaimers. These findings stand as a scathing indictment of provincial administration and raise serious doubts about the capacity of current personnel asked to carry out extant policy. Ibid at 9–19. Provinces (and municipalities) brought under national administration have increased over the past decade, through 2012, for this very reason. Such reports remain the norm. The reasons for the qualifications ranged from ‘limited or no audit performed, resulting in a disclaimer of opinion or adverse opinion; liabilities and creditors that could not be verified; loans, debitors and investments that were either misstated, or of which the recovery was doubtful; assets, including stock, stores and inventory, that could not be verified; misstatement of income; irregularities in disclosing expenditure; unacceptable financial statements for trading accounts’. Office of the Auditor-General General Report for 1999–2000 RP 75/2000 (2001) 15 (‘General Report 2000’) 3, 15–21. The national departments fared even more poorly with respect to compliance audits: over 57% of national departments received qualified reports because of ‘serious shortcomings in internal checking and control; non-compliance with other prescripts, including legislation and Treasury regulations; unauthorised expenditure that was incurred; insufficient control over personnel expenditure; and serious deficiencies in provisioning administration’. Ibid at 4, 22–30. The financial state of provincial government and local government is still abysmal. So few adequate controls exist at the provincial level that the Auditor-General could not issue a report on the 1999–2000 fiscal year. He was obliged to limit his assessments to completed audits from the previous financial year. Even with respect to these audits, the majority had to be qualified because internal departmental audits were largely unreliable and asset registers were either non-existent or incomplete. General Report 2000 (supra) at 6, 36–45. See also T Keenan ‘Auditor-General: Fighting Fraud with the Best of Them’ Finance Week (12 July 2002) 16. Unfortunately, the position of municipalities has weakened even further. Only seven municipalities in the entire country received unqualified audits in 2011.
70. Experts ranked the Auditor-General second, after the Special Investigating Unit, with respect to their perceived success in combating official corruption. See I Camerer Corruption in South Africa: Results of an Expert Panel Survey Institute for Security Studies Monograph 65 (2001) Chapter 6 (‘A significant proportion (48%) of the respondents saw the office of the Auditor-General as effective in fighting corruption.’)
71. See Mtshibi-Mahanyele v Mail & Guardian Ltd & Another 2004 (6) SA 329 (SCA), 2004 (11) BCLR 1182 (SCA)Auditor-General’s report of irregularities in tender for housing contract and a call for a commission of inquiry into improper benefits bestowed upon friends of the minister supported Court’s finding that published criticism of the appellant was reasonable under the circumstance and thus not defamatory); Young v Shaikh 2004 (3) SA 46 (C)Arms deal report by the Auditor-General, the Public Protector and the Director of Public Prosecutions led to accusations, in the media, of corruption. Court finds accusations – made by the defendant – based in part on the report, but otherwise not fully corroborated, to be defamatory.) See also Kruger v Johnnic Publishing (Pty) Ltd & Another 2004 (4) SA 306 (T)(Findings by Auditor-General of mismanagement and irregularities at a school led to allegations of corruption that prompted an ultimately unsuccessful suit for defamation.) As this book goes to print, President Zuma – a thus far acquitted suspect in arms deal corruption – has felt sufficient pressure from potential/impending ‘new’ court reviews of the arms deal to call for a special investigation. A similar investigation initiated by the Hawks, with assistance from the Mail & Guardian, into corrupt practices by Petro SA and government officials is in the offing.
72. Yearly criticism of the South African Revenue Service (SARS) by the Auditor-General in annual reports tabled before SCOPA ultimately led SARS to overhaul its internal auditing systems and to
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procure the technology necessary to manage its assets. The tabling of an unqualified financial audit of SARS before SCOPA was hailed by a SARS commissioner, Pravin Gordhan, as a clear indication that SARS is a ‘service organization that handles taxpayers’ money efficiently’. L Loxton ‘Gordhan Delighted with SARS Clean Bill of Health’ Business Report (24 September 2004).

73. After receiving disclaimers in two consecutive years by the Auditor-General in reports to Parliament, and in the face of mounting evidence that the Unemployment Insurance Fund had failed to comply with the PFMA, the Minister of Labour committed himself to the appointment of managers who would ensure future compliance with the PFMA. See C Terrblanche ‘Minister under Pressure over UIF’ The Mercury (20 September 2004). Similarly, a forensic audit by the Auditor-General that revealed millions of rands in losses at Transnet due to an irregular scrap metal contract that had by-passed normal procurement procedures was hailed by SCOPA – which had called for the investigation – as evidence that corruption could be effectively rooted out of government. See ‘Audit Finds Transnet Lost Millions through Irregular Scrap Metal Deal’ Business Report (18 July 2003).

74. See Ritchie & Another v Government, Northern Cape, & Others 2004 (2) SA 584 (NC) at paras 21–23 (State’s decision to fund the private defamation actions of public officials was an internal provincial government matter not susceptible of review by the courts, and that the matter fell within the domain of the Auditor-General for a determination as to whether the expenditure had been authorized.)


76. The Office of the Auditor-General has been quite critical of the government’s lassitude with respect to the Office’s reports of egregious, and often wilful, maladministration by national and provincial departments, municipalities and public entities: ‘The extent to which audit information effectively contributes toward accountability and transparency not only depends on the quality of the information provided in the various audit reports. It is also critically dependent on the success with which such information is further processed and the response it evokes in the concluding phase of the accountability process. In this respect the role of the public accounts committee is vital. … The Standing Committee on Public Accounts (SCOPA) is the mechanism through which the National Assembly exercises oversight over the receipt and expenditure of public money. The extent to which the committee appreciates the issues raised in the respective audit reports and pursues them through effective oversight practices will determine whether appropriate and sufficient pressure will be brought to bear on the various accountable authorities. … The committee also did not always succeed in following up unresolved matters. Given the reconsideration of roles and processes, to a large extent brought about by the Public Finance Management Act, it may be prudent to examine the weaknesses of SCOPA’s post-review processes in order to ensure that its recommendations have the desired impact on financial management in the public sector at national level. As it will be in the interests of accountability and useful for the committee and the public, and given the lack of resources of the committee, I shall in future report periodically on the status of implementation of the committee’s recommendations. This is in line with international practice.’ Office of the Auditor-General General Report of the Auditor-General: Year Ended 31 March 2000 (2001) 10. Some reports in the media suggest that SCOPA’s post-review process is improving as a result of the pressure applied by the Auditor-General. See L Loxton ‘Gordhan Delighted with SARS Clean Bill of Health’ Business Report (24 September 2004)(After years of qualified reports, and criticism from SCOPA, SARS received an unqualified financial audit.) The United Nations Report on Drugs and Crime underwrites the Auditor-General’s scepticism about the capacity of Parliament to rein in errant members of the executive and officials in the state apparatus. See United Nations Drugs and Crime: Country Corruption Assessment Report on South Africa (2003)(UN Corruption Report), available at http://www.info.gov.za/reports/2003/corruption.pdf (accessed on 5 November 2005)(‘Members of Parliament, who are aware of corruption within the ranks, feel they are supposed to act but, all too often, when a corrupt official is exposed, party discipline is imposed.’)

77. Unfortunately such hopes have been undercut by external assessments of the South African government to solve the many problems of governance that beset the country and address the
ravages of apartheid that remain with us today. In 2012, Moody's downgraded South Africa to Baa1, and our sovereign debt to BBB, just two grades above junk status: the first downgrade since the inception of the democratic era. Standard and Poor's downgrade followed not long thereafter. These downgrades will make solution of the problems identified by Moody's and S & P even more difficult as South Africa will find it harder to secure the loans necessary to build infrastructure and to supply basic services. The World Bank further complicated matters when it declared the socio-economic landscape of South Africa 'unsustainable'. The World Bank Group 'South Africa: Focus on Inequality of Opportunity' (July 2012) (3) Africa Region Poverty Reduction and Economic Management

11. The truth as reflected in both the AG's reports and the World Bank's analysis, hurts. As it should.

78. See Auditor-General Report on a Performance Audit of Service Delivery at Police Stations and 10111 Call Centres at the South African Police Service 2007–2008 (March 2009) ('A-G's Report'). The Auditor-General's investigation took place during 2007 and 2008 and assessed the 'basic measures, processes or systems that should be in place at police stations and the police emergency phone line 10111. By 'basic measure', the Auditor-General's report means sector policing, vehicle management, training, community service centres, and the provision of bullet-proof vests. The report concluded that the existing practices in all of these areas fell short of the standards required by the Constitution. The shortfalls ranged from the lack of an approved policy for sector policing to inadequate training and inadequate recording of cases of domestic violence. The Auditor-General found that many of these shortfalls are a result of inadequate training, a lack of funds, or both. The Auditor-General concluded that an underfunded, unskilled police force could not discharge its constitutional responsibility to protect the general population.

79. The Marikana Massacre of 16 August 2012, and the ongoing country-wide unrest in and around mining concessions and large commercial farms can hardly come as a surprise in light of these consistent warnings from the government itself.


81. The Public Protector was originally established in terms of the Constitution of the Republic of South Africa, Act 200 of 1993 ('Interim Constitution' or 'IC') ss 100–114. FC ss 182 reads: (1) The Public Protector has the power as regulated by national legislation (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; (b) to report on that conduct; and (c) to take appropriate remedial action. (2) The Public Protector has the additional powers and functions prescribed by national legislation. (3) The Public Protector may not investigate court decisions. (4) The Public Protector must be accessible to all persons and communities. (5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential. See also Ex Parte Chairperson of the Constitutional Assembly In Re: Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)('First Certification Judgment') at para 161 ('The Public Protector is an office modelled on the institution of the ombudsman.'). See, further, M Oosting 'The Ombudsman and His Environment: A Global View' in L Reif (ed) The International Ombudsman Anthology (1999)'(Reif Anthology') 5.


84. See S Owen 'The Ombudsman: Essential Elements and Common Challenges' in Reif Anthology (supra) at 51, 54–55. See also M Zacks 'Administrative Fairness in the Ombudsman Process' (1967 to 1987) 7 The Ombudsman Journal 55, 55 ('Complainants come to Ombudsmen for help to cut through
red tape and to deal expeditiously with their concerns. If they wanted technical, legal arguments and approaches, one can say with some justification that they should hire a lawyer and go to court.)

85. See Owen (supra) at 53 (Ombudsmen enable politicians to address failures in the state bureaucracy.)

86. Special Investigating Unit v Ngcinwana & Another 2001 (4) BCLR 411, 413B (E)(When interpreting the competence of tribunals under the Special Investigating Units and Special Tribunals Act 74 of 1996 with respect to the investigation of maladministration and corruption, the court held that ‘[c]onstitutional priority would thus seem to lie with the institution of the Public Protector. Any interpretation of the Act’s purposes must pay heed to that reality.’)

87. See Owen (supra) at 52; Oosting (supra) at 10.

88. Owen (supra) at 52.

89. See Oosting (supra) at 12 (“T]he mobilisation of shame can constitute a powerful weapon in his arsenal.”)

90. Ibid (“In this world, the sweet voice of reason – a well-formulated argument, based on meticulous research – does not always fall on attentive ears. Political support for the ombudsman is therefore essential.”)


93. Ibid.

94. Ibid.

95. Ibid.


97. FC s 181, read together with FC ss 193 and 194, provide the general constitutional framework for (almost) all Chapter 9 Institutions. Although these provisions do not establish ICASA, Chapter 9 does govern the Independent Authority to Regulate Broadcasting. See J White-Limpitlaw ‘Independent Communications Authority of South Africa’ in S Woolman & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, OS, March 2005) Chapter 24E (Noting that the independent authority to regulate broadcasting is not listed in FC s 181(1)).


Rights Commission’ in P Andrews & S Ellmann (eds) The Post-Apartheid Constitutions: Perspectives on South Africa’s Basic Law (2001) 571, 584–586. Perhaps the most surprising outcome of all is the extent to which other branches of government and private parties treat these findings as binding. Of equal import is the SAHRC’s capacity for adjudication and litigation. With respect to its powers of adjudication, a three-member panel chaired by an SAHRC commissioner held that the chanting of a slogan ‘kill the farmer, kill the boer’ did, indeed, amount to hate speech. *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC). With respect to its powers of litigation, the SAHRC has been an amicus or party in numerous cases. See, eg, *Welkom High School & Another v Head, Department of Education, Free State Province, & Another* 2011 (4) SA 531 (FB); *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & Others* 2009 (4) SA 222 (CC); *Brümmer v Minister For Social Development & Others* 2009 (6) SA 323 (CC); *Bhe & Others v Magistrate, Khayelitsha & Others; Shiki v Stihole & Others; South African Human Rights Commission & Another v President of the Republic of South Africa* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC); *Bekker & Another v Joka* 2002 (4) SA 508 (E), [2002] 1 All SA 156 (E); *S v Tsala (South African Human Rights Commission intervening)* 2000 (1) SA 879 (CC), 2000 (1) BCLR 106 (CC), 1999 (2) SADR 622 (CC); *National Coalition for Gay & Lesbian Equality & Another v Minister of Justice* 1998 (12) BCLR 1517 (CC), 1998 (3) All SA 26 (W); *Brümmer v Minister for Social Development & Others* 2009 (6) SA 323 (CC), 2009 (6) BCLR 677 (CC); *Government of the Republic of South Africa v Groothoom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC). The SAHRC has even acted against a vacation resort that evicted a family accompanied by two black children. See ‘Settlement of the Equality Court case against the Broederstroom Holiday Resort’ available at http://www.sahrc.org.za/media (accessed 3 February 2006). In the magistrate’s court, the SAHRC won a case on behalf of a learner who was assaulted and subject to racist remarks. See ‘Landmark Victory: Edgemead Race Case’ available at http://www.sahrc.org.za/media (accessed 3 February 2006).

100. Govender ‘SAHRC’ (supra) at 572.


102. Of the Chapter 9 Institution’s ‘shared’ powers of constitutional interpretation, the Constitutional Court, in *S v Jordan*, wrote: ‘In determining whether the discrimination is unfair, we pay particular regard to the affidavits and argument of the Gender Commission. It is their constitutional mandate to protect, develop, promote respect for and attain gender equality. This Court is of course not bound by the Commission’s views but it should acknowledge its special constitutional role and its expertise. In the circumstances, its evidence and argument that [the legal provision at issue] is unfairly discriminatory on grounds of gender reinforces our conclusion.’ 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC) at para 70.

103. FC s 142.

104. FC s 143.

105. Ibid.

106. For more on the actual space for innovation afforded by the Final Constitution with respect to provincial constitutions, as well as the significant constraints the Final Constitution imposes upon provincial constitutions, see S Woolman ‘Provincial Constitutions’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 21. South Africa’s nine provinces have only undertaken two serious attempts to promulgate a provincial constitution. The Western Cape ultimately succeeded. *Ex Parte Speaker of the Western Cape Provincial Legislature: In Re First Certification of the Constitution of the Western Cape* 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC) at para 15 (C) Chapter 6 provides a complete blueprint for the regulation of government within provinces which provides adequately for the establishment and functioning of provincial legislatures and executive. The first draft failed to meet Chapter 6’s standards on three separate grounds. First, the geographic multi-member constituencies endorsed by the provincial constitution could neither be squared with the closed list proportional representation system found in the Final Constitution.
nor saved by the legislative structure exception found within FC s 143(1)(a). Second, the WC text’s insistence that the Judge President (now Chief Justice) of the High Court of the Western Cape perform certain ceremonial functions and administer various oaths of office was inconsistent with the Final Constitution’s requirement that the President (now Chief Justice) of the Constitutional Court discharge these same duties. Third, WC text s 46(3) did not simply restate the Final Constitution’s bar on paid work by MECs: it went on to grant the provincial legislature the power to promulgate legislation governing the meaning of paid work. The Constitutional Court held that ethical concerns about unpaid work by MECs did not fall within FC s 143(1)(a)’s executive structure or procedure exception. The Constitutional Court then found that FC s 156(2) proscribed paid work by MECs, that ‘paid work’ could only have one meaning and that any debate over the meaning of ‘paid work’ would have to be decided by the courts. The WC text’s assertion that the province could weigh in on the meaning of ‘paid work’ created the possibility that each province would arrive at a different conclusion about the meaning of ‘paid work’. The Constitutional Court held that because ‘paid work’ under the Final Constitution could have only one meaning, any potential for deviation from that univocal – but still undetermined – definition created the conditions for inconsistency.) The Western Cape cured the defects of the first draft and succeeded the second time around.

Certification of the Amended Text of the Constitution of the Western Cape 1997 1998 (1) SA 655 (CC), 1997 (12) BCLR 1653 (CC). For a brief account of the drafting history of the WC text, see D Brand ‘The Western Cape Provincial Constitution’ (2000) 31 Rutgers Law Journal 961. KwaZulu-Natal has failed in court and in the political arena Certification of the Constitution of the Province of KwaZulu-Natal 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC) at para 4. At the time of writing eight of nine provinces are currently under ANC control. A true test of provincial autonomy – and perhaps of provincial constitution-making power – will only occur when provinces possess the political independence and the political will to test the centre. KwaZulu-Natal took another stab at drafting a provincial constitution. Three drafts – by the ANC, the IFP and the DA – were tabled. See Draft Constitution of KwaZulu-Natal, 2004, KwaZulu-Natal Provincial Gazette No 6300, Notice A (10 November 2004). The desire to accord some form of permanent recognition for the king appeared to drive this project. Although the IFP has, historically, identified itself as the party of the Zulu people, the ANC has maintained close political ties with the reigning king. Thus both parties had a horse in this race. Nothing came of it. Interview with Professor Friedman, University of KwaZulu-Natal (15 March 2005). I am indebted to Professor Friedman for his patient explanation of KZN constitutional politics.


108. See B Ackerman We The People (1991). However, Ackerman’s subsequent work with James Fishkin, Deliberation Day (2005) appears to over-value the capacity of a limited period of discussion to meaningfully alter views. At this particular historical moment, crisis would seem to be a far more powerful engine for change than deliberation. As of 2012, the shock to the world’s capitalist system post-2008 has yet to ignite substantial reform. (Some countries – Iceland and the United States – have put ‘back’ in place, some of the regulatory structures removed during the 1990s.) It may have to get worse before it gets better. The Great Depression – Ackermann’s second moment – seems to suggest as much. South Africa has yet to experience such a crisis – though all the conditions for one certainly exist. Violent mining sector strikes and labour unrest on farms in 2012 may work to consolidate existing, widespread discontent regarding the large-scale failure to deliver basic services across the country into social movements that force a ‘New Deal’ between the ANC government, business, unions and the rest of the denizens of South Africa. In the short term, however, the three parties who made the deal in the 1980s that set South Africa ‘free’ – the ANC, big business and the unions – are likely to arrive at a new via media that enables them to continue to control the economic and political levers of power.
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114. See A Fung & EO Wright ‘Deepening Democracy: Innovations in Empowered Participatory Governance’ (1998) 29(1) Science & Society 5, 32 (Suggests that people may become more reasonable and reflexive after ‘seeing that cooperation mediated through reasonable deliberation yields benefits not accessible through adversarial methods’).
115. It is worth noting that US experimental constitutionalists are less interested in standard structural injunctions – as means of eliciting information and securing greater, reflexive, normative value – and more intent at uncovering specialist courts or reform movements that are capable of enhanced pooling of information and of more significant adaptive behaviour over time. See Chapter 4 above.
116. August v Electoral Commission 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) (‘August’).
117. The first mention of the use of structural interdicts appeared in Pretoria City Council v Walker 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) (‘Walker’) at para 96 (my emphasis): ‘Instead of withholding amounts lawfully owing by him to the council, [Mr Walker] could, for instance, have applied to an appropriate court for a declaration of rights or a mandamus in order to vindicate the breach of his [right to equality]. By means of such an order the council could have been compelled to take appropriate steps as soon as possible to eliminate the unfair differentiation and to report back to the court in question. The court would then have been in a position to give such further ancillary orders or directions as might have been necessary to ensure the proper execution of its order.’
119. August (supra) at paras 38–39.
120. As Steven Budlender notes, the August Court was motivated by the fact that ‘just two months remained from the time of judgment to the time of the election, and was concerned that if there were any further dispute or uncertainty, the only way to allow prisoners to vote would be to delay the election. The court therefore very sensibly took matters into its own hands, demanding a timetable of arrangements from the Electoral Commission’. Budlender (supra) at 64.
121. 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) (‘NICR0’).
122. 2006 (4) SA 114 (C) (‘Kiliko’).
123. Section 21 of the Refugees Act 130 of 1998 provides that an application for asylum must be made to a refugee reception officer at any refugee reception office. Five such offices exist throughout the country. The applicants contended in their own interest and in the public interest that the Western Cape refugee reception office was not providing them with a proper opportunity to apply for asylum. All permitted no more than twenty applicants to enter the office to apply for asylum on any given day. Vast numbers of asylum seekers were effectively barred from applying for asylum.
124. Kiliko (supra) at para 32. Van Reenen J relied heavily on the Cape High Court judgment in Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others (No 1). But as Steven
Budlender has pointed out, Van Reenen J appears to have overlooked the fact that the structural interdict granted by the Cape High Court in *Metrorail* was overturned by the Constitutional Court in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at para 109. ‘While any number of factors could justify the granting of a structural interdict … and may well have justified the granting of such an order in the *Kiklo* case, it is necessary for courts to enunciate these factors when determining whether such an order is indeed “necessary”’. Budlender (supra) at 75.

125. *Centre for Child Law & Others v MEC for Education, Gauteng, & Others* 2008 (1) SA 223 (CT) (*Centre for Child Law*).


127. Ibid at 11. In a theme already engaged in Chapter 4, the under-capacity of the current public administration in South Africa practically begs for greater court intervention. The common critique that courts cannot handle polycentric social disputes does little work under conditions that one might describe as polity (as opposed to market) failure. A friend in the office of the president calls it the 15% problem. That is, since only 15% of the bureaucrats operate effectively, the government finds it difficult to follow through on creative policy solutions to endemic problems.


129. *Sibiya & Others v DPP, Johannesburg High Court & Others* 2006 (2) BCLR 293 (CC) (*Sibiya III*) at para 6.

130. Bishop ‘Remedies’ (supra) at Chapter 9, 9-185.

131. Ibid citing *Sibiya II* at para 22.

132. Ibid 9, 9-186.


134. See *Bhe* (supra) at para 33.

135. See *Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) at para 42. However, where the issues raised in the application for direct access are quite complex, the Court will tend to privilege the value of another court’s views on the topic over the interests of the applicant in securing direct access. In *Mkontwana*, the Court granted the WLD applicants direct access in relation to the constitutionality of section 118(1) of the Local Government: Municipal Systems Act 32 of 2000. *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 (CC) (*Mkontwana*). However, it declined to grant the applicants direct access in relation to other aspects of their challenge. Ibid at para 14.
136. In terms of Rule 4(11), the Constitutional Court’s Registrar refers an unrepresented party to the nearest office or officer of the Human Rights Commission, the Legal Aid board, a law clinic or such other appropriate body or institution that may be willing and in a position to assist such party.

137. See De Kock v Minister of Water Affairs and Forestry 2005 (12) BCLR 1183 (CC) (‘De Kock’); Mnguni v Minister of Correctional Services 2005 (12) BCLR 1187 (CC) (‘Mnguni’).

138. De Kock (supra) at para 5; Mnguni (supra) at para 7.

139. The 2003 Rules’ inclusion of a specific provision relating to the procedure to be adopted by parties seeking leave to intervene in proceedings before the Court marks a change from the position under the 1998 Rules. Although the Court has yet to interpret Rule 8 itself, the Court’s previous case law on intervention, as well as the case law surrounding Rule 12 of the Uniform Rules of Court, provide a rough-and-ready guide about what to expect from the Court under Rule 8. See K Hofmeyr ‘Rules and Procedure in Constitutional Matters’ in S Woolman & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, OS, February 2007) Chapter 5.

140. Kyalami Ridge’.

141. Ibid at para 30.

142. 2003 (4) SA 1 (CC), 2003 (5) BCLR 476 (CC) at para 58.


145. The Court exercises enormous amounts of discretion with respect to direct access, legal aid referrals, intervenors and amici and uses that discretion to control the kinds of cases it hears. Such discretion, readily employed, invariably undercuts its commitment to objective unconstitutionality. The absence of a written record of this exercise of discretion, as both Marius Pieterse and Michael Bishop have pointed out, makes it difficult to assess the seriousness of the Court’s invitation to non-state actors to approach it for relief. The real sting in Pieterse’s critique is that a Court genuinely interested in adjudicating socio-economic rights would have heard more than four cases in its first ten years (at the time of our correspondence). Email correspondence with Michael Bishop (5 February 2006); Email correspondence with Marius Pieterse (15 February 2006). The Constitutional Court, over the past six years (2006–2012), has indeed taken socio-economic rights matters more seriously – hearing roughly four to five cases a year.

146. In Re Certain Amicus Curiae Applications: Minister of Health & Others v Treatment Action Campaign & Others, the Constitutional Court discussed the particular duty which amici owe to the Court: ‘In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the Court.’ 2002 (5) SA 713 (CC) at para 5. For more on the rules governing amici, see G Budlender ‘Amicus Curiae’ in S Woolman & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, OS, July 2006).

147. See, eg, Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae) 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC) at para 3; Moise v Greater Germiston Transitional Local Council; Minister of Justice and Constitutional Development Intervening (Women’s Legal Centre as Amicus Curiae) 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC) at para 4; Minister of Defence v Potsane and Another; Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others 2002 (1) SA 1 (CC), 2001 (11) BCLR 1137 (CC) at para 9.
148. 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 greater use of its power to grant direct access.)

149. For the ur-text on constitutional costs upon which my views are entirely parasitic, see M Bishop ‘Costs’ in S Woolman & M Bishop (2nd Edition, RS2, September 2010) Chapter 6.

150. M Bishop ‘Costs’ (supra) at 6-1.

151. See Bel Porto School Governing Body and Others v Premier, Western Cape, & Another 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC)(‘Bel Porto School Governing Body’) at para 132. Motsepe v Commissioner for Inland Revenue 1997 (2) SA 898 (CC), 1997 (6) BCLR 692 (CC)(‘Motsepe’) at para 30; Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provision of the Gauteng School Education Bill 1996 (5) SA 165 (CC), 1996 (4) BCLR 537 (CC)(‘Gauteng School Education Bill’) at para 36. See also Pretoria City Council v Walker 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 98; Oranje Vrystaatte Vereniging vir Staatsondersteunde & Another v Premier, Province of the Free State & Other 1998 (6) BCLR 653 (CC) at para 4. However, where the successful respondent is a private individual, the Court will often order the applicant to pay the respondent’s costs. For example, in Omar v Government, RSA & Others, the Constitutional Court found that although the applicant’s challenge to the Domestic Violence Act was ‘to a considerable extent ill-conceived’, no costs order should be made in favour of the governmental entities defending the Act. 2006 (2) SA 289 (CC), 2006 (2) BCLR 253 (CC)(‘Omar’). At the same time, however, the Omar Court ordered the applicant to pay the costs of the third respondent – the applicant’s ex-wife under Islamic law who had been obliged to acquire various protection orders against the applicant in terms of the Domestic Violence Act. Omar (supra) at para 64.

152. See Motsepe (supra) at para 30; SACCAWU v Irvin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (3) SA 705 (CC), 2000 (8) BCLR 886 (CC)(‘SACCAWU’) at para 51; Gauteng School Education Bill (supra) at para 36.

153. M Bishop ‘Costs’ (supra). Unsuccessful applicants who raise important constitutional issues will generally not be mulcted in costs. However, the Constitutional Court routinely awards costs to applicants who have successfully pressed constitutional challenges. See, eg, Jaftha v Schoeman and Others; Van Rooyen v Stoltz & Others 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC) at para 66; Bannatyne v Bannatyne & Another 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC) at para 41; Larbi-Odam v Member of the Executive Council for Education, North-West Province 1998 (1) SA 745 (CC), 1997 (12) BCLR 1655 (CC) at para 48; Laugh It Off Promotions CC v SAB International (Finance) BV t/a Salomark International 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC) at para 68.

154. 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC)(‘Walters’) at para 61.

155. 2003 (6) SA 21 (SCA)(‘Afrox’).


158. At least one space remains within which to contest existing precedent. The Afrox Court states that High Courts will be able to deviate from SCA, AD and CC precedent with respect to how they understand such open-ended notions as boni mores and public interest. Afrox (supra) at para 28. A second line of attack may be open to the High Courts. Where the Supreme Court of Appeal has assiduously avoided the constitutionalization of an issue of law, then the Constitutional Court’s
doctrines of legality, the unity of the law, constitutional supremacy and an objective normative value system suggests that the High Courts should have an opportunity to test such a rule of law against the basic law’s dictates. See S v Bosak 2001 (1) SA 912 (CC), 2001 (1) SACR 1 (CC), 2001 (1) BCLR 36 (CC) at para 15 (‘The development of, or the failure to develop, a common-law rule by the Supreme Court of Appeal may constitute a constitutional matter. This may occur if the Supreme Court of Appeal developed, or failed to develop, the rule under circumstances inconsistent with its obligation under s 39(2) of the Constitution or with some other right or principle of the Constitution. The application of a legal rule by the Supreme Court of Appeal may constitute a constitutional matter. This may occur if the application of a rule is inconsistent with some right or principle of the Constitution.’)

159. While the constitutional structures for ‘public participation in the process of law making’ seem to me to belong, more properly, under the discussion of participatory bubbles, a reasonably compelling case can be made for the proposition that public participation in the process of law making forms a part of a regime of shared constitutional interpretation. In the discussion of Matatide II and Doctors for Life below, I emphasize the extent to which the Court was concerned with deepening democracy and creating space for citizens to address specific problems that have a direct bearing on their lives. In participatory bubble-speak, once a specific conflict has been resolved, the bubble bursts and legislators and citizens alike return to other matters that occupy them. But, as Marius Pieterse has made clear to me, there need not be such a neat cleavage between the immediate outcomes of participatory bubbles and the long-term effects of shared constitutional interpretation. Immediate outcomes of participatory bubbles can have at least two roles to play in the domain of shared constitutional interpretation. First, if our courts have created the space for meaningful participation by the citizenry in the law-making process, then citizens will have a role to play in shaping the meaning of constitutional norms through the legislative (as opposed to the judicial) process. Citizens, through the drafting of some kinds of legislation, will play a direct role in giving the basic law content. Second, even where the law fails to reflect the interventions of the citizenry, the ‘burst’ participatory bubble leaves behind a residue of active political engagement. The failure to influence the setting of norms (constitutional and statutory) in one set of circumstances need not, indeed cannot, prevent any future influence of civil society on norm setting. Just as neuronal networks that fail to rise to the level of consciousness may yet form a winning coalition in later cognitive battles over ‘awareness’, citizen networks that fail to carry one vote in Parliament or a provincial legislature may yet build upon their current strength and win a future battle in the legislature. Pieterse’s point, fleshed out thus, is that the space created by participatory bubbles in legislatures holds out the promise that citizens will have an ongoing role to play in the formation of constitutional norms and that such an ongoing role has the capacity to create community based organizations that ultimately share responsibility for constitutional interpretation with various branches of government. Many people involved in the organization of social movements around litigation designed to secure basic entitlements have noted that losses tend to undermine efforts to organize the historically disadvantaged members of our society. The citizens who helped shape Mazibuko are a case in point. See Mazibuko & Others v City of Johannesburg & Others 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC). Many citizens described themselves as dispirited by the results. However, in a country with over 6,000 demonstrations a year, a vibrant core of social activists and doggedly committed legal NGOs, such as the Socio-Economic Rights Institute, the Centre for Applied Studies, Section 27, Equal Education, the Centre for Child Law and the Legal Resources Centre, will likely ensure that new challenges are brought in a manner more likely to ensure that the litigants understand the role of litigation as part of an overall political strategy to deliver basic services to those persons in most urgent need.


162. Emphasis added. This formulation is reiterated, in virtually identical terms, with respect to the National Council of Provinces and the provincial legislatures in FC s 70(1)(b) and FC s 116(1)(b). The latter provision was cited but not judicially considered in In Re: Constitutionality of the Mpumalanga Petitions Bill, 2000. 2002 (1) SA 447 (CC), 2001 (11) BCLR 1126 (CC) at para 17. The equivalent provision in respect of municipal councils, FC s 160(6) makes no reference to democracy. FC s 160(6) was considered in Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development & Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa & Others. 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at paras 96–112.

163. 1998 (3) SA 430 (C), 1998 (7) BCLR 916 (C) at para 27.

164. Ibid.


166. See FC s 70(2)(c), FC s 116(2)(b), FC s 160(8). See also FC s 61(3)(Providing that national legislation determining how provincial legislatures’ delegates to the National Council of Provinces are to be selected must ensure minority party participation); FC s 70(2)(b)(Rules and orders governing participation of provinces in proceedings of National Council of Provinces must be ‘consistent with democracy’.)

167. 2003 (1) BCLR 25 (C).

168. Democratic Alliance v ANC & Others 2003 (1) BCLR 25, 31 (C) (‘Democratic Alliance v ANC’).

169. Ibid at 31.

170. Ibid at 37. Roux draws ‘two provisional conclusions’ from Democratic Alliance v ANC: ‘First, it is clear that, where the Final Constitution refers to democracy tout court, rather than any particular form of democracy, there is a danger that the term “democracy” will be understood as a reference to the majority-rule principle, rather than the deeper principle of democracy that appears to underlie the constitutional text as a whole. Secondly, the Court’s reluctance to super-impose its own conception of democracy on FC s 160(8) illustrates the inherent difficulty in all cases where the principle of democracy is implicated. As the Court notes, cases of this type are by definition “political”, and therefore subject, if not to a formal political question doctrine, at least to more than the ordinary degree of deference. When this deferential approach is coupled with the contested nature of democracy itself, it may be expected that non-specific or unqualified references to democracy in the Final Constitution will rarely give rise to determinate rules, other than the requirement that the dispute should be resolved according to the wishes of the majority. On the other hand, where references to democracy are qualified, there may be a basis for more robust judicial intervention.’ Roux (supra) at § 10.3.

171. 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC) (‘Masondo’).


173. Masondo (supra) at para 19.

174. Ibid at para 20.
175. Ibid at para 63.
176. Ibid at para 78.
177. Roux (supra) at § 10.3.
178. In Matatiele I, the Constitutional Court remarked, as obiter, that FC s 118(1)(a) may impose a duty on provincial legislatures, when considering a constitutional amendment under FC s 74(8), to entertain oral or written representations by the public. Matatiele I (supra) at para 65. Because the issue was not properly argued, the Matatiele I Court declined to decide it. To understand FC ss 59(1), 72(1) and 118(1), as Roux notes, one must first understand FC ss 59(2), 72(2) and 118(2). FC s 59(2) states that the National Assembly ‘may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society’. This provision is repeated, virtually verbatim, with respect to the National Council of Provinces, in FC s 72(2), and provincial legislatures, in FC s 118(2). Roux contends that ‘these provisions … acknowledge the value not so much of public participation in legislative decision making as access to information about the inner workings of the democratic process’. Roux (supra) at § 10.3.
179. Matatiele Municipality & Others v President of the RSA & Others 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (CC) (‘Matatiele II’).
180. On the difference between rationality review and reasonableness review, see M Bishop ‘Rationality is Dead! Long Live Rationality! Saving Rational Basis Review’ in S Woolman & D Bilchitz (eds) Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution (2012) 1; A Price ‘The Content and Justification of Rationality Review’ in S Woolman & D Bilchitz (eds) Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution (2012) 37.
181. Ibid at para 68.
182. These two decisions shook up political practices in all nine provincial legislatures. None of the legislatures knew how much participation was ‘reasonable’ for any given decision. But they do know now that they are obliged to consider public participation when reaching decisions that will have some demonstrable effect on a discrete and identifiable portion of the community. Panel discussion on Matatiele II and Doctors for Life, South African Human Rights Commission and the South African Institute for Advanced Constitutional, Public and International Law (11 October 2006). For another decision that has extended the Court’s views on polycentricity and public participation in legislative and judicial processes, see Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others [2008] ZACC 10, 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC).
183. FC s 182(4) and PPA s 6(1)(b).
186. Ibid. ninety-eight per cent were finalised before the case closed and a further 1% after the case closed. In only one case did the state refuse to follow the recommendation: it chose to take an alternative route to address the problem.
187. The Office of the Public Protector increases access through its acceptance of complaints in numerous formats. Personal interviews ensure that persons who are illiterate or who lack sufficient education to draft a document stating the alleged wrong can lay a complaint. Complaints registered by telephone interview ensure that those persons who lack the resources (time or money) needed to travel to a Public Protector’s office are still able to file a complaint. Complaints can also be initiated by letter. See Office of the Public Protector: South Africa (2003), available at http://www.publicprotector.org/brochure_faq/11_lang/english.pdf (accessed on 1 November 2005). The brochure is available in all eleven official languages. A toll-free number – 0800 11 20 40 – enables members of the public to speak directly with a member of the Public Protector’s office. The Public Protector’s relatively high rate of success in securing adequate redress for complainants raises the question of when, and whether, the Public Protector ought to be treated as the preferred forum for ventilation of disputes.
between a citizen and the state. As it stands, the law provides only limited disincentives with respect to forum shopping. On the one hand, the PPA permits the Public Protector to refuse to investigate any matter in which the complainant has not exhausted his legal remedies. PPA s 6(3)(b). On the other hand, the complainant has no obligation to approach the Public Protector for assistance prior to filing suit in a court of law. See Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape 2001 (2) SA 609, 625 (E), 2000 (12) BCLR 1322, 1333 (E)((The Public Protector and the Auditor-General) are bodies constitutionally mandated to pursue matters of this kind, but where the State fails to provide them with the means to do so it seems almost bizarre to insist that the courts are precluded from coming to the assistance of the applicants.) See also Dahalorishwua Patriotic Front & Another v Government, RSA & Others [2004] JOL 12911 (T)(‘Dahalorishwua’) at para 30.2. If anything, the current case law suggests that a complainant might be well advised to adopt a two-pronged approach to the resolution of a dispute with a public entity. See Motshibeli v Western Vaal Metropolitan Substructure [1999] JOL 5678 (LC) at para 18 (‘While the applicant may well have been entitled to approach the Public Protector for assistance, that clearly would have been a parallel exercise to the course of legal proceedings … In any event, he could not reasonably have understood that his referral of the dispute to the Public Protector could excuse him from pursuing the matter under the Labour Relations Act, including the filing of the necessary statement of claim in this Court.’) See also Prensho v Development Bank of Southern Africa Pension Fund & Another [1999] 12 BPLR 439, 443 (PFA) (Condonation of late application denied despite earlier application to Public Protector.) Motshibeli makes the Public Protector a somewhat less attractive substitute for litigation. However, the Public Protector remains a free and an effective mechanism for dispute resolution. Those complainants who believe that their best chance at securing the required relief is to be found in the courts are not barred from filing in both forums simultaneously.


189. Cathi Albertyn writes: ‘The CGE’s most important function is to act as a watchdog for gender equality, and hence of democracy. This watchdog role extends beyond the state to the private sector and civil society. Section 11(1)(a) of the Act explicitly authorises the CGE to monitor and to evaluate the policies and practices of all organs of state, statutory bodies or functionaries, public bodies and authorities and private business, enterprises and institutions. Section 11(1)(c) requires the CGE to evaluate any Act of Parliament or aspect of the common law, with particular emphasis on systems of personal, family and customary law. In terms of s 11(1)(h), the CGE is expected to monitor compliance with relevant international instruments, especially the Convention on the Elimination of All Forms of Discrimination Against Women. C Albertyn ‘Commission for Gender Equality’ in S Woolman & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, OS, June 2004) Chapter 24D.

190. Ibid (footnotes omitted).


192. Human Rights Commission Act, s 8, grants the SAHRC the power to resolve by mediation, conciliation or negotiation any dispute or to rectify any act or omission in relation to a fundamental right. Section 20(5) of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) – Act 4 of 2000 – empowers an equality court to refer disputes to an alternative forum.

193. The SAHRC has been loath to exercise its power of adjudication. But see Freedom Front v South African Human Rights Commission 2003 (11) BCLR 1283 (SAHRC)(Commission finds that the slogan ‘Kill the farmer, kill the Boer’ – chanted repeatedly at an ANC rally – constitutes hate speech.) Perhaps one reason for this reluctance is that its decisions are often understood not to be binding on the parties to the dispute.

194. While loath to exercise its power of adjudication, the SAHRC has initiated litigation or participated as an amicus on numerous occasions. The virtue of its appearance as an amicus – as I noted in the
endnotes above – is that it gives the courts, and especially the Constitutional Court, an additional perspective on a dispute.

195. See Jordan (supra) at para 70 (Recognizes the role of Chapter 9 Institutions in shaping the Court’s understanding of the content of a constitutional norm: ‘This Court is of course not bound by the Commission [of Gender Equality]’s views but it should acknowledge its special constitutional role and its expertise.’)

196. The Grootboom Court endorsed a significant monitoring role for the SAHRC and further requested that the SAHRC adopt a supervisory role to ensure the state’s compliance with the Court’s order. As note, the SAHRC failed to discharge this supervisory role.

197. Klaaren (supra) at Chapter 24C.

198. Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions: A Report to the National Assembly of the Parliament of South Africa (31 July 2007) (‘The Asmal Report’): ‘The Committee finds that the multiplicity of institutions created to protect and promote the rights of specific constituencies has in practice resulted in an uneven spread of available resources and capacities, with implications for effectiveness and efficiency. This has created fragmentation, confounding the intention that these institutions should support the seamless application of the Bill of Rights. The Committee therefore recommends the establishment of an umbrella human rights body to be called the South African Commission on Human Rights and Equality, into which the National Youth Commission, the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities (together with the Pan South African Language Board) and the Commission for Gender Equality should be incorporated together with the Human Rights Commission.’ The ‘fragmented’ quality of that last sentence reflects the terribly underwhelming quality of the report. It leaves the reader with misapprehension that the failure of the Chapter 9 Institutions is a failure of institutional design. It most certainly is not. The failure rests entirely with a government unwilling to brook any form of contestation of its will. Parliament seems to have decided that actual amalgamation – which would have required significant changes to the Constitution – was less desirable than letting the Chapter 9 Institutions die on the vine. If the report is an insult to our intelligence, Parliament’s continued inaction is a slap in the face of creative institutional designers (and South Africa’s citizenry) who had hoped to strengthen our democracy through the bodies that would mediate different kinds of discussions across our society and deepen our democracy and civil society in the process.

199. See S Woolman ‘Security Services’ in S Woolman & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, RS3, May 2011) Chapter 24C. Reports from the Public Protector, the Auditor-General and the Public Service Commission reveal a worrisome two-fold trend: (1) rent-seeking behaviour by public officials costs the state R1 billion per annum, and (2) few employees found guilty of defrauding the fiscus are actually dismissed – the vast majority retain their positions with only a warning.