I do hereby swear that I will in my capacity as Judge of the Constitutional Court of the Republic of South Africa uphold and protect the Constitution of the Republic and the fundamental rights entrenched therein and in so doing administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the Law of the Republic. So help me God.


I swear that, as Judge of the Constitutional Court, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the Law. So help me God.


I. INTRODUCTION

In 1993, South Africa adopted a transitional or interim Constitution (also referred to as the “IC”), enshrining a non-racial, multiparty democracy, based on respect for universal rights. This was a monumental achievement considering the complex and often horrific history of the Republic and the increasing racial, ethnic and religious tensions worldwide. A new society, however, could not be created by

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1 See S. Afr. Const. of 1993 (Interim Constitution) (entering into effect on April 27, 1994).

Thus, Nelson Mandela, along with his Deputy Presidents and the new Parliament, worked to create the social and institutional structures necessary for the transition to a multi-racial democracy. On February 14, 1995, the Constitutional Court of the Republic of South Africa (hereinafter “CCT” or “Court”) was inaugurated and charged with the challenging task of laying the jurisprudential groundwork for the great new society depicted in the optimistic provisions of the interim Constitution. In particular, the Court was called upon to establish the legal framework for the recognition and protection of the “Fundamental Rights” enumerated in Chapter 3 of the interim Constitution, the South African counterpart to the United States Bill of Rights.

As South Africans reinvented the social, political, and economic order of their country, work on a second constitution also went forward. The result, the Constitution of the Republic of South Africa, 1996, Act 108 of 1996 (hereinafter “Constitution” or “new Constitution”), benefited from the efforts of elected officials, numerous national and local outreach programs, and public debates and educational projects sponsored by both governmental and nongovernmental organizations. These efforts were designed to inform the public about the activities of the Constitutional Assembly, to educate the public about the importance of the Constitution and the drafting process, to encourage active participation in that process, and to solicit the contribution of ideas, critiques and criticisms. In fact, the Constitutional Assembly received more than two and a half million submissions from the general public. Although bulky, with some 243

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5 See S. Afr. Const. of 1993 (IC), ch. 7, § 98 (establishing a Constitutional Court); id. at sched. 3 (“Oaths of Office and Solemn Affirmations”); President Nelson Mandela, Speech at the Inauguration of the Constitutional Court (Feb. 14, 1995) (“It is the task of this Court to ensure that the values of freedom and equality which underlie our interim constitution ... are nurtured and protected so that they may endure.”); Speaker of Parliament Dr. F.N. Ginwala, Speech at the Inauguration of the Constitutional Court (Feb. 14, 1995); Chief Justice of the Supreme Court Michael Corbett, Speech at the Inauguration of the Constitutional Court (Feb. 14, 1995).

6 The presidential proclamation, required by Section 243 of the new Constitution to set the date of effectiveness of the new Constitution, was issued in 1997. It set February 4, 1997 as the date on which the Constitution entered into effectiveness with the exception of only one provision relating to the election of chairpersons to municipal councils. See Proc. No. R. 6, 1997; see also S. Afr. Const. of 1996, ch. 14, § 243

7 These efforts included radio discussions, neighborhood symposia and seminars (sometimes even under tents in rural areas, if necessary), information distributed at religious and sporting events, the national circulation of a free newspaper, Constitutional Talk, which reviewed in detail the submissions, committee activities and debates in the Constitutional Assembly, and the creation of an all-inclusive website at http://www.constitution.org.za/, which continues to provide free access to working drafts, submissions, and other documentation.

8 See Working Draft of the New Constitution, CONSTITUTIONAL TALK (Constitutional Assembly, Cape Town, South Africa), at 1.
provisions, 6 schedules and 4 annexes, the new Constitution truly represents the culmination of a very inclusive and fair process.

Chapter 2 of the new Constitution, entitled "Bill of Rights," differs only moderately from the "Fundamental Rights" set out in Chapter 3 of the IC. To a certain extent, credit for these differences must be given to the public submissions and to the drafters of the new Constitution, many of whom also helped draft the IC. The drafting of the new Constitution, however, also benefited from the development of a constitutional interpretative methodology reflected in the judgments handed down by the courts, in particular, the new Constitutional Court. These decisions allowed the drafters to repair not only structural lacunae exposed by the courts, but also to address the concerns raised in publicly or politically charged CCT decisions.

Both the IC and the new Constitution contain provisions instructive to judicial interpretation of the rights they grant. Section 35(1) of Chapter 3 of the IC, entitled "Interpretation," provides:

In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

Section 39 of the new Constitution, entitled "Interpretation of Bill of Rights," provides:

When interpreting the Bill of Rights, a court, tribunal or forum must -

(a) promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) consider international law; and

(c) may consider foreign law.

These provisions clearly mandate that the interpretation of constitutionally protected rights must be enlightened by the consideration of international law and may also be influenced by judicial consideration of foreign constitutional jurisprudence. Although there are differences between Section 35(1) of the IC and Section 39 of the new Constitution, the mandate supporting reference to extraterritorial ju-

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10 See, e.g., State v. Makwanyane, 1995 (3) SALR 391, 451-52 (CC) (striking down the death penalty in the face of large public support); see infra Section III for a discussion of the Makwanyane decision and the Court's response to popular pressure.
risprudence is clear in both texts. 13

The need for such a provision is obvious. Prior to the adoption of the IC, South Africa was decidedly not “an open and democratic society based on freedom and equality." 14 Moreover, the complicity of the South African judiciary in the enforcement of the oppressive apartheid regime tainted public confidence in domestic notions of justice. Therefore, reference to external jurisprudence from “open and democratic” societies offered an appropriate method for assuring the public that the “Fundamental Rights” described in the Constitutions would be reasonably protected from future interpretational mischief or bigotry. This same sentiment underpinned the decision to create the CCT, rather than expand the jurisdiction of an existing court. The drafters believed that the CCT would stand as a new, untainted court to protect citizens’ new Fundamental Rights and safeguard South Africa’s new constitutional ideals.

This article examines the evolution of the Court and its use of international public law and foreign comparative law to interpret the Fundamental Rights included in the interim Constitution. 15 With the character of jurisprudence transformed by the interjection of a new constitutional order, the early cases brought before the courts of South Africa for consideration involved fresh, new constitutional issues at all substantive and procedural levels. Since the early CCT opinions established the interpretive methodology now prevailing in the South African court system, the bulk of the analysis presented in this article describes the groundwork laid in four of the CCT’s most important early judgments: 16 State v. Zuma and Others, 17 State v. Makwanyane and Another, 18 Ex Parte Gauteng Provincial Legislature: In re Dis-
pute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995, and Azanian Peoples Organization (AZAPO) and Others v. President of the Republic of South Africa. Each opinion will be dealt with in a separate section. When considered together, analyses of these four cases illustrate the important stages in the evolution of the Court’s use of comparative law with respect to its Section 35 mandate, the Court’s interpretation of the Fundamental Rights, and the growth of the CCT as an institution.

The importance of these four cases is not diminished by the new Constitution. Most of the changes to the Fundamental Rights in the new Constitution are not expected to materially alter the content or interpretation of the rights. In fact, the CCT’s interpretation of Fundamental Rights under the IC can be credited with informing, if not instigating, many of the changes currently reflected in the Bill of Rights. Thus, understanding the form and substance of IC interpretations is critical to understanding the prospective evolution of constitutional law under the new Constitution. Even so, where useful, the analysis below also includes a brief examination of the Bill of Rights provisions corresponding to the relevant IC provisions under scrutiny.

Section II reviews the laying of the foundations for CCT rights interpretation and for reference to foreign comparative jurisprudence in the context of Zuma. The subsections in Section II address issues concerning: (i) the Court’s jurisdiction; (ii) the Court’s declaration of the Interim Constitution’s supremacy over the common law; (iii) the Court’s first steps toward developing a coherent, interpretive approach to Fundamental Rights; (iv) the textual distinctions between the United States and South African Constitutions which explain the Court’s adoption of a two-stage approach to rights interpretation instead of the one-stage approach used to interpret the United States Constitution; and (v) the issuance of retrospective declarations of invalidity by the Court.

Section III examines Makwanyane as an example of the Court’s maturing interpretive approach. Section III is divided into a number

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1996 (3) SALR 165 (CC).
1996 (4) SALR 671 (CC).

It should be noted that many of the cases decided by the CCT after the New Constitution became effective have considered issues that arose under the Interim Constitution. Although cases arising under the IC in the 1993-1996 period will eventually work their way out of the court system, judgments handed down as recently as February 1998 were still being decided based on interpretation of the IC, under which their issues arose. See, e.g., City Council of Pretoria v. Walker, 1998 (2) SALR 363 (CC); Sanderson v. Attorney General, Eastern Cape, 1998 (2) SALR 38 (CC).

For example, the first three judgments handed down which arose under the new Constitution relied upon precedent established under the IC. See State v. Nusele, CCT 25/97 (Oct. 1997) (visited Aug. 27, 1998) <http://www.law.wits.ac.za/judgements/nusele.html>; Parbhoo and Others v. Getz NO and Another, 1997 (4) SALR 1095 (CC); State v. Pennington and Another, 1997 (4) SALR 1076 (CC).
of subsections that first provide an important historical background to the case, and then (i) review the Court’s initial pronouncement regarding the use of legislative history and the interplay between constitutional interpretation and public opinion, (ii) describe the Court’s maturing interpretive approach, and (iii) provide a detailed analysis of how the Court undertakes its Section 35 mandate. Section III further amplifies the theme first introduced in the discussion of Zuma regarding the importance of interpreting the IC in the context of South African history. Because Makwanyane is one of the most comprehensive and detailed examples of the Court’s reasoning, a significant portion of this article is dedicated to its analysis.

While Section III provides an expansive application of the Section 35 mandate, Section IV explains the next stage of the evolution of the CCT’s interpretation of rights and highlights the discretionary aspects of Section 35’s mandate by considering the Gauteng Provincial Legislature decision. Section IV reviews the restraint exercised by the CCT’s in its use of international and foreign comparative legal analysis and discusses the question of what criteria the Court should apply in determining whether the exercise of discretion is justified. The last subsection of Section IV uses the example provided by the Gauteng dispute briefly to provide comparative insight into the new Constitution and to highlight the inherent complexities involved in the creation of positive obligations by modern constitutions.

Section V addresses the Court’s analysis in AZAPO that involved a uniquely South African dispute over the constitutionality of the Truth and Reconciliation Commission created to help heal the wounds of the apartheid. Section V’s subsections focus on the CCT’s creative use of international law and foreign experience in fashioning an introspective and uniquely South African solution to the issue. Additionally, the analysis in Section V reveals that the case favoring restraint in the Court’s use of comparative constitutional analysis is more compelling in AZAPO than in the Gauteng Provincial Legislature opinion because of the special role of the Truth Commission in the context of South Africa’s divisive history.

The Article concludes by drawing these observations together to illustrate how the CCT has wisely undertaken its rather unique mandate to refer to external jurisprudence. It highlights the evolution of the Court’s reasoning from the more exhaustive approach reflected in Makwanyane to the more selective approach reflected in AZAPO. The conclusion assesses the Court’s success in undertaking its Section 35 mandate while maintaining a sensitivity to the more

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See infra Section V. The Truth and Reconciliation Commission was created to "promote national unity and reconciliation" in the context of South Africa’s violent past. See AZAPO, 1996 (4) SALR 671, 677 (CC) (quoting Section 3 of the National Unity and Reconciliation Act 34 of 1995).

See infra Section VI.
subjective elements of South Africa's social, economic and political reality. It offers a predictive model for CCT's comparative interpretation under the new Constitution. The model highlights certain factors that may influence the Court's use of international and foreign jurisprudence in the future.

II. ZUMA LAYS THE FOUNDATION

On April 5, 1995, the CCT handed down its first judgment.\(^2\) In *State v. Zuma and Others*, the Court addressed the constitutionality of Section 217(1)(b)(ii) of the Criminal Procedure Act No. 51 of 1977,\(^4\) which placed the burden of disproving the voluntary nature of a confession on the accused.\(^5\) The prosecution tendered the confessions of two individuals, each indicted on two counts of murder and one count of robbery. The defendants pleaded not guilty, despite the confessions tendered against them.\(^6\) At a subsequent hearing, the accused challenged the legal presumption that their confessions were voluntary and testified that the confessions were extracted by duress.\(^7\) The unanimous judgment of the Court, crafted by Acting Justice Sydney Kentridge,\(^8\) rightly struck down the provision as violating the right to a fair trial found in Section 25(3) of the interim Constitution.\(^9\)

The *Zuma* judgment addressed a number of different jurisprudential issues in its brief eighteen-page decision. Lower courts had been rendering judgments in constitutional cases without any real oversight for nearly a year, because the IC entered into force in April 1994,\(^10\) but the CCT was not inaugurated until February 1995.\(^11\) In re-

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3. The relevant section provided:

   (b) that where the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof at the proceedings in question— . . .

   (ii) be presumed, unless the contrary is proved, to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, if it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto.

4. See Zuma, 1995 (2) SALR at 647. The constitutionality of the statutorily mandated burden of proof was raised at a hearing on the admissibility of the confessions. See id. at 648.

5. See id. at 648.

6. The accused testified that they had been assaulted and threatened. See id.


8. See Zuma, 1995 (2) SALR at 659; see also S. Afr. Const. of 1993 (IC), ch. 3, § 25(3) ("Every accused person shall have the right to a fair trial.").

response to this ripening need for guidance, the Court felt it important to address a broad range of procedural and substantive issues in order to maximize the utility of its pronouncements and provide a definitive approach to constitutional interpretation.\(^3\) The \textit{Zuma} judgment: (i) reviewed the claim of CCT jurisdiction,\(^5\) (ii) determined the legal relationship between the common law and the IC,\(^6\) (iii) revealed the CCT's interpretive approach to constitutional issues,\(^7\) (iv) demonstrated a coherent method of constitutional analysis which respected Section 35's mandates,\(^8\) and (v) provided examples of the considerations pertinent to the issuing of orders by the CCT.\(^9\) This section will examine the Court's first steps in each of these areas.

\section{The Question of Jurisdiction\(^{40}\)}

The CCT held that although the referring court had ample jurisdiction to decide the constitutional issue raised in \textit{Zuma}, which it should have exercised, the importance of the constitutional issue warranted the attention of the Court. On that basis, the Court cured the defective referral and accepted jurisdiction. More specifically,\(^{33}\) See infra Section II, Part A.

\(^{31}\) In certain instances where parties before the CCT had omitted a particularly useful argument, the Court certified additional questions to the parties for response. \textit{See Zuma}, 1995 (2) SALR at 657 (asking the Attorney General whether there is judicial discretion to reject admissible, but prejudicial evidence).

\(^{32}\) See \textit{id}. at 649.

\(^{33}\) See \textit{id}. at 650-52.

\(^{34}\) See \textit{id}. at 652-53. One of the more interesting features of the arguments submitted to the CCT, especially in the earlier cases, was the number of pages dedicated to persuading the Court which method it should adopt to interpret a particular provision of the IC and how that methodology logically supported a rights interpretation favorable to the position being advanced. These arguments were understandable considering that the CCT's interpretive style was completely unknown.

\(^{35}\) See \textit{id}. at 653-57. The difference between the selection of an interpretative approach, \textit{see infra Section II}, and the application of a coherent method of analysis, \textit{see infra Section II}, Part D, illustrates the difference between theory and practice. The development of an appropriate methodology that remains true to theory is important because the abstract nature of theory does not easily lend itself to subjective application. The fact that it is possible to adopt a variety of methodologies under the auspices of the same interpretive theory is one of the reasons judicial interpretations vary and enrich the legal landscape.

\(^{36}\) See \textit{id}. at 663-64.

\(^{37}\) Section 102 of the IC attempted to establish procedural guidelines for the \textit{triage} of constitutional competence among the courts. \textit{See S. Afr. Const} of 1993 (IC), ch. 7, § 102. However, the language of the Section was inadequate to the task and confusing. Undoubtedly for this reason and because the Constitutional Assembly found a wiser approach, the new Constitution leaves the procedural aspects of judicial interaction on constitutional matters to the legislature. \textit{See S. Afr. Const} of 1996, ch. 8, §§ 166(c), 169(b), 171, 172(2)(c). \textit{But see State v. Pennington and Another}, 1997 (4) SALR 1076, 1082-83 (CC) (noting the lack of legislation enacted to govern appeals from the Supreme Court to the Constitutional Court). Therefore, the purposes of this first subsection are adequately served without dwelling on the formerly significant problems surrounding questions of referral, appeal and direct access. Regardless of the short existence of Section 102, the CCT sounded a critical note in \textit{Zuma} emphasizing the responsibility of the lower courts to pull their weight in constitutional matters.
the Court based its jurisdiction on Section 100(2) of the IC, which allows direct access to the CCT “where it is in the interests of justice.”

The constitutional question in Zuma had been referred from the criminal trial before Judge Hugo in the Natal Provincial Division. Even though an agreement among the parties had given Judge Hugo the requisite constitutional jurisdiction to determine the validity of Section 217(1)(b)(ii) of the Criminal Procedure Act, he did not do so. Instead, he referred the question to the CCT. The CCT correctly found the referral “wholly incompetent.” The Court explained that the conferral of jurisdiction permitted under Section 101 logically commanded such jurisdiction be exercised in the determination of the issue at hand and not referred to the CCT.

The Zuma case, unfortunately, was typical of numerous cases that were referred to the CCT by judges fearful of exercising constitutional jurisdiction. In response, the CCT patiently educated, entreated and, where necessary, chastised the courts to exercise their responsibilities in this area. In Zuma, the Court began the important process of instilling discipline in the judicial ranks with regard to fulfillment of their constitutional obligations.

In fact, the Zuma Court requested that both parties address the question of the competence of the referral, including what other grounds for CCT jurisdiction might exist. This type of life-line was provided on a number of occasions in 1995, and rightly so given the novelty of both the form and substance of constitutional litigation under the IC. Anticipating that the original referral may have been defective, T. P. McNally SC, Attorney General for Natal, filed a Notice of Motion requesting direct access under of Section 100(2) of the IC.

Section 100(2) stated, “The Rules of the Constitutional Court may make provision for direct access to the Court where it is in the interest of justice to do so in respect of any matter over which it has juris-

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S. Afr. Const. of 1993 (IC), ch. 7, § 100(2).

With certain exceptions, Section 101(6) allows the parties themselves to agree to vest a lower court with constitutional jurisdiction it did not otherwise possess. See S. Afr. Const. of 1993 (IC), ch. 7, § 101(6). In Zuma, the parties granted Judge Hugo jurisdiction. See Zuma, 1995 (2) SALR at 649.

See Zuma, 1995 (2) SALR at 649.

Id.

Id.

The Court explained that the Attorney General sought direct, or interlocutory, access to the CCT to resolve the constitutional issue because the lower courts would not address the question and it would then be referred to the Court at the end of the trial. See id. at 649. The Court noted in Zuma that “[i]t was in these circumstances that the Attorney General of Natal applied under section 100(2) of the [IC] for direct access to the Court.” Id.

See State v. Vermaas; State v. Du Plessis, 1995 (3) SALR 292, 293-97 (CC) (hereinafter Vermaas) (explaining that only issues that arise during a trial that lay within the CCT’s exclusive jurisdiction as set forth in Section 102(1) of the IC should be referred to the CCT).

See Zuma, 1995 (2) SALR at 649.
In this regard, the relevant sections of Rule 17 of the Constitutional Court Rules provide:

1. The Court shall allow direct access in terms of section 100(2) of the Constitution in exceptional circumstances only, which will ordinarily exist only where the matter is of such urgency, or otherwise of such public importance, that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government.

2. The special procedure referred to in subrule (1) may be sanctioned by the Court on application made to it in terms of these rules.

Although the constitutionality of the evidentiary burden represented by Section 217(1)(b)(ii) does not on its surface appear to meet the strenuous criterion of urgency that Rule 17 requires, South Africa’s long history of abusive police procedures under the former regime offers one reason why the Court granted direct access in the Zuma case, as well as in others. As Zuma explains, “The admissibility of confessions is a question which arises daily in our criminal courts and prolonged uncertainty would be quite unacceptable.”

B. The Interim Constitution and the Common Law

The interpretation of Chapter 3 of the interim Constitution that defined a list of Fundamental Rights required nothing less than a total reassessment of South African jurisprudence. Nowhere was this more evident than in criminal law and procedure. Since 1994, courts in South Africa have applied a host of different approaches in their attempt to interpret the effect of the IC on the common law. In
Zuma, the Court made a definitive statement regarding the effect of the IC on the interpretation of the common law. First, the Court recognized the effect apartheid had on the old common law rights. Then, it introduced the concept of substantive review grounded in the interim Constitution.

Although the majority of judgments that the Court would later hand down went to great lengths to contextualize the legal arguments before the Court, reviewing their pros and cons prior to stating the Court's position, Zuma advanced on the substantive issue with determination:

The concepts embodied in these provisions are by no means an entirely new departure in South African criminal procedure. The presumption of innocence, the right of silence and the proscription of compelled confessions have for 150 years or more been recognised as basic principles of our law, although all of them have to a greater or lesser degree been eroded by statute and in some cases by judicial decision. The resulting body of common law and statute law forms part of the background to s 25 [of the IC].

Thus, the CCT acknowledged that the common law serves as the starting point for constitutional analysis with regard to the rights of detained, arrested, and accused persons. Nevertheless, the Zuma court also recognized that the common law had been corrupted by apartheid-era jurisprudence. The Court then addressed the question of how constitutional ideals are to be applied to repair and reshape the common law, noting with respect to the common law rule in question:

The right to a fair trial conferred by [Section 25(3) of the IC] is broader than the list of specific rights set out in the paragraphs (a) to (j) of the sub-section. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.

The Court then revisited the prevailing common law rule, most recently expressed by the Appellate Division in State v. Rudman and Shabatata, 1996 (1) SALR at 725, 741 (CC).
Another; State v. Mthwana. Pursuant to the rule upheld in Rudman, judicial review on appeal was restricted to determinations of formal or procedural irregularity or illegality, meaning that a court of appeal "does not enquire whether the trial was fair in accordance with 'notions of basic fairness and justice', or with the 'ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration.' In response, Justice Kentridge wrote:

That was an authoritative statement of the law before 27th April 1994. Since that date section 25(3) has required criminal trials to be conducted in accordance with just those "notions of basic fairness and justice". It is now for all courts hearing criminal trial or criminal appeals to give content to those notions. Thus, from that moment on, Zuma required all criminal courts in South Africa to apply the spirit of the IC to interpretations of the common law and established that the "concept of substantive fairness" and "notions of basic fairness and justice" must be given tangible meaning in South African courts.

The Zuma Court grounded this approach in the language of Section 35 of the IC, which requires courts, when interpreting Fundamental Rights, to "promote the values which underlie an open and democratic society based on freedom and equality." It is no small achievement that the CCT broadly interpreted Section 35 and was able to fashion such a direct jurisprudential pathway between a past "characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights . . . ."

C. Interpretative Approach: A Theory of Modified Generosity

Zuma clarifies the CCT's early support for a modified theory of generous interpretation of Fundamental Rights. This approach has the following characteristics: (a) a right must be interpreted in the context of the broader objectives of Chapter 3, (b) the interpretation must be sensitive to its effect on and integration into the existing common law, and (c) interpretation must respect the language of

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60 1992 (1) SALR 343, 372 (App. Div.). The Appellate Division of the Supreme Court is the forum of last resort for non-constitutional matters. In as much as the vast majority of issues, substantive or procedural, arising after the adoption of the IC became constitutionalized, the Appellate Division saw its sphere of influence somewhat diminish in the early years of the CCT.
61 Id.
62 Id.
64 The process of reshaping and rejuvenating the common law illustrated by the Court in Zuma, see supra Section II, Part B, not only helps the judiciary keep its bearings in the changing legal landscape, but also provides a concrete example of how to undertake its new responsibili-
the constitutional provision.

As noted, early submissions before the CCT included lengthy, academic critiques concerning the appropriateness of one or another theory of constitutional interpretation, citing *inter alia* the grammatical, systematic (or holistic), purposive and historical approaches to interpretation. Parties actually contended that the Court would be making an error if it considered the constitutionality of their claims from the wrong *theoretical* vantagepoint. Zuma reflected its early ruminations on this topic and foreshadowed the debates more completely canvassed in *Makwanyane*.

The most attractive interpretive model reviewed by the Court described a "generous approach" to constitutional interpretation, under which a constitutional provision is interpreted with a view to granting the interested party the largest possible measure of constitutional protection. One possible hazard inherent in this approach is that it promotes an over-emphasis on the outcome of an interpretation and its reflection on the underlying right rather than concern over the actual interpretative methodology used to reach the holding. From this perspective, wholesale adoption of the generous approach risks undermining the development of clearly defined rights and of a predictable, or at least a reasonably consistent, method of analysis for the determination of the content of those rights.

In his analysis, Acting Justice Kentridge provided a contextual limitation on the utility of the "generous" approach to avoid the pitfall of subscribing to a solely ends—or values—focused interpretative approach. In doing so, he initiated the Court's application of Section

ties under the IC. The clearest exercise by the Court of its power to reshape the common law was reflected in the unanimous judgment delivered in *Shabalala v. Attorney General, Transual and Another*, 1996 (1) SALR 725 (CC) discussed *supra* notes 53, 59.

66 See *supra* note 37.
68 Again, the purposive nature of this contextualization was clarified in *Makwanyane*. See *Makwanyane*, 1995 (3) SALR at 404-409; see also infra Section II, Part D.
69 Many interpretive theories were reviewed or explored by the Court both in the submissions of counsel and during oral argument. See generally Zuma, 1995 (2) SALR 642 (CC). The importance of this exploration into interpretative theories in *Zuma* is illustrated by the attention it was given by counsel. Counsel for the accused preferred as generous an approach as possible while counsel for the state argued for a conservative approach. Nevertheless, the basis for the Court's ultimate, if partial, adoption of a generous approach rather than a wholly grammatical approach was not revealed in the brief judgement.

70 While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single "objective" meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it can not be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.

*Id.*
35 to constitutional interpretation. First, summarizing certain principles outlined in the Canadian case of Regina v. Big M Drug Mart Ltd., Acting Justice Kentridge noted in Zuma that “regard must be paid to the legal history, traditions and usages of the country concerned, if the purposes of its constitution are to be fully understood.” However, he offered this borrowed bit of Canadian constitutional jurisprudence, not to emphasize the importance of restricting the scope of generous interpretation, but in the context of a developing argument against the continued viability of the pre-constitutional common law understanding of a fair trial. By virtue of this minor oversight, the Court’s analysis in Zuma, though hinting at it, did not adequately accentuate the usefulness of the purposive approach to interpretation, which was, in fact, the point of Canadian Justice Dickson’s comment. Although the Court did not seize the opportunity to blend in the purposive approach to act as a mitigating force on generous interpretation, the reference to Big M Drug Mart served to highlight the point that interpretation must have some contextual limitations.

Acting Justice Kentridge also captured a critical element in early constitutional interpretation—the concept of plain meaning. He emphasized that “even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to ‘values’ the result is not interpretation but divination.” The critical importance of having respect for the language of the IC could not have been better stated. As an added benefit, the focus on language in Zuma foreshadowed the question of the use of legislative history as an aid to interpretation that was clarified in Makwanyane.

D. Methodology: A Transnational Perspective on Rights

Having set the appropriate stage for constitutional analysis, Acting Justice Kentridge addressed the key question: whether the presumptive voluntariness of a confession violates the constitutional right to a fair trial, particularly given the importance of the associated right to be presumed innocent as generously interpreted in the context of Chapter 3’s objectives. His answer noted that Section 35 of the IC broadly establishes its objectives as the promotion of values that are intrinsic to an “open and democratic society based on freedom and

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72 Zuma, 1995 (2) SALR at 651.
73 This oversight was addressed in Makwanyane. See Makwanyane, 1995 (3) SALR at 403.
74 Zuma, 1995 (2) SALR at 653.
75 See infra Section III.
76 Chapter 3 of the interim Constitution provides for a host of specific rights. See S. Afr. Const. of 1993 (IC), ch. 3.
equality. Section 35 is relatively novel in the history of constitutional law. For example, in the United States, judicial reference to public international law and foreign constitutional jurisprudence is extremely rare. Even in countries more accustomed to referring to international or comparative foreign law such reference has developed from practice, has been limited to the non-constitutional context of judiciary review and has not been required or even explicitly permitted by the applicable constitutions. Given the uniquely terrible history of apartheid under which South Africa’s legal and administrative systems were established to enforce and maintain the segregation, marginalization and minimization of the majority of South Africans of color, the framers of the IC wisely ensured that the standards applied to the construction of the post-apartheid legal system were not drawn from the same well, but from purer waters.

Through its use of Canadian and other foreign law references, the judgment in Zuma developed and applied the Court’s new Section 35 analysis. The Zuma decision exposed two important and interrelated issues which required significant fine tuning, much of which came in subsequent judgments handed down two months later in June of 1995, especially in the Makwanyane decision discussed in Section III. Those issues concerned the choice between the “one-stage” and the “two-stage” techniques of rights interpretation and the selection of appropriate international and foreign comparative sources. A third, and ultimately more important issue concerning the Court’s discretion in its use of transnational jurisprudence is addressed in Section IV below discussing the constitutionality of the Gauteng Education Bill.

E. The One-Stage and the Two-Stage Approaches

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77 See Zuma, 1995 (2) SALR at 652 (citing Qozeleni v. Minister of Law and Order and Another, 1994 (3) SALR 625 (E)).
78 Few comparable mandates for international and foreign comparative analysis exist. But see, e.g., CAN. CONST. § 27; HUNG. CONST. art. 7.
80 One notable exception is Section 7 of the Constitution of Hungary, which explicitly recognizes reference to international law. See HUNG. CONST. art. 7 (accepting, inter alia, the “universally recognised rules and regulations of international law”).
82 See Makwanyane, 1995 (3) SALR 391; State v. Williams and Others, 1995 (3) SALR 632 (CC) (outlawing juvenile whipping); Vermaas, 1995 (3) SALR at 293 (guaranteeing the right to publicly funded legal representation as part of a fair trial); State v. Mhlungu, 1995 (3) SALR 867 (CC) (considering the right to a fair trial in the context of untimely service of an indictment). For a good review of these decisions, see Carpenter, supra note 81, at 24-29.
83 See infra Section IV.
When a constitutional right is granted without limitation, such as the right to "due process of law" under the Fifth Amendment of the Constitution of the United States, the content of the right, for example, what is due, must be construed conservatively in each particular instance in order to allow incremental accretions to the right as future cases may require. This is more readily apparent when one considers, in contrast, a constitutional right granted subject to an internal limitation, such as the Third Amendment of the Constitution of the United States which states, "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." Axioms of construction aside, it is clear that the right of homeowners not to have soldiers quartered in their homes is subject to the existence of a state of peace, and that the right of the government to station soldiers in United States homes is subject to the consent of the owner in times of peace and subject to appropriate legislation in times of war. Although its interpretation leaves room for judicial discretion, the first stages of the analysis are intrinsic to the right: Is there a soldier in the home? Is it peacetime and did the government obtain the owner's consent? However, in the case of an unlimited right judicial determination of the content of the right must build in the limits to which the right is subject—what it means, what it does not mean, when it may be abridged, when it may not and what procedural elements are adequate or inadequate for its protection. This is what is meant by the "one-stage" approach to constitutional rights analysis.

The two-stage approach can be illustrated by returning to the observations made about the Third Amendment. At stage one, a competent court notes that a homeowner has a right not to have soldiers stationed in his or her home. At stage two, this court notes that the right is subject to limitations, in this case internal limitations, which allow the right to be abridged in certain situations. In this instance, those circumstances are whether, if the alleged violation occurred in peacetime, consent was obtained from the owner or, if the alleged violation occurred in a time of war, the quartering of soldiers in the owner's home was achieved pursuant to appropriate legislation.

The two-stage approach is more easily illustrated in the context of constitutions that, unlike the United States Constitution, include

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84 U.S. CONST. amend. V.
85 U.S. CONST. amend. III.
86 One could also argue that the Ninth Amendment, which states, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," is a source of limitation since, from a Hobbesian point of view, the scope of one right may be limited by the conflicting scope of others. See CHARLES BLACK JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 10-17 (1997) (asserting a similar argument in regard to unnamed rights).
87 See, e.g., Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982) (using the two stage analysis of the rights and protections contained in the Third Amendment with respect to state aims).
limitations clauses. Such constitutions, including the interim Constitution and the new Constitution, provide a list of relatively unqualified rights, followed by a clause indicating the criteria under which these rights may be subject to limitation.

In this context, Acting Justice Kentridge observed in *Zuma* that the "single stage approach... may call for a more flexible approach to the construction of the fundamental right, whereas the two-stage approach may call for a broader interpretation of the fundamental right, qualified only at the second stage." Although only cursory attention was given to it in *Zuma*, the limitation clause in Section 33 of the IC is at the core of the two-stage approach that emerged in later cases and is currently used by the CCT. Section 33 of the IC provided in part:

(1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation —
   (a) shall be permissible only to the extent that it is —
      (i) reasonable; and
      (ii) justifiable in an open and democratic society
      based on freedom and equality; and
   (b) shall not negate the essential content of the right in
   question,
   and provided further that any limitation to —
   (aa) a right entrenched in section 10, 11, 12, 14(1), 21,
      25 or 30(1)(d) or (e) or (2); or
   (bb) a right entrenched in section 15, 16, 17, 18, 23 or
      24, in so far as such right relates to free and fair political

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88 See, e.g., CAN. CONST. §§ 1, 6(4), 15(2), 25, 26, 35; GRUNDEGESETZ [Constitution] GG arts. 18-19 (F.R.G.); A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 8 (Hung.); INDIA
CONSTR. art. 33; NAMIB. CONST. art. 22; TANZ. CONST. paras. 29-30; see also Universal Declaration of
(1948); Benjul Charters on Human and Peoples’ Rights, arts. 27-29, Organization of African Unity

89 *Zuma*, 1995 (2) SALR at 654.

91 See S. AFR. CONST. of 1993 (IC), ch. 3, § 33. Cf. S. AFR. CONST. of 1993 (IC), ch. 3, § 33
with S. AFR. CONST. of 1996, ch. 2, § 36. Section 36 of the new Constitution states:
(1) The rights in the Bill of Rights may be limited only in terms of law
of general application to the extent that the limitation is reasonable and
justifiable in an open and democratic society based on human dignity,
equality and freedom, taking into account all relevant factors, including —
   (a) the nature of the right;
   (b) the importance of the purpose of the limitation;
   (c) the nature and extent of the limitation;
   (d) the relation between the limitation and its purpose; and
   (e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of
the Constitution, no law may limit any right entrenched in the Bill of
Rights.
activity,
shall, in addition to being reasonable as required in paragraph (a) (i), also be necessary.
(2) Save as provided for in subsection (1) or any other provision of this Constitution, no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter.
(3) The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter.
(4) This Chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7(1).

In Zuma, Acting Justice Kentridge adopted a flexible approach to Section 33 and analyzed the question using both the one-stage and the two-stage approaches. He found that in many situations either approach would lead to the same result. He first observed that “re-


Id. In this context, although I note my broad concurrence with textualism, under which textual differences in constitutional provisions are deemed meaningful to interpretation, I do not feel that the textual distinctions drawn by Ronald Dworkin to support his assertion that certain phraseology intrinsically invokes a moral interpretation while other phraseology does not, is particularly useful in the comparative constitutional law context, as Frederick Schauer suggests in his comparison of the United States and South African constitutions. Cf. RONALD DWORKIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) with Frederick Schauer, Constitutional Invocations, 65 FORDHAM L. REV. 1295 (1997). The discussion surrounding “moral reading” draws its relevance from the intra-constitutional distinctions in the text of the United States Constitution, as the title of Dworkin’s article affirms, and, in the context of the current exposition, can be seen as an interpretive method useful within the one-stage approach. Where, as in South Africa, the two-stage approach is applicable to the analysis of all rights, although there may be distinctions between rights which have internal limitations and those which do not, for example Section 32, which provided the right to public information, and Section 9, which provided the right to life, restrictions on any right must still be interpreted under the limitations clause criteria. See S. Afr. Const. of 1993 (IC), ch. 3, § 32(b) (including the limitation of “where reasonably practicable”).

Under the IC, the first two criteria are reasonableness and justifiability, each of which invoke analysis with “moral” content. See S. Afr. Const. of 1993 (IC), ch. 3, § 33(1)(a)(i)-(ii). Clearly intra-constitutional interpretive distinctions in the context of the South African Constitution must be based on alternative considerations. In this light, it makes a world of difference that the drafters of the South African Constitution chose not to adopt a one-stage approach. It might have been reckless or even dangerous not to provide the apartheid-tainted judiciary with the interpretive imperatives set down in the limitations clause or Section 35’s mandate that the Court utilize foreign legal sources. See S. Afr. Const. of 1993 (IC), ch. 3, § 35(1). That a simi-
verse onus provisions similar to Criminal Procedure Act 217(1)(b)(ii), are not uncommon to either foreign or South African courts and are not *per se* unconstitutional in such jurisdictions. Subsequently, he analyzed the offensive nature of the particular provision, using alternatively the rationale developed for one-stage analyses in the United States and the United Kingdom, and the rationale developed for two-stage analyses in Canada, to determine its unconstitutionality.

Justice Kentridge further noted that under the one-stage analysis used in *Leary v. United States*, the United States Supreme Court held a presumption of an intent to import marijuana was a violation of due process. The Supreme Court reasoned that the presumed intent was not rationally related to possession, the fact underpinning the presumption. With regard to the two-stage approach, Kentridge observed that in *Regina v. Oakes* the Supreme Court of Canada reached an identical conclusion on a very similar set of facts. Like *Leary*, Oakes involved the constitutionality of allowing the proven fact of possession of an illegal substance to give rise to a presumption of an intent to traffic which the defendant bore the burden of disproving. However, the Canadian Supreme Court first determined that the reversal of the evidentiary burden of proof, the 'reverse onus,' abridged the right to be presumed innocent as expressly provided for in the Canadian Charter. The Court then held that the reverse onus was not justifiable because it unfairly tipped the balance against the accused by relieving the prosecution of its duty to prove its case beyond a reasonable doubt—the standard required by the

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A reverse onus exists when a statute creates a legal presumption of guilt that the defendant bears the burden of rebutting. *See Zuma*, 1995 (2) SALR at 653.

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right to be presumed innocent.106

Even though the application of either the one- or two-stage approaches may result in a similar outcome, Justice Kentridge noted that the Canadian limitations clause and right to a fair trial are very similar to their homologues in the IC.107 On this basis, he decided to adopt a Canadian-style two-stage analysis as more fitting for Fundamental Rights analysis.108

Quite astutely, the Court wound these sources together into a

106 See Zuma, 1995 (2) SALR at 655. In this instance, the accused must disprove the presumption on a balance of probabilities. Following the logic outlined in the Canadian cases, the South African Constitutional Court recognized that in this situation an accused who met his burden of raising a reasonable doubt as to their guilt might still be found guilty because the accused failed to supply enough evidence to negate the presumed intent. See id. at 655-57.

107 See id. The Canadian limitations clause states, "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." See CAN. CONST. (Constitution Act, 1982) pt. 1 ("Guarantee of Rights and Freedoms"), § 1 (punctuation omitted).

An individual's right to a fair trial appears in as Section 11 of the Charter of Rights and Freedoms, which states:

Any person charged with an offence has the right
(a) to be informed without unreasonable delay of the specific offence;
(b) to be tried within a reasonable time;
(c) not to be compelled to be a witness in a proceedings against that person in respect of the offence;
(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
(e) not to be denied reasonable bail without cause;
(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or International law or was criminal according to the general principles of law recognized by the community of nations;
(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
(i) if found guilty of the offence and if punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Id. at § 11 ("Legal Rights").


[Section 11(d)] bears a close relationship to s 25(3)(a) of our Constitution. In both Canada and South Africa the presumption of innocence is derived from the centuries-old principle of English Law, forcefully restated by Viscount Stankey... that it is always for the prosecution to prove the guilt of the accused person, and that the proof must be beyond a reasonable doubt. Accordingly, I consider that we may appropriately apply the principles worked out by the Canadian Supreme Court in particular the first two principles...

Id. at 656.
compelling analysis of law encompassing very different legal systems,
using the weaknesses discovered under one form of analysis to inform
and strengthen the other. Juxtaposing these observations and the
relevant South African provisions, Justice Kentridge ultimately
reached a conclusion squarely rooted in the exigencies of the IC. Al-
though the Court unfortunately failed to address Section 35’s call for
reference to applicable international law, the Court developed an
interpretation that is informed by foreign comparative jurisprudence
and yet sensitive to the distinctiveness of the South African constitu-
tion and history.

Even so, the analysis in Zuma falters somewhat by not clearly ad-
dressing the criteria laid down in the limitations clause described in
Section 33. Although, the Court adopted the Canadian methodol-
gy for analyzing the content of the right to a fair trial, it neither
selected to follow the limitations clause analysis adhered to in Canada,
nor put forth its own analysis in this regard. The Court’s limitations
clause analysis avoided any meaningful clarification of the methodol-
ogy to be applied at each stage. Such an analysis would include dis-
cussion of the following questions: What are the components of the
required reasonableness analysis? How does the Court determine
whether the limitation is “justifiable in an open and democratic soci-
ety based on freedom and equality?” What is the “essential content”
of the right to a fair trial? What additional criteria is the CCT ap-
plying in this case to reflect the constitutional requirement that a
limitation on Section 25 rights must also be deemed “necessary?”
Perhaps for the sake of expediency and perhaps because, as Justice
Kentridge put it, “[t]he State’s problems here are manifold,” these
matters were left over for the judgments expected in June 1995.

F. The Issuing of Orders

The Court held in Zuma that the reversal of the burden of proof
affected by Criminal Procedure Act Section 217(1)(b)(ii) was incon-
sistent with the Constitution, that the right not to be compelled to
confess was integral to the right to a fair trial, and that the burden of
proving that the right has not been violated must be proven by the

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109 See Zuma, 1995 (2) SALR at 654.
110 See S. AFR. CONST. of 1993 (IC), ch. 3, § 35 (“In interpreting the provision of this Chapter
a court of law shall[, ]... where applicable, have regard to public international law applicable
to the protection of rights entrenched in this Chapter.”).
111 See id. at ch. 3, § 35.
112 See Zuma, 1995 (2) SALR at 660-62.
113 See S. AFR. CONST. of 1993 (IC), ch. 3, § 33(1)(a)(i).
114 Id. at ch. 3, § 33(1)(a)(ii).
115 See id. at ch. 3, § 33(b).
116 See id.
117 See Zuma, 1995 (2) SALR at 660.
prosecution beyond a reasonable doubt. Following that determination, the CCT declared Section 217(1) (b) (ii) invalid through one of the two mechanisms provided by Section 98(5) of the IC.

Section 98(5) of the Interim Constitution provided the CCT with a choice of invalidating a law or requiring the legislature to reconsider the provision and correct the constitutional defect. Section 98(5) stated:

In the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency: Provided that the Constitutional Court may, in the interests of justice and good government, require Parliament or any other competent authority, within a period specified by the Court, to correct the defect in the law or provision, which shall then remain in force pending correction or the expiry of the period so specified.

This option grants considerable power to the CCT, and undoubtedly would violate the separation of powers principle underlying the United States Constitution. Perhaps because of the scope of this power and the importance placed on this issue by counsel, the CCT later developed a practice of carefully explaining the reasons behind its choice of invalidation over compelling parliamentary rectification.

In Zuma, counsel for the respondent focused their arguments against the issuance of a retrospective declaration of invalidity on the basis of Section 98(6). Section 98(6) stated:

Unless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of a law or a provision thereof—

(a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declara-

118 See id. at 659-62.
119 See id. at 662.
120 S. Afr. Const. of 1993 (IC), ch. 7, § 98(5). Section 172(1) of the new Constitution, the replacement for Section 98 of the IC states, in pertinent part, "When deciding a constitutional matter within its power, a court (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency." S. Afr. Const. of 1996 § 172(1).
121 Although the result is quite similar under American law, i.e., a declaration of unconstitutionality voids the continued application of that law, the grant of specific authority to the Supreme Court to order a legislative remedy or repeal within a specific time-frame would clearly offend the United States Constitution.
122 See, e.g., State v. Williams, 1995 (3) SALR 632, 658-59 (CC) (beginning the practice of justifying the Court’s choice of method).
123 See Zuma, 1995 (2) SALR at 663-64.
With regard to this issue, the Court held that it would do a great injustice to allow confessions to stand after the effective date of the IC, while invalidating the reliance upon Section 217 (1)(b)(ii) of the Criminal Procedure Act from the date of the judgment. The CCT, therefore, invalidated the use of Criminal Procedure Act Section 217 (1)(b)(ii) in a first step toward the establishment of a new legal order in South Africa. In eighteen pages, it redirected the evolution of common law, proclaimed the proper theoretical approach under which the interpretation of fundamental rights should take place and demonstrated the appropriate methodology for examining constitutional questions. Along the way, the Court provided an insight to the judiciary on how to make use of foreign comparative law to inform constitutional interpretation. Similar to the United States Supreme Court in *Marbury v. Madison*, the CCT's assertion of primacy was direct and unaltering. As mentioned above, however, a number of important matters were left over, by design or omission, for judgments to be handed down in June of 1995.

### III. Makwanyane Provides Refinement

The abolition of the death penalty in South Africa was an historic event both inside and outside the country. From the middle of 1985 to the middle of 1988, South Africa ranked third among the world's countries in number of state ordered executions. More than 537 people were executed during that period.

Although Zuma was the first assertion of CCT primacy over an act

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125 See Zuma, 1995 (2) SALR at 663-64. The court tabled the question of whether Criminal Procedure Act Section 217(1)(b)(ii) should be invalidated in cases commenced before the IC became effective upon determination of the meaning of Section 241(8). *See id. at 694; see also S. Afr. Const. of 1993 § 241(8).* The court addressed this issue in the Mhlungu opinion. *See State v. Mhlungu and Others, 1995 (3) SALR 867, 890, 905-6 (CC) (invalidating any application of Section 217(1)(b)(ii) of the Criminal Procedure Act, 1977, in any criminal trial, regardless of when trial may have commenced, or when the final verdict is given).*
126 *U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and the duty of the judicial department to say what the law is.").
128 See *Amnesty International, WHEN THE STATE KILLS . . ., Amnesty International Publications 204 (1989).* Only Iran and possibly Iraq conducted more executions than South Africa during that period. *See id.*
129 *See id.*
the Zuma decision spoke more to the supremacy of constitutional considerations in the evolution of common law than the Court’s power to nullify an act of Parliament. In Makwanyane, the CCT struck down the death penalty as an affront to the right to life and as an unconstitutional form of punishment, putting an end to the gallows as well as the entire legislative scheme and penal system underpinning them. In this way, Makwanyane stands as the South African equivalent of Marbury v. Madison. This extraordinary reversal of South Africa’s past was accomplished in the face of significant public support for the death penalty by all races, and at a time of escalating violent crime.

The unanimous Makwanyane judgment, running some one hundred and twenty-five pages and comprising ten separate opinions, dealt with a number of topics worthy of independent study outside of the context of this article. This section carefully reviews two of the more important topics covered by the CCT, each of which find their moorings in international and/or foreign comparative law. The first topic is the establishment of governing principles for the judicial use of legislative history. The unanimous Makwanyane judgment, running some one hundred and twenty-five pages and comprising ten separate opinions, dealt with a number of topics worthy of independent study outside of the context of this article. This section carefully reviews two of the more important topics covered by the CCT, each of which find their moorings in international and/or foreign comparative law. The first topic is the establishment of governing principles for the judicial use of legislative history. The second topic is the Court’s statement of the role of public opinion in the judicial interpretation of human

130 See Zuma, 1995 (2) SALR at 659 (holding that section 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977 violated provisions of the interim Constitution).
131 See id at 650-52.
132 See Makwanyane, 1995 (3) SALR at 451-53.
133 5 U.S. (1 Cranch) 137 (1803).
134 The Sunday Times reported that a contemporary survey found that more than eighty percent of whites and more than fifty percent of blacks in South Africa’s metropolitan areas were in favor of retaining capital punishment. See Ken Vernon, Millions to Unite to Fight Court Ruling on the Noose, SUNDAY TIMES (South Africa), June 11, 1995 (reporting on the plans of several religious leaders to organize their followers in support of the death penalty).
136 See Makwanyane, 1995 (3) SALR at 404-407; see also infra Section III, Part B.
This section otherwise restricts itself to analysis of Makwanyane's improvements on the interpretative approach and methodology outlined in Zuma. A final subsection is reserved for further reflections on Makwanyane's legacy.

A. Background

Themba Makwanyane and Mavuso Mchunu were convicted in the Witwatersrand Local Division of the Supreme Court on four counts of murder, one count of attempted murder and one count of robbery with aggravating circumstances and were sentenced to death. Their appeals to the Appellate Division of the Supreme Court were dismissed, but further hearings regarding the imposition of their sentences were postponed until the constitutionality of the punishment could be addressed by the CCT. Although the Court delivered Makwanyane second after Zuma, Makwanyane and State v. Mchunu, argued as one case, were the first cases argued before the Constitutional Court. Argument was heard on February 15, 1995, the day after the inauguration of the Court. In fact, President Mandela, although carefully avoiding a public statement of his views on the case, alluded to its historical importance in his speech at the Court's opening ceremony.

The importance of the capital punishment issue resulted in heightened scrutiny of the new Court's deliberations. The Court, eager to uphold its image as an open, accessible and nonpartisan institution, responded by giving consideration to each issue raised by the

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199 See id. at 404-409; see also infra Section III, Part C.
10 See id. at 401.
110 The postponement, because it was not accompanied by a formal order of referral, did not amount to a competent referral to the CCT, but the Court treated the language of the order as an implied referral. See id. at 401. An effective moratorium on executions existed in the early 1990s, during which time the government stated its intention to review the issues surrounding capital punishment. See Heads of Argument on Behalf of the Government of the Republic of South Africa Represented by the Minister of Justice, v. 1, para. 12, at 7-8; Makwanyane, 1995 (3) SALR at 402. In the decision, the Court explained:

No executions have taken place in South Africa since 1989. There are apparently over 300 persons, and possibly as many as 400 if persons sentenced in the former Transkei, Bophougousana and Venda are taken into account, who have been sentenced to death by the Courts and who are on death row waiting for this issue to be resolved. Some of these convictions date back to 1988, and approximately half of the persons on death row were sentenced more than two years ago. This is an intolerable situation and it is essential that it be resolved one way or another without further delay.

Id.
16 Zuma was argued on February 23, 1995 and decided on April 5, 1995. See Zuma, 1995 (2) SALR at 642. Makwanyane was argued on February 15, 1995, but decided on June 6, 1995. See Makwanyane, 1995 (3) SALR at 391.
18 See Roger Matthews, South Africa Court Must Rule on Death Penalty, FIN. TIMES (London), Feb. 15, 1995, at 5.
party's oral and written arguments.\textsuperscript{144} In the \textit{Makwanyane} judgment, the CCT went beyond Zuma's use of foreign comparative jurisprudence. In observing the Section 35 mandate in \textit{Makwanyane}, the Court used international law, in addition to foreign comparative law, to enrich its consideration of principal \textit{and ancillary} issues before the Court, including the use of legislative history.\textsuperscript{145}

\textbf{B. Legislative History}

The main opinion in \textit{Makwanyane} was written by Justice Arthur Chaskalson, President of the Court.\textsuperscript{146} His treatment of legislative history reflected the Court's deep concern not to open a Pandora's box of reference materials.\textsuperscript{147} The Court distinguished the use of background materials in constitutional interpretation from the process of ordinary statutory interpretation.\textsuperscript{148} In this regard, the Court tentatively acknowledged the comparative usefulness of such materials in the context of constitutional interpretation.\textsuperscript{149} The Court also considered the use of background information by other tribunals.\textsuperscript{150} The opinion noted that the constitutions of the United States, Germany, Canada and India are all interpreted with the aid of historical background materials.\textsuperscript{151} The Court also pointed to the use of \textit{travaux préparatoires} by the European Court of Human Rights and by the United Nations Committee on Human Rights in interpreting the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights.\textsuperscript{152} The Court noted that the South African "Multi-Party Negotiating Process was advised by technical committees, and that the reports of these committees on the drafts \[were\] the equivalent of the \textit{travaux préparatoires} relied upon by the international tribunals."\textsuperscript{153} On the strength of this analogy, the Court found it acceptable to make use of similar materials for the interpretation of the IC, but added certain qualifications.\textsuperscript{154} The first qualification Justice Chaskalson offered requires South African courts to consider the nature of the background evidence

\textsuperscript{144} See \textit{Makwanyane}, 1995 (3) SALR at 410.
\textsuperscript{145} See \textit{Makwanyane}, 1995 (3) SALR at 412-15.
\textsuperscript{146} See \textit{Makwanyane}, 1995 (3) SALR at 404.
\textsuperscript{147} See \textbf{id.} at 404-409.
\textsuperscript{148} See \textbf{id.} at 404-405.
\textsuperscript{149} See \textbf{id.} at 405.
\textsuperscript{150} See \textbf{id.} at 404-409.
\textsuperscript{151} See \textbf{id.} at 405-406. The CCT recognized, however, that the courts in each country utilize background materials in subtly different manners. See \textbf{id.}
\textsuperscript{153} \textit{Id.} at 406-407.
\textsuperscript{154} See \textbf{id.} at 407.
and the reason for its submission when assessing the weight given such evidence in the interpretive analysis.\textsuperscript{155} The second qualification warned future courts against overemphasizing the importance of the participation of "individual actors in the process, no matter how prominent a role they might have played."\textsuperscript{156} In distinguishing among secondary materials, the Court explained that the strength of the relation between the information and the asserted position should be paramount over its source.\textsuperscript{157}

Justice Chaskalson added three more qualifications: "It is sufficient to say that where the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution."\textsuperscript{158} However, he explicitly eschewed any restriction on the Court’s ability to adopt additional rules governing the use of legislative history, stating, "It is neither necessary nor desirable at this stage in the development of our constitutional law to express any opinion on whether it might also be relevant for other purposes, nor to attempt to lay down general principles governing the admissibility of such evidence."\textsuperscript{159} Justice Chaskalson also acknowledged that “[b]ackground evidence may, however, be useful to show why particular provisions were or were not included in the Constitution.”\textsuperscript{160} Following this point, he noted that background materials indicated that provisions concerning capital punishment were explicitly left out of the IC based on an agreement, referred to as the “Solomon solution,” to leave the determination of its constitutionality up to the future CCT.\textsuperscript{161}

\textbf{C. Public Opinion}

To understand the CCT’s awkward position in terms of public opinion, it is helpful to remember that apartheid’s stranglehold on civil liberties had only begun to be lifted in 1990. It was not until the first free elections in 1994 that efforts were commenced in earnest by the new administration to assure and protect those civil liberties.\textsuperscript{162} The campaign for the new government of national unity and the

\begin{footnotesize}
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\item \textsuperscript{155} See id.
\item \textsuperscript{156} Id.
\item \textsuperscript{157} See id.
\item \textsuperscript{158} Id. at 407 (emphasis added).
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} See id. at 409.
\item \textsuperscript{162} See David van Wyk, \textit{Introductions to the South African Constitution, in Rights and Constitutionalism: The New South African Legal Order} 131, 137 (David van Wyk et al. eds., 1995) (arguing that South Africa began the journey towards abolishing apartheid in 1990 when F.W. de Klerk addressed the Parliament with practical steps to negotiate a political settlement in the country). South Africa scheduled its first free and inclusive elections for April 27, 1994. See id. at 141.
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authority of the interim constitution had begun as millions of people who had suffered the indignities of the bantustan system cried out for basic improvements to their quality of life, such as potable water, decent housing, and electricity. Although relief was slow in coming, the constitutional education and participation programs ran strong. These programs taught people about the IC and asked for their input and participation in writing the Constitution. By mid-1994, people had begun to exercise their new rights—demonstrating against discrimination, demanding better housing and striking for better wages, work conditions, and health benefits. In manifestations both moderate and extreme, the era of constitutional rights was born in South Africa. However, the public remained concerned about the institutions charged with preserving their hard-earned rights.

The decision to create the CCT, rather than grant jurisdiction over constitutional issues to the Supreme Court, was a conscious one reflecting the desire to provide a new forum for the protection of human rights untainted by the past participation of the judiciary in the enforcement of apartheid. The Justices of the Court, conscious of the Court's special role and new roots, voted to reinforce the perception of new judicial autonomy and South African unity by decorating the Court with artwork representing South Africa's multi-cultural society and by electing to wear green robes instead of the traditional black. Following this same theme, the symbol of the CCT is the African tree of justice, under which tribal disputes are traditionally settled. The shape of the tree's branches reflects the pattern of the new flag as well as the shape of the horn of Africa. These symbolic changes and the early success of the CCT bolstered public confidence that an impartial institution would hear the pleas of the oppressed and protect their rights.

Makwanyane, however, provided a special challenge because, as

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163 See NELSON MANDELA, LONG WALK TO FREEDOM, 534-35 (1994) (stating that before the April 27, 1994 elections, candidates participated in public conversations in an effort to gather feedback on the interim constitution and support for democratic elections); see generally WEEKLY MAIL & GUARDIAN, A-Z OF SOUTH AFRICAN POLITICS (1995) 361-375 (providing a demographic profile of South Africa's nine provinces). Laws concerning work permits, pass laws, and restrictive education policies were adopted and rigorously enforced with the segregation of South African society and the creation of "independent" homelands for non-white South Africans. Such "homelands" were eventually called bantustans. See MANDELA, supra, at 295.

164 See id. at 536 (stating that individuals who lived in territories that were not participating in the elections organized strikes and demonstrations to urge inclusion in the new democratic state).

165 See van Wyk, supra note 162, at 157, 168 (describing how the concerns of distinct parties and the MPNP, the pre-democratic government which drafted the IC, led to a series of innovative structures in the IC including a Constitutional Court distinct from the appellate division).

166 Unfortunately, these expectations often did not include a deeper understanding of the judicial process. On opening day, the new Court began receiving a steady stream of calls from individuals anxious for assessments of their constitutional rights, settlements of their disputes and court orders for the protection of their rights. Calls came in from attorneys, bailiffs, court clerks, detainees, and even prisoners.
mentioned above, public opinion favored the death penalty. Hundreds of unsolicited letters and facsimile transmissions for and against capital punishment arrived at the Court from the moment the case was opened until well after the judgment was handed down.\textsuperscript{164} All the major newspapers stated their own positions on the issue and carried articles, commentaries and editorials reflecting public sentiment on both sides of the issue. Some articles asked by what right an unelected few dared render a decision on the issue.\textsuperscript{167} Other articles called for a referendum.

The response of the Court, under the heading of "Public Opinion," focused on Section 11(2) of the interim Constitution that provided the right not to be subjected to cruel, inhuman or degrading treatment or punishment.\textsuperscript{171} K.P.C.O. (Klaus) von Lieres und Wilkau SC, then Attorney General, had argued that society determines what is cruel, inhuman or degrading treatment and that public opinion

\textsuperscript{160} See State v. Makwanyane, 1995 (3) SALR at 471 (Kriegler, J., concurring) ("We were favoured with literally thousands of pages of material in support of and opposed to the death penalty, ranging from the religious, ethical, philosophical and ideological to the mathematical and statistical."). Both congratulatory and condemnatory correspondence was received after the judgment was made public.

\textsuperscript{165} See, e.g., Winnie Graham, ed., \textit{Letters: This Really is the Last Straw}, STAR (South Africa), June 7, 1995 (stating that the CCT's opinion represented an autocratic decision of an elite few who overruled the wishes of the majority). In fact, counsel for the respondent argued that, due to the depth of public opinion on the matter, a ruling against capital punishment would run contrary to the constitutional principle of a majoritarian democracy. See Respondent's Heads of Argument at 46-48, \textit{State v. Makwanyane and Another}, 1995 (3) SALR 391 (CC).

\textsuperscript{169} See, e.g., ACDP Backs Calls for People to Decide, CITIZEN, June 20, 1995 (reporting that the African Christian Democratic Party supported the call for a referendum); Capital Punishment: 'Let People Decide,' CITIZEN, June 20, 1995 (reporting the National Party call for referendum); NP Referendum Call Hypocritical: DP, CITIZEN, June 20, 1995 (reporting the Democratic Party opposition to the National Party position in favor of the referendum); Referendum on Death Penalty Call 'Cheap Political Move', CITIZEN, June 20, 1995 (reporting reactions to the National Party's call for a referendum). But see Capital Punishment Referendum Refused, BUS. D.A., June 20, 1995, at 2 (reporting the Justice Minister's decision to reject requests for a referendum).

\textsuperscript{170} See Makwanyane, 1995 (3) SALR at 409 (discussing the application of Section 11(2) of the IC). Section 11 of the IC, entitled "Freedom and security of the person," stated:

1. Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.
2. No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.

\textbf{S. AFR. CONST. of 1993 (IC), ch. 3, § 11.} The new Constitution's Bill of Rights contains a similar protection in Section 12. See \textit{S. AFR. CONST. of 1996, ch. 2, § 12}. Section 12 states:

1. Everyone has the right to freedom and security of the person, which includes the right:
   (a) not to be deprived of freedom arbitrarily or without just cause;
   (b) not to be detained without trial;
   (c) to be free from all forms of violence from either public or private sources;
   (d) not to be tortured in any way; and
   (e) not to be treated or punished in a cruel, inhuman or degrading way.

\textit{Id.}
polls indicated overwhelming support for capital punishment and, therefore, society did not consider the punishment to fall within the definitions of cruel, inhuman or degrading.\(^{172}\) Although brief, the poignancy of the Court’s response is undeniable. Justice Chaskalson observed:

> Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected.\(^{173}\)

He reinforced his conclusion with the timeless words of Justice Jackson, who affirmed the counter-majoritarian purpose of the Bill of Rights in the United States Constitution:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.\(^{174}\)

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\(^{172}\) See *Makwanyane*, 1995 (3) SALR at 410 (discussing the Attorney General’s argument in favor of the death penalty). The Attorney General’s office operates independently from the national government. While the Attorney General argued in favor of retaining the death penalty, counsel for the national government, the well-respected Advocate George Bizos, argued against it. See *id.* at 404; *id.* at 484 (Madula, J., concurring).

\(^{173}\) *Id.* at 431.

\(^{174}\) *See id.* at 432 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 625, 638 (1943)). Interestingly, as noted by Justice Chaskalson in *Makwanyane*, the Tanzanian Court of Appeal
These eloquent statements unfortunately did not quell the public outcry that followed the decision. It is doubtful, given the strength of emotions surrounding this issue, that the Court's position would have met with broad understanding even if they had been appropriately excerpted by the media. Nevertheless, death row was emptied and its former occupants were eventually re-sentenced in accordance with the order of the Court. The call for a referendum, championed by the historically challenged National Party, failed.

*Makwanyane*, South Africa's *Marbury v. Madison*, succeeded in establishing the primacy of the Court's constitutional interpretations over the legislative powers of Parliament.

D. Clarification of the Interpretive Approach

Justice Chaskalson recognized with approval the Court's adoption in *Zuma* of a modified generous approach to interpretation and provided additional clarification of that approach. He re-emphasized the passage from *Regina v. Big M Drug Mart Ltd.*, first quoted in *Zuma* by Acting Justice Kentridge, which states:

The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the [Canadian Charter of Rights and Freedoms] itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection.

The theoretical difficulty arises during instances in which the generous and purposive approaches conflict, rather than complement each

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reached the opposite conclusion in *Mbusuu and Another v. The Republic*, Criminal Appeal No. 142 of 1994 (Jan. 30, 1995) on this issue just six months before *Makwanyane* was decided. The Tanzanian court held it is for society and not the Courts to determine whether capital punishment is necessary. See id.

176 *See Capital Punishment Referendum Refused, supra* note 170, at 2 (reporting the Justice Minister’s decision to reject requests for a referendum).

177 *See Makwanyane*, 1995 (3) SALR at 403.


179 *See Zuma*, 1995 (2) SALR at 651.

180 *Makwanyane*, 1995 (3) SALR at 403.
other. Depending on the facts of each case, a conflict between the two approaches may occur where a teleological interpretation of the purpose of a constitutional provision requires a restrictive interpretation of the right in question. In such a situation, the purpose of the right in question may demand that a generous approach to the interpretation of that right be moderated.\textsuperscript{183}

In \textit{Makwanyane}, Justice O'Regan's concurring opinion provided additional clarification on this potential theoretical conflict.

In giving meaning to [the right to life], we must seek the purpose for which it was included in the Constitution. This purposive or teleological approach to the interpretation of rights may at times require a generous meaning to be given to provisions of chapter 3 of the Constitution and at other times a narrower or specific meaning. \textit{It is the responsibility of the courts, and ultimately this Court, to develop fully the rights entrenched in the Constitution. But that will take time. Consequently any minimum content which is attributed to a right may in subsequent cases be expanded and developed.}\textsuperscript{182}

In so advocating incrementalism, her opinion also wisely provided the South African judiciary with additional clarity on the task of constitutional review.

Before the passage of the IC, the judiciary and the bar were accustomed to parliamentary sovereignty and a legal regime that was, and remains today, a curious mixture of English common law and Dutch civil law. Prior to 1993, the content and character of rights were relatively known quantities in South Africa, just as rights in the United States are today. Not only did the IC replace those pre-1993 rights, but also in many instances it raised certain long-standing rules of statutory, administrative or common law to the status of constitutional law and required such rules to be understood and interpreted in a new way.\textsuperscript{185} As such, these first arguments before the Court were lengthy in their numerous requests for clarification. The Justices allowed all parties more than their share of time allotted to canvass their ideas, while at the same time patiently responding to and vigorously, though politely, questioning counsel. By painstakingly addressing even seemingly inconsequential arguments, the Court may have

\textsuperscript{183} For example, a generous interpretation of a typical "right to life" clause would not permit a court to extend the interpretation of that right to a supercomputer with artificial intelligence because the \textit{purpose} of the typical "right to life" clause is clearly not the protection of inanimate objects.

\textsuperscript{182} \textit{Makwanyane}, 1995 (3) SALR at 506 (emphasis added).

\textsuperscript{185} For example, in \textit{Makwanyane}, the Attorney General argued that to interpret the right to life as excluding the possibility of the death penalty would take away the power of the South African Police Service to shoot to kill in order to affect arrest (something permitted under Section 49(2) of the Criminal Procedure Act), as well as the right of the average citizen to kill in self defense or the right of a soldier to kill in defense of his country. The Court patiently responded to those arguments. \textit{See Makwanyane}, 1995 (3) SALR at 448.
stemmed judicial angst. Given the importance of the issues involved and the strength of commitment to them felt by each of the Justices, the Court presented eleven separate opinions, ten of them broadly concurring with Justice Chaskalson. There was unanimous agreement with the order of the Court, and a majority agreed with the reasons given by President Chaskalson for the violation of Section 11(2). However, a plurality emphasized the violation of the right to life protected by Section 9 as being more fundamentally important to their analysis than the violation of Section 11(2). Notwithstanding the results of the analysis, however, the Justices employed a substantially similar methodology. The common threads of constitutional analysis woven into the separate opinions provides an excellent sampling of constitutional interpretation by the CCT.

184 In time, however, the Court's mounting docket of cases forced it to adopt a stricter adherence to the rules limiting the length of oral arguments.
185 For descriptions of the opinions, see infra text accompanying notes 287-290.
186 Each of the Justices, whether basing their analysis on Section 11(2) or on Section 9, referred favorably to the rationale adopted by Justice Chaskalson in respect of Section 11(2).
187 This plurality consisted of Justices Didcott, Kriegler, Langa, Mahomed, O'Regan and Sachs. These Justices indicated that the basis for their declaration of unconstitutionality was the right to life, with the offense to Section 11(2) serving as an ancillary violation. See id. at 461 (Didcott, J., concurring); id. at 475 (Kriegler, J., concurring), id. at 478-79 (Langa, J., concurring); id. at 487-88 (Mahomed, J., concurring); id. at 504 (O'Regan, J., concurring); id. at 510-11 (Sachs, J., concurring). The holding of the plurality is unclear, however, because all of the Justices contributed in a different way to the debate surrounding this issue. Furthermore, the right to life opinions are (a) more complex to analyze than the opinions stressing Section 11(2) because they tend not to flow from a step by step analysis, due largely to their interdependence with regard to and in support of the Court's methodology appearing in the Chaskalson judgment, and (b) do not establish a plurality of the Court with regard to the content of the right to life in this context.

Additional reasons contribute to the prominence of the Section 11(2) and Section 9 analysis here in spite of the six to five plurality favoring the right to life rationale. For instance, Justice Chaskalson's judgment appears to have been intended by the CCT to be the most complete analysis. The other opinions, appearing alphabetically thereafter, imported or referenced sections of Justice Chaskalson's analysis, and developed additional and alternative points of emphasis. Secondly, as a result of (b) there is no authoritative statement of the Court to be gleaned from the right to life opinions. Their agreement only supports a proposition that the death penalty violates the right to life. There was not a plurality on the exact basis of the violation of the right to life because the opinions do not adopt a common position on the content of the right to life in this context. This does not mean that the holding of the Court must be understood as declaring the death penalty to be an unconstitutional violation of the Section 9 right to life as well as, with respect to Section 11(2), an unconstitutional imposition of cruel, inhuman and degrading punishment.
E. Section 35: Combining Method and Mandate

Makwanyane improved on the analysis in Zuma by making ample use of international law as well as foreign comparative law, while also noting the discretionary nature of Section 35. Explicitly acknowledging Section 35's requirement that the CCT look to foreign and international law when interpreting Chapter 3 rights, Justice Chaskalson first conceded that "[c]apital punishment is not prohibited by public international law..." He then proceeded carefully to distinguish the language used in those international instruments and foreign constitutions that permits capital punishment from the language in the text of the IC. He commented that "[i]nternational human rights agreements differ, however, from our Constitution in that where the right to life is expressed in unqualified terms they either deal specifically with the death sentence, or authorizes exceptions to be made to the right to life by law," and referenced the discretion of the Court in this regard. Justice Chaskalson continued, "[a]lthough we are told by section 35(1) that we 'may' have regard to foreign case law, it is important to appreciate that this will not necessarily offer a safe guide to the interpretation of Chapter 3 of our Constitution." In doing so, he reiterated Zuma's cautionary stance that it is possible to respect the mandate of Section 35 without slavishly following international or foreign comparative jurisprudence. In this instance, as in Zuma, the Court drew a textual distinction between the language of the IC and the language used in other jurisdictions. Again, under the two-stage analysis called for by the IC and the new Constitution, the Court is bound first to determine if the right in question has been violated and then to evaluate the constitutionality of the violation in terms of the limitations clause.

As in Zuma, the Court in Makwanyane surveyed international and foreign comparative jurisprudence to give content to the rights provided in Section 11(2). However, Makwanyane expanded the analysis to include public international law and a wider range of foreign

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See id. at 413-14.

Id. at 414.

See id. at 415.

Id. at 414 (citing Article 6 of the International Covenant on Civil and Political Rights (ICCPR) of 1966, Article 4(2) of the American Convention on Human Rights, Article 2 of the European Convention on Human Rights and Article 4 of the African Charter of Human and People's Rights, each of which either directly sanction capital punishment or provide for a qualified right to life by stating essentially that no person shall be arbitrarily deprived of the right to life).

Id. (citing Zuma, 1995 (2) SALR 642 (CC)).

The nature of this judicial discretion is explored in Section IV which considers the CCT's determination that the Truth and Reconciliation Commission is not unconstitutional. See infra Section IV.

See Makwanyane, 1995 (3) SALR at 415.

See id.
jurisdictions. Even so, constitutional comparisons are complicated by the subjective nature of the foreign instruments. It is, therefore, often necessary for the analyst to obtain an in-depth knowledge as well as an historical and jurisprudential perspective on the treatment of a particular constitutional issue under the foreign instrument. Highlighting one example of such a difficulty, Justice Chaskalson remarked:

The United States jurisprudence has not resolved the dilemma arising from the fact that the constitution prohibits cruel and unusual punishments, but also permits and contemplates that there will be capital punishment. The acceptance by a majority of the United States Supreme Court of the proposition that capital punishment is not per se unconstitutional, but that in certain circumstances it may be arbitrary and thus unconstitutional, has led to endless litigation... The difficulties that have been experienced in following this path, to which Justice Blackmun and Justice Scalia have both referred, but from which they have drawn different conclusions, persuade me that we should not follow this route.

Specifically, the problem with the United States Constitution as a basis for comparative analysis is that its structure inhibits the first stage of the comparison.

The Eighth and Fourteenth Amendments to the United States Constitution prohibit the imposition of cruel and unusual punishments in the United States. The Fifth Amendment states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury..." and "nor shall any person... be deprived of life, liberty or property, without due process of law." The decision by the drafters of the United States Constitution to prohibit "cruel and unusual punish-

196 See id. at 413 (explaining that "international and foreign authorities are of value because they analyse arguments for and against the death sentence").

197 See id. at 415 (noting that the Court is "required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country").

198 Id. at 422 (citations omitted). Justice Chaskalson noted with understanding the difficulties outlined in Justice Blackmun's famous dissent in Collins v. Collins, 510 U.S. 1141 (1994), concerning the United States' inability to balance the need for individualized consideration in criminal punishment, including capital sentencing, with the need for a non-arbitrary (standardized) system of capital punishment. A movement toward one is a movement away from the other. See id. at 1144-45 (arguing that the United States Supreme Court has conceded that "fairness and rationality cannot be achieved in the administration of the death penalty").

199 See Malwanyane, 1995(3) SALR at 435 (pointing out that the United States Constitution, unlike the South African Constitution, lacks a limitation clause).

200 "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The relevant portion of the Fourteenth Amendment states: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, §1.

201 U.S. CONST. amend. V (emphasis added).
ment" while at the same time adopting a permissive stance toward capital punishment implies that the drafters did not believe that capital punishment was per se cruel and unusual punishment when carried out following the "presentment or indictment of a Grand Jury" and in accordance with "due process of law." In Justice Chaskalson's analysis, the IC and United States Constitution's different language merits that each Constitution receive a different analysis. Even so, elements of the United States Supreme Court's analysis, especially as they relate to the impropriety of arbitrariness and inequality in the imposition of the punishment, proved informative to the analysis of the IC provisions.

Justice Chaskalson also noted that the language of the Indian Constitution creates the same dilemma as the language in the United States Constitution. The leading case then on point, Bachan Singh v. State of Punjab, reached a conclusion similar to that in Gregg v. Georgia. Again, Chaskalson found that such a conclusion is not supported by the language of the IC.

Justice Chaskalson also noted that the imposition of the death penalty, though permitted by the terms of the International Covenant on Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, could, in specific instances, be considered cruel and unusual punishments under those same instruments.

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205 See Makwanyane, 1995(3) SALR at 415 (noting that the United States Constitution recognized capital punishment as lawful from its beginnings). However, this does not diminish the very real reflection in Trop v. Dulles, 356 U.S. 84 (1958), that the Eighth Amendment "is not static" and that it "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop, 356 U.S. at 101. Nothing in the Fifth Amendment states that capital punishment must be permitted, only that it may. See U.S. CONST. amend V. As with other forms of punishment now deemed cruel and unusual, it is still possible for a court to determine that capital punishment is cruel and unusual punishment.

206 See Makwanyane, 1995(3) SALR at 435 (explaining that the South African Constitution is different from the United States' in that the United States Constitution does not have a limitations clause, thus forcing courts to find limits to constitutional rights through a narrow interpretation of the rights themselves).

207 See id. at 417-21.

208 Article 21 of the Indian Constitution states, "No person shall be deprived of his life or personal liberty except according to procedure established by law." INDIA CONST. art. 21 (emphasis added).

209 (1980) 2 S.C.C. 684, 709 (holding that the imposition of the death penalty was constitutional despite a constitutional guarantee of the right to life).

210 428 U.S. 153 (1976) (holding that the death sentence is not per se cruel and unusual punishment).

211 See Makwanyane, 1995(3) SALR at 428 (pointing out that the wording of the South African Constitution frames the analysis differently than the United States or Indian Constitutions).

212 See International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, art. 6, 999 U.N.T.S.


214 See id. at 424-26 (noting that these instruments tolerate, but do not attempt to justify, the death penalty).
cused on three international tribunal cases involving claims for American extradition requests for persons charged with capital crimes in the United States. In all of the cases, the accused alleged that extradition to the United States would potentially subject them to cruel, inhuman and degrading treatment in violation of the applicable international instrument. In two of the three cases, the claim was deemed meritorious and the denial of extradition was upheld based on the cruel, inhuman and degrading nature of the potential sentence of death.

Justice Chaskalson, in concluding the analysis of the first stage of the Court’s approach, found that capital punishment violated Section 11(2). Although he guided the reader directly to the analysis of the limitations clause of Section 33, the two-stage analysis is somewhat paradoxical. How can a judge find that a punishment is cruel, inhuman and degrading in stage one, and still question whether the punishment is constitutional under the criteria set out in the limitations clause? Does not the first conclusion imply automatic failure to meet the saving provisions of Section 33? Although this would undoubtedly be the case under a one-stage approach of American constitutional interpretation, it does not need to be the case under the two-stage approach of the IC. Once the violation is established, the limitations clause requires the Court to determine whether the violation is nevertheless reasonable or justifiable, whether it negates the essential content of the right and, in the case of Section 11(2), whether it is necessary.

As in the Court’s expanded use of public international law, the limitations clause analysis in Makwanyane represented a significant refinement over the analysis in Zuma. Nevertheless, the two decisions share similar points in their analyses. For example, the two shared a

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2 See id. at 424.
3 The holding in Ng was in part based on the use of a gas chamber to execute the defendant. See id. (explaining that the Ng court concluded that a country was not precluded from permitting extradition to a country that might enforce the death penalty but finding that the method here was unduly cruel and therefore holding against extradition). In Soering, the decision was based in part on the “death row phenomenon” relating to the mental and emotional anguish linked to the lengthy detention and other conditions surrounding imprisonment on death row. See Soering, 161 Eur. Ct. H.R. at 36-45.
4 See Makwanyane, 1995 (3) SALR at 433-34 (“I am satisfied that in the context of our Constitution the death penalty is indeed cruel, inhuman and degrading punishment.”).
5 See id. at 435.
6 See id. (discussing how the lack of a limitations clause in the United States Constitution forces the U.S. courts to interpret fundamental rights narrowly).
7 See id. at 435 (stating that under a two-stage approach, the question is not just if a law is constitutional, but also whether the law is justifiable).
8 See supra text accompanying note 196.
continued reference to American jurisprudence for insights into rights analysis despite the noted difference in U.S constitutional approach and structure. The depth of U.S. constitutional jurisprudence is a result of the lengthy treatment the judiciary in the United States has given to even the smallest elements of rights analysis. Further, both analyses also shared a preference for Canadian constitutional law. This preference was understandable in light of the similarities in structure between the Canadian Constitution and the IC, notably their similar limitations clause. Two additional factors weigh in favor of a South African preference for Canadian jurisprudence. The Canadian Constitution was written more recently. Also, Canadian society has had to accommodate a multiplicity of ethnic minorities as well as the ancillary complexities associated with being a multilingual and multicultural society.

The Makwanyane judgment essentially distilled the limitations clause into its core elements. Here again, the Court turned to transnational sources for guidance. In Makwanyane, the CCT surveyed the interpretive techniques of the Canadian, German and European Court of Human Rights and found that limitations analysis typically consists of some form of a balancing test by which the courts review the means and ends of the offending legislation. Again, the South African Court favored the Canadian court’s method and its three-prong proportionality test developed in Regina v. Oakes.

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the [legislative] objective. Secondly, the means, even if rationally connected to the objective in the first sense, should impair ‘as little as possible’ the right or freedom in question. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the charter right or freedom, and the objective which has been identified as of ‘sufficient importance.’

Justice Chaskalson went so far as to lay out the potential application of this specific test to the question before the Court. Nevertheless, due to the textual differences between the Canadian Charter of Rights and the IC’s Chapter 3 on Fundamental Rights, the Oakes test was not adopted outright.

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11 See Makwanyane, 1995 (3) SALR at 415; Zuma, 1995 (2) SALR at 653.
12 See Makwanyane, 1995 (3) SALR at 436-38; Zuma, 1995 (2) SALR at 656 (“Accordingly, I consider that we may appropriately apply the principles worked out by the Canadian Supreme Court. . .”).
13 See Makwanyane, 1995 (3) SALR at 436-39.
15 See id. at 437-38.
16 See id. at 439 (citing Zuma, 1995 (2) SALR at 642).
The Court then noted that the German Federal Constitutional Court and European Court of Human Rights also employ balancing tests. Interpretation of offending legislation in terms of the German limitations provisions is also based on proportionality, as it was in the rights analysis under Oakes. Even so, for textual reasons similar to those raised with regard to the Canadian approach in Oakes, Justice Chaskalson expressed certain misgivings regarding the German approach as well. Likewise, Justice Chaskalson found the use of the proportionality test by the European Court to be tainted by the fact that the European Court is obliged to accommodate the sovereignty of its member states. Sovereignty is accommodated through the "margin of appreciation" which is broader or narrower, depending on the right that is being infringed upon. Under this doctrine, greater deference is granted by the European Court to rights violations in areas of social policy and lesser deference in areas of fundamental rights. Although recognizing the European Court's position as one of necessary compromise, Justice Chaskalson did not find the CCT to be similarly constrained.

Having heeded Section 35's mandate by canvassing a variety of sources, Justice Chaskalson then refocused on the limitations clause of the IC. At this point, it might be helpful to retrace the first step of limitations clause analysis. As stated above, Section 33(1)(a) calls for any limitation to be found (i) reasonable and (ii) justifiable. Prior to addressing the Canadian, German and European Court rationales, Justice Chaskalson indicated that "[t]he limitation of constitutional right for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality." Justice Chaskalson included both criteria in the balancing (or proportionality) test he ap-
plied. 236

In applying this test, Justice Chaskalson first turned to the key Section 33(1) (a) arguments before the Court.237 The reasonableness and justification of the death penalty were argued on penological theories of deterrence, prevention and retribution.238 The state’s statistical argument that the death penalty provides for greater deterrence was deemed to lack sufficient evidentiary support.239 The Court did not find the respondent’s argument that capital punishment prevents recidivism particularly compelling because the Court reasoned that the alternative of life imprisonment would have the same result.240

Theories of deterrence and prevention aside, the Court’s analysis of the respondent’s argument that capital punishment is an expression of legitimate societal outrage and desire for retribution provides the most interesting and revealing commentary. As Justice Chaskalson wrote:

Retribution is one of the objects of punishment, but it carries less weight than deterrence. The righteous anger of family and friends of the murder victim, reinforced by the public abhorrence of vile crimes, is easily translated in to a call for vengeance. But capital punishment is not the only way that society has of expressing its moral outrage at the

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236 In the text, Justice Chaskalson referred more often to the term "justifiability" than reasonableness. Chaskalson, however, apparently used "justifiability" to signify the combination of reasonable and justifiable. Similarly, Justice O’Regan treats Section 33(a)(i) (reasonableness) and (a)(ii) (justifiability) as one test. See id. at 339 (O’Regan, J., concurring). Interestingly, Justice Kriegler indicated that some distinction may exist between reasonable and justifiable, writing, "As I am satisfied that section 277(1)(a) does not meet the threshold test of reasonableness, I find it unnecessary to ask whether it is justifiable." Id. at 477 (Kriegler, J., concurring). Even so, in a footnote he explicitly raises the question of whether or not a distinction between the two can be effectively drawn. See id. at 477 n.8. Justice Langa agrees that the death penalty is unreasonable, deeming it unnecessary to further address justifiability. See id. at 479 (Langa, J., concurring). On the other hand, Justice Mahomed’s analysis reached the conclusion that the death penalty was not justifiable in an open and democratic society. See id. at 497. This conclusion obviated the need to address the other components of Section 33. This potential distinction was not addressed by the other Justices, who also subscribed to a balancing approach, whether or not they place their emphasis on Section 11(2) or Section 9. See, e.g., id. at 499 (MokgoroJ., concurring).

237 See Makwanyane, 1995 (3) SALR at 436. The Court reserved the issues of "essential content" and self-defense for later discussion. See id. at 446-51; see also S. AFR. CONST. of 1993 (IC), ch. 2, § 33(b).

238 See id. at 441-46.

239 See id. at 443. Current and historical evidence provided by the Commissioner of Police, as amicus curiae, did not support the respondent's contentions that the murder rate had increased since the 1992 moratorium of death penalty sentences. In fact, statistical analysis conducted by Justice Didcott found that the murder rate prior to the moratorium was not affected by the announcement of the moratorium. See id. at 465-66 (Didcott, J., concurring). In fairness to the respondent, however, it is impossible to show that the death penalty provides no deterrent at all because there is no reliable means of calculating how many murders were not committed because of the death penalty. See id.

240 See id. at 443-44. It was, however, argued that capital punishment is an effective specific deterrent to prevent prison crimes by the particular individual over the course of their imprisonment.
crime that has been committed. We have long outgrown the literal application of the biblical injunction of, 'an eye for and eye, and a tooth for a tooth.' Punishment must to some extent be commensurate with the offence, but there is no requirement that it be equivalent or identical to it.24

Justice Chaskalson recalled that free and democratic societies do not inflict upon violent criminals the same violence criminals inflict on others.24 Even more importantly, however, Justice Chaskalson acknowledged that the interim Constitution recognized the horrific past of South African law enforcement and the objective of the IC to create a state founded on respect for human rights by citing the concluding provision, or epilogue, of the IC.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu24 but not for victimisation.
Justice Chaskalson found that, in light of this clear statement of constitutional priority, it was inappropriate to give undue weight to retribution in the Court's analysis.

Two additional components of the analysis of constitutional rights under Section 33 are also addressed in *Makwanyane*—the requirement in Section 33(1)(b) that a limitation to a fundamental right not "negate the essential content of the right" and the requirement of necessity in Section 33(aa). The first of these components posed a difficult theoretical problem for the Court: what is the "essential content" of a right? Again, the Court found reference to foreign jurisprudence useful.

Although similar injunctions exist in a few other constitutions around the world, there is little helpful jurisprudence on point indicating a clear path for judicial interpretation. Not only is there a paucity of international and foreign comparative guidance, there is also a potential theoretical conflict which arises in the analysis. For example, if the "essential content" of the right to dignity is viewed subjectively as the right of each individual to have his or her own dignity respected, then the death penalty could be interpreted as negating the "essential content" of the right. However, if it is viewed objectively as, for example, the right of all citizens to have their dignity respected, then depriving the criminal of his or her dignity may not negate the 'essential content' of the right. All of the Justices addressing the issue voiced similar consternation over the interpretation of Section 33(1)(b). It is of no surprise that the "essential content" component of the limitations clause does not appear in Section

See *Ackerman*, supra, at 795-96 (supporting Ackerman's hypothesis regarding possible mixed approaches).

See *Makwanyane*, 1995 (3) SALR at 446.

See id. at 436-46.

See id.

See *Makwanyane*, 1995 (3) SALR at 446-47 (Chaskalson, J., concurring) (discussing the lack of useful jurisprudence).

For example, although the German Constitution is one of the sources of this concept, the Federal Constitutional Court of Germany has not been successful in providing it meaning. See DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY, 906 (1994).

See *Makwanyane*, 1995 (3) SALR at 447 (Chaskalson, J., concurring).

See id. (Chaskalson, J., concurring). In interpreting these clauses, it is important to avoid the tautological values debate and allow the examples to be taken at face value. While one critic may argue that execution in the subjective approach may not negate the "essential content" of the individual right if they are allowed to "die with dignity," another may argue in response to the objective approach that a death caused by the systematic operation of the state's machinery diminishes the dignity of all. Although Justice Ackermann does not formally develop an objective approach, he does indicate that he disagrees with this formulation. See id. at 458 (Ackermann, J., concurring). Justice Kentridge provides a more rigorous discussion of the subjective versus objective approaches. See id. at 469-70 (Kentridge, J., concurring).

See id. at 458 (Ackermann J., concurring); id. at 461 (Didcott, J., concurring); id. at 469-70 (Kentridge, J., concurring); id. at 479 (Kriegler, J., concurring); id. at 479 (Langa, J., concurring); id. at 497-98 (Mahomed, J., concurring); id. at 510 (O'Regan, J., concurring).
36 of the new Constitution. In contrast, the requirement in Section 33(1)(aa) that a limitation to a Section 11 right also be “necessary” is more manageable. Nevertheless, because all the Justices determined that. Section 277 of the Criminal Procedure Act failed to meet the primary legs of the limitations test, none of them definitively addressed what additional analysis should be applied in instances where the requirement of “necessity” is met. Justice O’Regan, eloquently summing up the Court’s methodology, came the closest to addressing how the Court might factor “necessity” into its analysis.

The purpose of the bifurcated levels of justification need not detain us here. What is clear is that section 33 introduces different levels of scrutiny for laws which [sic] cause an infringement of rights. The requirement of reasonableness and justifiability which attaches to some of the section 33 rights clearly envisages a less stringent constitutional standard than does the requirement of necessity. In both cases, the enquiry concerns proportionality: to measure the purpose, effects and importance of the infringing legislation against the infringement caused. In addition, it will need to be shown that the ends sought by the legislation cannot be achieved sufficiently and realistically by other means which [sic] would be less destructive of entrenched rights. Where the constitutional standard is necessity, the considerations are similar, but the standard is more stringent.

This summarization also highlights an important distinction between the United States Constitution and its more modern counterparts. Not only do the more modern constitutions and international treaties tend to contain limitations clauses more conducive to the two-stage approach, they also reflect the efforts of newer constitutional democracies to establish a variety of textual standards applicable to rights analysis. In essence, the rational basis, mid-level and strict scrutiny developed under common law in the United States tend to be written directly into the limitations clauses of modern constitutions whether adopted by common law or civil law jurisdictions.

Section 33(aa) exemplified this type of constitutional engineering and it specifically listed those rights for which a limitation must be

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252 See Makwanyane, 1995 (3) SALR at 456.

253 See id. at 434-35; id. at 458 (Ackerman, J., concurring); id. at 470 (Kentridge, J., concurring); id. at 495 (Madala, J., concurring); id. at 497 (Mahomed, J., concurring); id. at 503 (Mokgoro, J., concurring); id. at 509 (O’Regan, J., concurring); id. at 510 (Sachs, J., concurring).

254 Id. at 339.
found to be necessary (strict scrutiny). Section 33(bb) listed those rights for which the necessity of the limitation must be determined only in so far as the limitation related to "free and fair political activity." Thus, a limitation on the right to freedom of expression contained in Section 15 of the IC, like limitations on the right to free speech contained in the First Amendment of the United States Constitution, must be found to be reasonable and justifiable. To the extent the restriction on freedom of expression relates to free and fair political activity, it must also be necessary as in the U.S. Interestingly, these particular attempts at jurisprudential engineering are abandoned in the new Constitution. The approach in Section 36 of the new Constitution, however, actually adopts the judicial analysis outlined by the CCT in Makwanyane. The high level of precision contained in Section 36 may prove problematic for the South African courts, but only in the short-term.

Both the judicial and rights engineering evident in modern constitutions clearly demonstrate an effort to benefit from local jurisprudence and international and foreign comparative jurisprudence. A two-stage interpretive process via a limitations clause certainly helps a judiciary in the transition to constitutional democracy by articulating the basic analytical propositions. The alternative, a less precise limitations clause, would have forced South African courts to reinvent the wheel of constitutional rights interpretation by muddling through the

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257 See S. Afr. Const. of 1993 (IC), ch. 3, § 33(aa) ("[A] right entrenched in section 10, 11, 12, 14(1), 21, 25, or 30(1)(d) or (e) or (2).")
258 Id. at ch. 3, § 33(bb) (listing "right[s] entrenched in section 15, 16, 17, 18, 23, 24").
259 See id. at ch. 3, § 15 (providing the right to free speech and expression); see also infra note 264 (quoting the text of section 16 of the new Constitution which protects the right to free speech and expression).
262 It is useful to compare the text of Section 36, supra note 91, with Justice O'Regan's explanation in Makwanyane, 1995 (3) SALR at 509 (O'Regan, J., concurring), quoted supra in text accompanying note 256.
263 The best example of this is the formulation of the new right to freedom of expression contained in Section 16 of the new Constitution:
(1) Everyone has the right to freedom of expression, which includes –
(a) freedom of the press and other media;
(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.
(2) The right in subsection (1) does not extend to –
(a) propaganda for war; incitement of imminent violence; or
advocacy of hatred that is based on race, ethnicity, gender or religion,
and that constitutes incitement to cause harm.

development of standards for constitutional analysis as courts in the United States have done in the past. Rights engineering also provides broad benefits by integrating judicial experience. For example, the development over two centuries in the United States of administrative due process jurisprudence is reflected in South Africa's new and meticulously formulated right to "just administrative action" contained in Section 33 of the new Constitution:

1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
3. National legislation must be enacted to give effect to these rights, and must
   (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
   (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
   (c) promote an efficient administration.

Thus, much of the work of judicial interpretation is either constitutionally predetermined or the Constitution, itself, clearly indicates the interpretive path. Nevertheless, the language is far from perfect or unambiguous, as exemplified by subsection (c) above. As indicated earlier, Makwanyane highlighted similar problems in regard to Section 33 of the interim Constitution. The Court's difficulties in this regard surely influenced the ongoing drafting process of the Constitution.

F. Reflections on Makwanyane

Through a review of the most applicable foreign and international legal models available, Justice Chaskalson offered insight into what has become an important part of CCT practice. In Makwanyane, the CCT examined the competing interpretive models for their strengths and weaknesses. The Court then settled on its own interpretive methodology, which was grounded in the dictates of the IC.

Through the Court's discussion, the reader gains an appreciation of how the CCT's practice is not substantially different from that followed by courts in other free and democratic nations and that, in certain respects, it may even represent an improvement on them.
CCT's ultimate reasoning is tailored to the specific needs and objectives of the new South African society, as reflected in the language of the IC. Makwanyane ended capital punishment and established the CCT's preeminence in constitutional interpretation over the Parliament. If that were the extent of Makwanyane's legacy, it certainly would be more than enough to justify its historical significance. However, Makwanyane not only ended capital punishment under the IC, but also rendered impossible its reinstitution under the Constitution while it was still being drafted, in part due to the completeness of its review of applicable transnational law.

When Makwanyane was decided, the Constitutional Assembly was still working on the new Constitution. The Court's decisions were being heavily reported, usually incorrectly in the early days. Those involved in the process closely reviewed the Court's decisions. As mentioned, there was talk of a referendum on capital punishment, as well as the potential inclusion of explicit language in the new Constitution. Thus, the announcement of the decision in Makwanyane was of great public moment. Those who supported the death penalty reviewed the decision to see if any interpretive "room" existed for a future decision allowing capital punishment in certain circumstances.

The CCT could have decided Makwanyane in a manner that might have allowed capital punishment to rise from the judicial ashes on either of two bases: (a) the CCT could have subscribed to a prohibition of the punishment under Section 11(2) based on a holding that the formalities and procedures associated with capital punishment—for example, the conditions of detention in awaiting punishment or the arbitrary or discriminatory system of arrest, trial and/or conviction—constitute cruel, inhuman, or degrading treatment, which would have left open the same door as in Furman v. Georgia, or (b) the CCT, although striking down capital punishment for other reasons, could have indicated its support for an objective interpretation of the right to life as the right of all citizens to enjoy life which arguably might then not be negated by the fact that one citizen forfeited his or her life.

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26 See id. at 442 ("It is of fundamental importance to the future of our country that respect for the law of our country should be restored, and the dangerous criminals should be apprehended and dealt with firmly . . . . But the question is not whether criminals should go free and be allowed to escape the consequences of their anti-social behavior. Clearly they should not; and equally clearly those who engage in violent crime should be met with the full rigor of the law. The question is whether the death sentence for murder can legitimately be made part of that law. And this depends on whether it meets the criteria described by section 33(1).").

270 See supra text accompanying notes 168-176.

408 U.S. 238, 256-57 (1972) (holding a death penalty statute unconstitutional because it lacked adequate procedural guidelines, producing arbitrary sentencing decisions). Four years after the Supreme Court struck down a death penalty statute in Furman, it upheld a subsequent death penalty statute that included procedural safeguards designed to cure the arbitrary imposition of death sentences. See Gregg v. Georgia, 428 U.S. 153, 195 (1976). Together, Furman and Gregg demonstrate the problems created by invalidating capital punishment based on procedural, instead of substantive, grounds.
life. When read carefully, it is apparent that Makwanyane did not leave room for a legislative revival of capital punishment on either basis.

Although the analysis of the constitutionality of a particular punishment under Section 11(2) has a strong procedural component, Justice Chaskalson also focused on the nature of the punishment itself.\textsuperscript{272} Under his analysis, a procedural review along the lines of American due process jurisprudence was insufficient because it failed to capture the totality of the offense affected by the punishment: \textsuperscript{273}

We have to accept these differences in the ordinary criminal cases that come before the courts, [because of arbitrariness or bias] even to the extent that some may go to goal when others similarly placed may be acquitted or receive non-custodial sentences. But death is different, and the question is whether this is acceptable when the difference is between life and death. Unjust imprisonment is a great wrong, but if it is discovered, the prisoner can be released and compensated; but the killing of an innocent person is irremediable.\textsuperscript{274}

Justice Chaskalson effectively combined this statement on the totality of death with the distinctions he found between the IC and international and foreign constitutional texts to transcend the more typically procedural tenor of death penalty analysis.\textsuperscript{275} Rather than overemphasizing the arbitrariness of the regulations governing the death sentence, or the administrative and judicial procedures adopted to accommodate it, Justice Chaskalson placed the enormity of the punishment in the context of its impact on a variety of rights, especially the right to human dignity and the right to life.\textsuperscript{276} He held that the death penalty is a cruel and unusual punishment, not only because it is a complete negation of human dignity and not only in the context of an imperfect judicial system, but also because the absoluteness of the death penalty negates any ability to later cure unavoidable biases

\textsuperscript{272} See Makwanyane, 1995 (3) SALR at 409 ("It is also an inhuman punishment for it '... involves, by its very nature, a denial of the executed person's humanity,' and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the State.") (quoting Furman, 408 U.S. at 290) (Brennan, J., concurring).


\textsuperscript{274} See id. at 420. The court also cited Suffolk v. Watson, 381 Mass. 648 (1980), in which Chief Justice Hennessy's plurality decision held capital punishment unconstitutional under the Massachusetts State Constitution. See id. at 420 n.82.

\textsuperscript{275} See id. at 420-21 (discussing Furman).

\textsuperscript{276} See id. at 422, 429. The interim Constitution specifically provided for both the right to life and the right to dignity. See S. Afr. Const. of 1993 (IC), ch. 3, § 9 ("Every person shall have the right to life."); S. Afr. Const. of 1993 (IC), ch. 3, § 10 ("Every person shall have the respect for and protection of his or her dignity.").
For all of these reasons, Justice Chaskalson argued that the death penalty could not be deemed a justifiable limitation on the rights to dignity and life. Understood in this light, Justice Chaskalson reasoned that the procedural defects were unacceptable because they are evidence of arbitrariness, inequality and bias and because they are related to a more fundamental constitutional offense: the dehumanization and indignity of state-supported, institutionalized killing.

Under this rubric, Justice Chaskalson introduced the rights to life and dignity as powerful examples of the broad constitutional impact of the death penalty. As indicated above, these rights are treated as informing the interpretation of Section 11(2). These rights also reinforced Justice Chaskalson’s holding that the punishment itself is constitutionally offensive and not only unconstitutional because of the specific procedures by which that punishment is imposed. In so holding, Justice Chaskalson closed the front door to legislative revival that was left open in the United States by the rationale adopted in Furman.

The Makwanyane judgment also attempted to close the back door to the revival of capital punishment through the popular will by rendering it almost impossible to justify any reinstatement of capital punishment by constitutional amendment. Justice Chaskalson’s rationale contained two additional features that require review in this context. First, by inextricably linking the violation of Section 11(2) to capital punishment’s undeniable offense to Section 9, the right to life, and Section 10, the right to human dignity, Chaskalson made it clear that any potential revival of capital punishment would not only have to be explicit, but that at least Sections 9, 10 and 11 also would have to be rewritten in order to effectuate it. Second, by undermining the reasons submitted in support of the death penalty, he indicated that the constitutional structure itself may not tolerate capital punishment. If no evidence conclusively supporting or refuting the deterrence theory existed when Makwanyane was decided, it is unlikely that such evidence will appear later. Most important among the Court’s findings was that retribution, while an undeniable statement of honest, human emotion, is not in keeping with the statement of National

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277 See id. at 422-25, 451.
278 See id. at 451.
279 See id. at 417-19.
280 See supra text accompanying note 173.
282 See Makwanyane, 1995 (3) SALR at 451.
283 See 408 U.S. 238, 256-57 (1972).
284 See Makwanyane, 1995 (3) SALR at 421-22, 429. It is worthy to note that any amendment to Section 9’s unqualified right to life permitting the taking of life by the state would have pitted the strong anti-abortion movement against supporters of capital punishment.
285 Chaskalson argued that the statistics did not support the deterrence argument and that a life sentence provided the same preventative effect. See Makwanyane, 1995 (3) SALR at 439-51.
Unity and Reconciliation. In fact, Justices Langa, Madala and Mokgoro, among others, joined Justice Chaskalson in emphasizing that the very future of South Africa depends on the abiding respect of all South Africans for the tenets outlined within the statement. Makwanyane made it clear that the statement of National Unity and Reconciliation would also have to be fundamentally altered or entirely deleted if capital punishment were to be reinstated.

The concurring Justices who emphasized the right to life as the primary consideration in their analysis provided one key point of additional reasoning that would also complicate the task of any would-be revivalists. It should not be overlooked that the majority of the Justices of the Court severely held capital punishment to be an unconstitutional violation of the right to life in the first instance, and violation of the right not to be subjected to cruel, inhuman, and degrading treatment in the second instance. All of the Justices commenting on the right to life, however, were keenly aware of the need to restrict their interpretation in anticipation of future arguments submitted in one of the abortion cases winding their way through the court system.

A majority of the Court, six Justices in total, indicated that the right to life contains at a minimum the right not to be deliberately put to death by the state. By so indicating, these Justices closed off another potential avenue for the legislative resurrection of capital punishment: Section 33 could not be rewritten to make capital punishment a permissible limitation on Section 9. As a result of the CCT’s interpretation, Section 9 would have to be revised to contain a qualification in the first instance in order to permit capital punishment.

The Court exhaustively analyzed the practical, theoretical and constitutional grounds for capital punishment and rejected them

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285 This finding was strongly bolstered by the statements of Justices Langa, Madala and Mokgoro indicating that capital punishment is not in keeping with ubuntu. See infra note 429. Justice Sachs’ concurring opinion provided additional support, bringing an appreciation not only of notions of traditional African justice, but also an appreciation of African tradition and historical context to the questions of life and punishment. See Makwanyane, 1995 (3) SALR at 513-21 (Sachs, J., concurring).

287 See infra Section V, discussing the Court’s response to challenge to the Truth and Reconciliation Commission’s right to grant amnesty.

289 See Makwanyane, 1995 (3) SALR at 391.

289 See id. at 453 (Ackermann, J., concurring); id. at 461 (Didcott, J., concurring); id. at 475 (Kriegler, J., concurring); id. at 478 (Langa, J., concurring); id. at 487 (Mahomed, J., concurring); id. at 570 (Sachs, J., concurring). This astute interpretation must be credited to Advocate Wim Trengove, SC, who argued on behalf of the applicants. This interpretation constitutes neither a majority opinion nor a true plurality of the six Justices favoring this interpretation, only five actually based their decisions on analysis of the right to life. Justice Ackermann, although basing his conclusion on his analysis of Section 11(2), noted this interpretation with favor in his opinion. See id. at 458 (Ackermann, J., concurring). Justices Mokgoro and O’Regan adopted broader views on the right to life. Justices Kentridge and Madala did not provide an analysis of the right to life. Thus, only four Justices ruling on the right to life adopted this interpretation. They were joined by one, Justice Ackermann, whose remarks in this regard were not pertinent to his conclusion. See id.
leaving open only the unlikely but entirely plausible chance that: (i) the Parliament would amend the IC, or (ii) the Constitutional Assembly drafting the new Constitution would reformulate the Bill of Rights to accommodate capital punishment. However, based on Makwanyane, it was unlikely that any of these possibilities would survive review by the CCT. Under the interim Constitution, any further reformation of Fundamental Rights was ultimately subject to review by the CCT according to Constitutional Principle II. Furthermore, the interim Constitution required that the CCT review any change in the “Fundamental Rights” introduced by the new Constitution.

Although the drafters of the new Constitution did not substantively alter many of the core elements of the IC, such as the right to dignity and the right to life, the drafters did modify the right to “freedom and security of the person,” both to accommodate some of the interpretive difficulties raised by the Court in Makwanyane and to accommodate freedom of choice concerns. Furthermore, the statement of National Unity and Reconciliation is no longer the epilogue to the Constitution, but it is imported into the new Constitution via Article 22 of Schedule 6, entitled “Transitional Arrangements,” for the specific purpose of maintaining constitutional authority for the Promotion of National Unity and Reconciliation Act. Capital punishment has not been reinstated.

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299 The abolition of the death penalty remained as a potential extension of the right to life even up to the circulation of the final draft of the Constitution. See Adrian Hadland, It’s the Final Draft of the Constitution But the Big Decisions Still Lie Ahead, SUNDAY INDEP., Nov. 26, 1995, at 7.

298 Constitutional Principle II states:

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the [new] Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.

S. Afr. Const. of 1993 (IC), sched. 4, II (emphasis added).

297 See S. Afr. Const. of 1993, ch. 5, § 71 (granting the CCT authority to certify that the new Constitution is in keeping with the Constitutional Principles negotiated at Kempton Park and included as Schedule 4 of the IC).

296 Cf. S. Afr. Const. of 1993 (IC), ch. 3, § 10 (“Every person shall have the right to respect for and protection of his or her dignity.”) with S. Afr. Const. of 1996, ch. 2, § 10 (“Everyone has inherent dignity and the right to have their dignity respected and protected.”). Cf. S. Afr. Const. of 1993 (IC), ch. 3, § 11 (“Every person shall have the right to life.”) and S. Afr. Const. of 1996, ch. 2, § 11 (“Everyone has the right to life”).

See supra note 171 (comparing Section 12(1) of the new Constitution with Section 11 of the IC).

295 See S. Afr. Const. of 1996, ch. 2, § 12(2) (granting rights to reproductive and bodily integrity). Although the topic is beyond the scope of this article, it is worth pointing out that the Constitution seems to anticipate a judicial balancing of some sort to reconcile the meanings of Section 11’s unqualified right to life and Section 12(2)’s statement that “Everyone has the right to bodily integrity and psychological integrity, which shall include the right (a) to make decisions concerning reproduction . . .” Id.

294 Article 22 of Schedule 6 states:

Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution, all the provisions relating to amnesty contained in the previous Constitution under the heading “National
Although it may be too early to describe clear stages in the evolution of the CCT's jurisprudence, the Zuma and Makwanyane decisions were indicative of the judgments handed down in 1995. First, as formative judgments, both decisions reflected the CCT's sincere concern that it adequately covered all the appropriate theoretical and practical legal issues. Both decisions also reflected the Court's desire to ensure that the public understands its reasoning and that the lower judiciary follows its reasoning. Procedural errors and mistakes by the lower courts and by counsel were highlighted, but generally tolerated in an attempt to consider the important issues. Second, Zuma and Makwanyane illustrate the CCT's early focus on criminal justice. This was a rational choice for the Constitutional Court because the system of apartheid created a virtual police state legitimized by the judicial enforcement of apartheid's laws and the acceptance of egregious behavior by the police, army and security officers. Although the actual apartheid laws were repealed, either shortly before the adoption of the IC, or upon its adoption, the lingering cancer in South Africa included a number of the remaining criminal statutes like those addressed in Zuma and Makwanyane and portions of the common law which had been manipulated to accommodate gross violations of human rights despite long-standing notions of fairness and justice. In 1995, the CCT attacked a great number of these issues.

Unity and Reconciliation are deemed to be part of the new Constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended, including for the purposes of its validity.

S. AFR. CONST. of 1996, sched. 6, art. 22.

Schedule 7 to the IC lists a whole series of such laws relating to the creation of the Bantustans and, eventually, the quasi-sovereign, though centrally controlled, Transkei, Bophuthatswana, Venda and Giskei states. See S. AFR. CONST. of 1993 (IC), sched. 7.

In Zuma the court discussed the manipulation of the common law. See Zuma, 1995 (2) SALR at 650. Justice Kentridge, writing for the Court, said:

The presumption of innocence, the right of silence and the proscription of compelled confessions have for 150 years or more been recognized as basic principles of our law, although all of them have to a greater or lesser degree been eroded by statute in some cases by judicial decision.

Id.

From 1995-1997, the highest concentration of the Court's judgments concerned the right to a fair trial and the presumption of innocence. See State v. Rens, 1996 (1) SALR 1218 (CC) (regarding the right to appeal); State v. Nului, 1996 (1) SALR 1207 (CC) (regarding the right to appeal); Shabalala and Five Others v. Attorney General of the Transvaal and Another, 1996 (1) SALR 726 (CC) (striking down a blanket docket privilege that precluded an accused person from having access to the contents of police records in all circumstances—whether information could prove exculpatory or not—and from ever consulting with State witnesses without the consent of the prosecution, which was entirely discretionary); Vermaas, 1995 (3) SALR 292 (CC) (regarding the right to counsel). On the heals of Zuma, the Court eviscerated an additional burden of proof inequities. See State v. Bhulwana; State v. Gwadiso, 1996 (1) SALR 388 (CC) (holding unconstitution the presumption in the Drugs and Drug Trafficking Act 140 of 1992 that the mere possession of a certain amount of marijuana creates an inference of an intent to deal); State v. Mbatha; State v. Prinsloo, 1997 (3) SALR 1012 (holding unconstitutional a provision of the Arms and Ammunition Act 75 of 1969 which made the finding of arms on someone's premise or vehicle presumptive proof of possession); State v Julies, 1996 (4) SALR 313
IV. GAUTENG PROVINCIAL LEGISLATURE: EQUAL ACCESS TO EDUCATION

A. The CCT Settles In

Also in the Court’s first year, the Court checked executive power through an exercise of its constitutional authority and safeguarded the constitutional balance between the national and provincial levels of government in Executive Council of the Western Cape Legislature and Others v. President of the Republic of South Africa and Others.\(^9\) The Court’s decision to carry out its initial assertion of supremacy over each of the other branches of government confirmed the Court’s commitment to the protection of Fundamental Rights announced in Chapter 3 of the interim Constitution. Thus, the Court confirmed its institutional integrity and perhaps most importantly, its own impartiality.\(^1\)

In 1996, the CCT turned more of its attention to addressing the balance between the national and provincial levels of government.\(^2\)

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\(^9\) Executive Council of the Western Cape Legislature and Others v. President of the Republic of South Africa and Others, 1997 (2) SALR 287 (CC) (striking down provisions of the Gambling Act 51 of 1965 that preventing an authorized policeman from entering a place was a presumptive violation of the Act).  
\(^1\) The ANC had faith in the CGT, but the predominantly white political parties and the Inkatha Freedom Party, representing primarily the people of the Zulu kingdom, were not convinced that the CCT would be impartial. Although the Court’s opening was marked by many laudatory headlines, some newspapers questioned the Justices’ partisanship. Cf. Patrick Lawrence & Gail Irwin, Watchdogs of the Constitution, THE STAR, Feb. 13, 1995, at 13 (providing photographs and biographical sketches of each of the eleven CCT Justices) with Bob Drogin, 11 Activists Sworn in for New S. African Court, L.A. TIMES, Feb. 15, 1995, at A8 (noting that some “critics have called the new court too white, too male and too stacked with partisans of the ANC . . . .”). Considering the daunting task of unraveling the corrupted jurisprudence of the apartheid era and restoring trust in the judiciary’s role as the protector of rights, it may have been warranted for the Court to have acted with far less moderation than they did.  
\(^2\) The Court was responsible for twenty-four judgments in 1996. Seven of the twenty-four judgments, or twenty-nine percent of total judgments, concerned the national and provincial balance. Included in this calculation were judgments regarding the certification of the Constitution, as well as the KwaZulu-Natal Constitution. Eight of the twenty-four judgments in 1996, or thirty-three percent of total judgments for that year, concerned criminal law statutes.
For example, the *Gauteng Provincial Legislature* dispute on the constitutionality of a provincial education bill banning certain types of school admission tests addressed this concern. This Section examines the *Gauteng* dispute as a backdrop against which the CCT judgments evolved. This Section explores: (i) the discretion within the Section 35 mandate to consider other constitutional law, (ii) the comparative insights the *Gauteng* dispute provides for the new Constitution, and (iii) the complexities involved in the creation of positive obligations, for example, creating a right to education. Such positive obligations are common in modern constitutions.

**B. Background**

On November 1, 1995, the first set of nation-wide local elections held with universal suffrage took place under the watchful eyes of international and non-governmental organizations. The ANC won in all but one province. In the later 1996 elections, the Inkatha Freedom Party won in KwaZulu-Natal, and the old National Party won in the Western Cape. Both of these parties were understandably concerned about protecting their respective power bases. The parties found a common interest in working to secure a high degree of constitutional protection and respect for minority rights. In this light, one may easily understand why issues of national power, especially national legislative power, have continuously provoked a high degree of scrutiny and a fair amount of constitutional litigation between the national and provincial governments.

The National Party, the Inkatha Freedom Party and the Democratic Party challenged the constitutionality of certain provisions of the National Education Policy Bill relating to the powers conferred upon the Minister of Education. The Court found the contested provisions of the bill to be constitutional since they created only an advisory and cooperative structure for the formulation of education policy at the national and provincial levels and did not empower the

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504 The Western Cape and KwaZulu-Natal Provinces were, by constitutional amendment, given additional time to hold elections, *see* Second Amendment Act No. 44 1995, which were held in May and June of 1996 respectively. The elections in 1994 were national elections which elected individuals such as President Nelson Mandela.

505 *See* AFRICA NEWS, Nov. 13, 1995 (stating that the ANC dominated seven out of eight provinces).

506 *See* Mandela extends “hand of peace” to rivals in KwaZulu-Natal, BBC SUMMARY OF WORLD BROADCASTS, July 7, 1996 (reporting that the IFP defeated the ANC in KwaZulu-Natal); Deputy President de Klerk says ANC’s tricks failed in Western Cape elections, BBC SUMMARY OF WORLD BROADCASTS, June 2, 1996 (declaring national party victory in the Western Cape).

507 *See Gauteng Provincial Legislature*, 1996 (3) SALR at 178 (dismissiing petitioner’s argument that the Bill was unconstitutional because it infringed on the rights and powers of governing bodies of certain schools without the constitutionally requisite negotiation of administrative authority).
Minister of Education to force provinces to adhere to his or her policy.\textsuperscript{308} Each province had the right to adopt its own education policy, subject to certain constitutional constraints and to certain national oversight provisions of the bill which the Court held inoffensive.\textsuperscript{309}

C. The End of Separate and Unequal

Broadly speaking, the early stages of racial integration of the South African educational system have progressed somewhat more smoothly than in the United States. Nevertheless, one should not judge integration too quickly based on the early successes of larger, well-known institutions with much at stake in the new political environment.\textsuperscript{310} For example, the process toward integration at elementary and secondary school levels has been problematic in a number of areas.\textsuperscript{311} Despite justifiable fears that white separatists would lead large-scale conflagrations, there have been relatively few instances of violence or large-scale disobedience in support of traditionally all-white institutions.\textsuperscript{312} Many proponents of integration, however, were anxious about its practical implications because a fair degree of stubbornness persisted among these institutions.

In fact, many of the white public and state-funded schools tried to avoid integration by adopting a host of both obvious and more subtle measures designed to perpetuate segregation. These measures included residency requirements and language tests as well as cultural and religious manifestos. A dispute arose in \textit{Gauteng Provincial Legislature} regarding the inclusion in the School Education Bill of 1995 of provisions designed to prohibit such practices.\textsuperscript{313} This dispute was re-

\textsuperscript{308} See id. at 178-82.
\textsuperscript{309} See id.
\textsuperscript{310} See Dirty War Erupts at Wits, \textit{Mail & Guardian}, Nov. 10-16, 1995.
\textsuperscript{312} There has been, however, some small-scale resistance. See generally \textit{S. Africa Court Outlaws School Discrimination}, Assoc. Press, Apr. 5, 1995 (describing resistance by conservative whites that required police to escort black children to formerly all-white schools).
\textsuperscript{313} See \textit{Gauteng Provincial Legislature}, 1996 (3) SALR at 171-72. The School Education Bill of 1995 included a number of provisions prohibiting the use of proxy tests designed to maintain segregation. See Gauteng School Bill of 1985, §§ 19, 21, 22. Section 19 stated:

1. Language competence testing shall not be used as an admission requirement to a public school.
2. Learners at public schools shall be encouraged to make use of the range of official languages.
3. No learner at a public school or a private school which receives a subsidy in terms of Section 69 shall be punished for expressing himself or herself in a language which is not a language of learning of the school concerned.

\textit{Id.} at § 19.
ferred to the CCT in accordance with Section 98(9) of the IC by the Speaker of the Gauteng legislature pursuant to a request by one-third of its members. The parties contesting the provisions argued that

Section 21 of the bill stated:

1. The religious policy of a public school shall be made by the governing body of the school concerned after consultation with the department, and subject to the approval of the Member of the Executive Council.

2. The religious policy of a public school shall be developed within the framework of the following principles:
   a. The education process should aim at the development of a national, democratic culture of respect for our country's diverse cultural and religious traditions.
   b. Freedom of conscience and of religion shall be respected at all public schools.

3. If, at any time, the Member of the Executive Council has reason to believe that the religious policy of a public school does not comply with the principles set out in subsection (2) or the requirements of the Constitution, the Member of the Executive Council may, after consultation with the governing body of the school concerned, direct that the religious policy of the school shall be reformulated in accordance with subsections (1) and (2).

4. The provisions of section 18(4) to (8) shall apply mutatis mutandis to a directive issued by the Member of the Executive Council under subsection (3) and in such application any reference to language policy shall be construed as a reference to religious policy.

Id. at §21.

Section 22 stated:

1. No person employed at any public school shall attempt to indoctrinate learners into any particular belief or religion.

2. No person employed at any public school or private school shall in the course of his or her employment denigrate any religion.

3. (a) (i) Every learner at a public school, or at a private school which receives a subsidy in terms of Section 69, shall have the right not to attend religious education classes and religious practices at that school.
   (ii) In this regard the department shall respect the rights and duties of parents to provide direction to their children in the exercise of their rights as learners, in a manner consistent with the evolving capacity of the children concerned.
   (b) The right conferred by paragraph (a) on a learner at a private school which receives a subsidy in terms of Section 69, may be limited where such limitation is necessary to preserve the religious character of the private school concerned.
   (c) Except as is provided for in paragraph (b) no person employed at a public school, or at a private school which receives a subsidy in terms of Section 69, shall in any way discourage a learner from choosing not to attend religious education classes or religious practices at that school.

4. No person employed at a public school shall be obliged or in any way unduly influenced to participate in any of the religious education classes or religious practices at that school.

Id. at §22.

See S. Afr. Const. of 1993 (IC), ch. 7, §98(9). This provision permitting preliminary rulings prior to the adoption of a law is similar to Article 61 of the French Constitution du 4 Octobre 1958, as amended on October 29, 1974, though the French provision requires any question regarding constitutionality to be raised before a bill is adopted. See JOHN BELL, FRENCH CONSTITUTIONAL LAW 258 (1992).
those provisions violated their rights delineated in Section 32(c) of the IC. Section 32 of the IC, entitled "Education," is the last fundamental right included in Chapter 3, and reads as follows:

Every person shall have the right—
(a) to basic education and equal access to educational institutions;
(b) to instruction in the language of his or her choice
where this is reasonably practicable; and
(c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.315

The most important argument put forth by the petitioners was that Section 32(c) imposed an affirmative duty on the government to establish such schools where it is practicable to do so. Therefore, they argued, the government has no authority to prohibit language-testing for admissions, to direct the development of religious policy, or to dictate who should be required to be instructed in religion at such schools.316

Addressing the core argument, the Court held that Section 32(c) creates a permissive right, allowing individuals to establish private schools without government funding based on common culture, language or religion, provided that the establishment of such an institution is practicable and that the institution does not discriminate on the basis of race.317 The judgment also referred to this ability as a defensive right,318 or the right of an individual to defend the establishment of such an institution. In this context, the Court noted that the state must respect and permit, but is under no obligation to fund, the establishment of such schools. However, those establishing them may defend their right to do so against state encroachment on the basis of Section 32(c).319 Because of the circumstances surrounding the dispute rather than the legal questions addressed by the Court, the judgment was hailed as the South African equivalent of Brown v. Board of Education.320

D. Discretion in the Section 35 Analysis

This judgment highlights the fact that the CCT is only required to take into consideration public international law "where applicable."321

315 See S. Afr. Const. of 1993 (IC), ch. 3, § 32. The right to education is now contained in Section 29 of the Constitution.
316 See Gauteng Provincial Legislature, 1996 (3) SALR at 171-73.
317 See id. at 173, 177.
318 See id. at 172.
319 See id. at 173, 177.
The Court’s discretion to determine whether the use of international sources is applicable provides the CCT with a dimension of control over the constitutional mandate of Section 35.\textsuperscript{322} The conclusions reached by Justice Mahomed, writing on behalf of nine Justices in Gauteng Provincial Legislature, made very little use of both international and foreign comparative law. In fact, the only reference to foreign comparative law was made in written arguments submitted to the Court.\textsuperscript{327} Justice Mahomed rightly dismissed the alleged relevance based on the “wholly distinguishable” language of the Charter.\textsuperscript{324} Although clearly rejecting this foreign jurisprudence, Justice Mahomed did not state why he did not find any other source of public international law applicable.

In a concurring opinion, Justice Sachs reviewed the public international law considerations at length, illuminating the issue and underscoring the relevance of the public law considerations to the decision.\textsuperscript{325} The question arises, then, whether Justice Mahomed should have felt compelled by Section 35 to consider the foreign law contained in Justice Sachs’ opinion. The discretionary clause, “where applicable,” grants the Court the ability to resolve constitutional questions without the influence of public international law when the Court does not deem it necessary to give meaning or content to a Chapter 3 right in the context of a dispute before the Court. One interpretation of the clause “where applicable” would apply it to the context of the dispute before the Court and not to whether on-point public international law exists. The difficulty with this interpretation is that it could actually restrict the Court’s reference to public international law to only international treaties and agreements binding on South Africa. This interpretation, however, has been rejected by the CCT, which has not hesitated to review the probative value of non-binding international instruments and jurisprudence.\textsuperscript{320}

It should be noted that this interpretation of the ambit of judicial discretion under Section 35 of the IC might be altered by operation

\textsuperscript{322} Interestingly enough, although that provision states the Court “may have regard to comparable foreign case law,” id. at ch. 3, § 35, the CCT has more often looked to foreign case law for interpretive assistance than to public international law.

\textsuperscript{327} See Gauteng Provincial Legislature, 1996 (3) SALR at 175 (noting the petitioner’s citation to Section 23 of the Canadian Charter, CAN. CONST. (Constitutional Act, 1982), pt. 1 (Canadian Charter of Rights and Freedoms), § 23, which relates to language rights in the context of education).

\textsuperscript{325} See id. at 176.

\textsuperscript{324} See id. at 185, 204-07 (Sachs, J., concurring) (discussing United Nations debates and various international treaties that do not create a state responsibility to establish a particular kind of educational institution).

\textsuperscript{320} See, e.g., Makwanyane, 1995 (3) SALR at 413-14 (explaining the value of international authority to assist the CCT); see also Gauteng Provincial Legislature, 1996 (3) SALR at 186 n.9 (advocating the application of internationally accepted principles to Section 32 of the IC); John Dugard, Public International Law, in CONSTITUTIONAL LAW OF SOUTH AFRICA, 13-9 - 13-11 (Matthew Chaskalon et al. eds., 1996) (explaining that the CCT has considered international treaties and decisions in their interpretation of Chapter 3 of the IC and issues affecting human rights).
of Section 39 of the new Constitution, which does not contain a qualified obligation. Section 39 appears to mandate the consideration of international law, since it now uses the word "must," instead of the "where applicable" qualifier appearing in Section 35 of the IC.\footnote{Cf. S. AFR. CONST. of 1993 (IC), ch. 3, § 35 with S. AFR. CONST. of 1996, ch. 2, § 39.} Perhaps this alteration was meant to stop judges from limiting the breadth of the rights of the accused, detained, or convicted by asserting that international norms regarding human rights interpretations may only rarely be applicable due to the "unique complexities" of the South African reality. In addition, it appears that even administrative tribunals and alternative dispute resolution fora are now called upon by Section 39 to inform their interpretation of protected rights by reference to transnational jurisprudence.\footnote{See S. AFR. CONST. of 1996, ch. 2, § 39 (mandating that courts, tribunals and forums consider international law).} Even if this is the case, the obligation is only to consider international public law, not to be bound by it.\footnote{See id.} At most, therefore, Section 39's mandate to consider international law may only require courts to include in their analyses an explanation of why international law is or is not useful to the interpretation of the right at issue.

The dispute in \textit{Gauteng Provincial Legislature} involved at its core an interpretation of Section 32. Specifically, unless Section 32(c) created an obligation on the state to establish and to fund certain types of schools, the Petitioner's claim that that right was violated by a statute which fails to establish (or fund) such schools was moot.\footnote{See \textit{Gauteng Provincial Legislature}, 1996 (3) SALR at 177.} As stated earlier, Justice Mahomed held that Section 32(c) did not create such an obligation on the state. The section merely accorded individuals a right to create such institutions privately, if practicable and non-discriminatory on the basis of race, and to have this right protected by law.\footnote{See id. at 174, 177.} From this point of view, and in the context of this dispute, the application of public international law was not important to advance the Court's understanding or appreciation of the right in question. The petitioners simply relied on a clearly untenable interpretation easily contradicted by reference to the interim Constitution.\footnote{See \textit{id.} at 172-73.} Perhaps if counsel for the Petitioners had argued an interpretation about which reasonable minds could differ, Justice Mahomed would have felt that reference to comparative constitutional law sources was warranted. This does not mean, however, that on-point public international law might not have been helpful to reinforce the holding. Justice Mahomed could have adopted or referenced portions of Justice Sachs's concurring opinion in support of his conclu-
E. Comparing the Modern Constitution

One inescapable observation in *Gauteng Provincial Legislature* concerns the rights created in Section 32. 535 The right to education is common to modern constitutions and appears in certain international instruments, 536 although its expression differs greatly from country to country. In the United States, the Fourteenth Amendment has long been the primary tool in the struggle for equality. 537 It has also been, by necessity, a multi-purpose tool, protecting the right to equality across a broad spectrum of issues including education, social welfare and gender. 538 Perhaps owing to the civil law tradition, most modern constitutions provide a more detailed list of rights, many of which contain a residual equality component. 539 For example, analysis of a dispute regarding a constitutional right to housing might easily necessitate an evaluation of ancillary equality issues if a mortgage is denied. 540

Section 8 of the IC states the right to equality as follows:

1. Every person shall have the right to equality before the law and to equal protection of the law.
2. No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
3. This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and

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534 See id. at 203-5 (Sachs, J., concurring).
536 See, e.g., CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms), § 29; FR. CONST. (Preamble to the 1946 Constitution), para. 13; GRUNDEGESETZ [Constitution] [GG] art. 7 (F.R.G.); HUNG. CONST. art. 70F(2); NAMIB. CONST. art. 20; TANZ. CONST. art. 11(1); BANJUL CHARTER ON HUMAN AND PEOPLES RIGHTS art. 17(1), June 27, 1981, 21 I.L.M. 58; UNIVERSAL DECLARATION OF HUMAN RIGHTS, GAOR, Res. 217A (III), Art. 26, 3 U.N. GAOR, Resolutions pt. 1, at 71, U.N. Doc. A/810 (1948).
537 See U.S. CONST. amend XIV.
equal enjoyment of all rights and freedoms.
(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.

(4) **Prima facie** proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.  

For obvious historical reasons, this is the first "Fundamental Right" granted in Chapter 3 of the interim Constitution.  It is also the first right enshrined in the new Constitution.  Although the Court has since been called upon to interpret this right to equality on a number of occasions, the existence of Section 32 had the seemingly odd result in *Gauteng Provincial Legislature* of placing the judicial review of the anti-discriminatory provisions of the Bill outside of the direct context of Section 8.

Although the development of jurisprudence concerning the right to education need not be divorced in every case from considerations of equality, the Court in *Gauteng Provincial Legislature* did not face questions directly related to the juncture between these rights. A case involving allegations of discrimination against an existing private

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54 See *id.* at ch. 3, § 8.
542 Chapter 3, Sections 7 to 35, define the "Fundamental Rights" contained in the interim Constitution. Section 7 guarantees standing to sue and applies the responsibilities contained in the Constitution to the government. See S. Afr. Const. of 1993 (IC), ch. 3, § 7.
543 Section 9 of the new Constitution reads as follows:

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.
544 See State v. Rens, 1996 (1) SALR 1218 (CC). See also President and Another v. Hugo, 1997 (4) SALR 1 (CC); Prinsloo v. Van der Linde and Another, 1997 (3) SALR 1012; Fraser v. Children's Court, Pretoria North and Others, 1997 (2) SALR 218 (CC); Brink v. Kitshoff, 1996 (4) SALR 197 (CC).
institution would be a better example. Such a case might even require the Court to balance the right to equal access to educational institutions provided by Section 32(a), and the right to equality of the law under Section 8, against Section 32(c), which provides for the establishment of educational institutions on the basis of a common culture, language or religion. For instance, to achieve the goal of providing a common religious school, the school may have to deny a student of another religion, admission even though Section 32(a) guarantees the right to equal access to educational institutions. Although the IC does account for the overlapping equality component in the right to education, it does not cover all conceivable instances where a right is granted but equal results cannot be guaranteed. Although that was not the case here, Gauteng Provincial Legislature serves as a harbinger of the outstanding issue, that a Court needs to address the unqualified granting of a right to all citizens of equality that cannot necessarily be achieved on an equal basis in all areas. In these instances, as in the United States, the CCT would have to “read in” the equality component.

F. The New Right to Education

In the wake of the Gauteng Provincial Legislature decision and public debate, the right to education was significantly clarified in Section 29 of the new Constitution. It now states:

1. Everyone has the right—
   (a) to a basic education, including adult basic education; and
   (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

2. Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—
   (a) equity;
   (b) practicability; and
(c) the need to redress the results of past racially discriminatory laws and practices.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—

(a) do not discriminate on the basis of race;
(b) are registered with the state; and
(c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.346

Interestingly, the interim Constitution's specific reference to "equal access to educational institutions" was removed.350 Nevertheless, the changes in wording did not divorce the equality component from the right. It now appears, however, that the equality component in the right to education must be "read in" to Section 29(1) with regard to public school education,351 although certain constitutional restraints will apply to private education through subsection (3).352 Certainly there will be room for judicial evaluation of equality when the matter of what constitutes "basic education" and "adult basic education" is determined by the legislature,353 or in the event of a dispute, by the courts. For example, a question may arise as to whether the concept of a right to "basic education" includes access to at least, current textbooks, a hot meal and a chair for every student. Curiously, the new right to education does not include an explicit positive obligation on the state with regard to basic education.354 This undoubtedly reflects the drafters' inability to resolve the complex jurisdictional questions surrounding the need for a coordinated education policy at the national and the provincial levels, as exemplified by the dispute involved in the National Education Policy Bill case.355 By allowing certain of these elements to remain vague, the drafters opened up a potential hornet's nest of litigation designed to determine the content of the Section 29 rights.

Nevertheless, where one field of potential conflict is left open by

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346 Id.
351 The government's obligation "to ensure the effective access to, and implementation of, this right" clearly relates only to the contingent right in subsection (2) of Section 29 to receive education in an official language of choice. See S. Afr. Const. of 1996, ch. 2, § 29(2). Section 29(3), however, makes more affirmative requirements such as the prohibition against discrimination. See id. at § 29(3)(a).
352 See id. at § 29(3) (allowing the right to establish and maintain private schools, but without racial discrimination or standards inferior to public schools).
353 See id. at § 29(1).
354 In Section 29(1), the state must take reasonable measures to make "further education" available and accessible. However, there is no mandate that the state should do the same concerning basic education. Cf. id. at § 29(1)(b) with id. at § 29(1)(a).
355 See 1996(3) SALR at 178.
the draftsman, the source of conflict in Gauteng Provincial Legislature was definitively closed; probably in response to Gauteng Provincial Legislature, Section 29(3) of the new Constitution, the homologue of Section 32(c) of the IC, which clarifies that private institutions may be established at the expense of those establishing them.\textsuperscript{55}\textsuperscript{6} Section 29 actually outlines additional requirements for such establishment, including state registration and conformity to comparable public school standards.\textsuperscript{55}\textsuperscript{7} Section 29(3), however, leaves out the interim Constitution's Section 32 proviso regarding practicability;\textsuperscript{55}\textsuperscript{8} however, this is only logical, considering that such institutions must be privately funded, although they are not precluded from receiving discretionary governmental funding.\textsuperscript{55}\textsuperscript{9} Also unlike Section 32, Section 29 does not limit the authority for "independent" institutions to common language, culture and religious schools.\textsuperscript{55}\textsuperscript{10}

Another observation concerning modern constitutions is revealed by the nature of the dispute in Gauteng Provincial Legislature. Petitioners sought a judicial determination that the state had a positive obligation to create and fund common language, culture or religious educational institutions.\textsuperscript{56}\textsuperscript{1} Although rejected, this argument underscores how many modern constitutions have undertaken to engineer the administrative state in addition to the legislative, executive and judicial offices. In many instances, this engineering explicitly calls for the adoption of specific legislation and the establishment of particular organizations, or otherwise creates positive and sometimes expensive obligations on the state.\textsuperscript{56}\textsuperscript{2} Although this was not held to be the case for Section 32 of the IC in Gauteng Provincial Legislature, the Court noted that Section 23 of the Canadian Charter explicitly creates such an obligation.\textsuperscript{56}\textsuperscript{3} Arguably, many of these provisions were

\begin{footnotes}
\footnotetext[6]{See S. Afr. Const. of 1996, ch. 2, § 29(3).}
\footnotetext[7]{See id.}
\footnotetext[9]{See S. Afr. Const. of 1996, ch. 2, § 29(4).}
\footnotetext[10]{Section 29(3) does not qualify what types of educational institutions individuals have the right to establish. See id. at § 29(3).}
\footnotetext[11]{See Gauteng Provincial Legislature, 1996 (4) SALR at 174.}
\footnotetext[12]{For example, Sections 110-123 of the interim Constitution call for the creation of the Office of a Public Protector, appointed by the President, a Human Rights Commission, a Commission on Gender Equality, and for the writing of legislation regarding the Restitution of Land Rights. See S. Afr. Const. of 1993 (IC), ch. 8, §§ 110-123. The new Constitution provides for these and other similar administrative bodies in Sections 181-197. See S. Afr. Const. of 1996, ch. 9, §§ 181-187. The right to property in Section 25 of the new Constitution now contains in subsection 9 the requirement for national legislation regarding land restitution. See id. at ch. 2, § 25(a).}
\footnotetext[13]{See Gauteng Provincial Legislature, 1996 (3) SALR at 175 (citing Section 23 of the Canadian Charter). The Charter states in applicable part: (3) The right of citizens of Canada . . . to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority . . . (b) includes, where the number of those
\end{footnotes}
written with an eye towards a more ideal future, as exemplified by Section 29(1)(b).\textsuperscript{364} Certainly some of these provisions cannot be given their full measure of effect under current budget constraints and, indeed, several Justices have indicated their concerns about the practical and fiscal implications of such positive obligations.\textsuperscript{365} Nevertheless, the Constitutional Assembly drafted a new Bill of Rights which includes two new rights, the right to housing and the right to health care, food, water and social security,\textsuperscript{366} and far more positive obligations than the IC. The new Constitution includes:

- The obligation to enact national legislation against unfair discrimination in the right to equality;\textsuperscript{367}
- The obligations arising by operation of the right to a safe environment;\textsuperscript{368}
- The obligation to enact national legislation addressing the problem of past discriminatory practices concerning land entitlement and use,\textsuperscript{369} and (ii) giving effect to the right to access to information and to the right to just administrative action;\textsuperscript{370}
- The obligation to provide for the legal representation of a child at state expense in civil proceedings affecting the child;\textsuperscript{371} and
- The obligations to provide counsel for detainees, prisoners and accused persons in terms of Section 35.\textsuperscript{372}

children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

\textit{Id.}

\textsuperscript{364} See S. AFR. CONST. of 1996, ch. 2, § 29(1)(b) (stating generally that the state must make "further education . . . progressively" available in the future).

\textsuperscript{365} See, e.g., Vermaas, 1995 (3) SALR at 299 (CC) (indicating in \textit{dicta} that regardless of the difficulties the government must eventually comply with the obligation to provide counsel at public expense in accordance with Section 25(3)(e) of the IC); State v. Mhlongu, 1995 (3) SALR at 886-87; State v. Ntuli, 1996 (1) SALR 1207, 1213 (CC) (state put on notice of constitutional deficiency regarding right to appeal and given time to correct); Minister of Justice v. Ntuli, 1997 (3) SALR 772 (CC) (Parliament's request for extension of time denied). \textit{But see} AZAPO, 1996 (4) SALR 671, 700 (CC) (Didcotu, J., concurring) (indicating his dissatisfaction with the fact that monetary considerations may have played too important a role in Justice Mahomed DP's opinion). For a discussion of the right to counsel under the IC see Sharon Meadows, \textit{Implementing the Right To Counsel in Post-Apartheid South Africa}, 29 GEO. WASH. J. INT'L L. & ECON. 455 (1995).

\textsuperscript{366} See S. AFR. CONST. of 1996, ch. 2, §§ 26, 27 (providing for the right to housing and the right to health care, food, water and social security respectively).

\textsuperscript{367} See \textit{id.} at § 9(4) ("National legislation must be enacted to prevent . . . unfair discrimination.") (emphasis added).

\textsuperscript{368} See \textit{id.} at § 24 ("Everyone has a right (a) to an environment that is not harmful to their health or well being: and (b) . . . to have the environment protected . . . through reasonable legislative and other measures . . . ").

\textsuperscript{369} See \textit{id.} at §§ 25(6), 25(9) (mandating that Parliament pass laws to redress past discrimination concerning land use).

\textsuperscript{370} See \textit{id.} at §§ 32 (requiring legislation to protect the right to access information); \textit{id.} at §§ 33 (guaranteeing the right to just and fair administrative action).

\textsuperscript{371} See \textit{id.} at § 28(h).

\textsuperscript{372} See \textit{id.} at § 35(2)(c) ("To have a legal practitioner assigned to the detained person by the state and at the state expense.").
V. *AZAPO: The Court Looks Ahead*

In addition to providing South Africans of all backgrounds with an understanding of the constitutional process and soliciting their input, the educational campaigns undertaken by NGOs, including student representatives of the Azanian Peoples Organization (AZAPO), and the Constitutional Assembly attempted to inform people of the value of a Bill of Rights generally, as well as informing the people about the content of each individual right. This effort included instruction on the reciprocal obligations that come with having rights. For example, the right to free speech implies the obligation to allow others to speak freely. Not surprisingly, given South Africa's history of oppression, public understanding of the reciprocal nature of rights required more time to take root. The euphoria over the exercise of new freedoms easily eclipsed the sense of obligation attached to these freedoms. For instance, although a positive movement toward labor solidarity and unionism emerged, both sides tended to take uncompromising positions and often employed somewhat destructive practices in many of the ensuing strikes and demonstrations. These standoffs forced business to close operations, resulting in some diminished productive capacity and unfortunate increases in unemployment and all of the related ills. Outside of the labor context, accepting reciprocal obligations was also a problem. Unfamiliarity with paying taxes meant that government housing and sewage programs faced serious challenges. Previously, for example, many non-white South Africans had withheld tax money in protest against the *apartheid* government. In an attempt to break this habit, organizations, such as the “Masakane—Let’s Build Together” Program led by Archbishop Desmond Tutu, took it upon themselves to explain that the government’s effectiveness depended on the payment of taxes.

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379 AZAPO was founded in the late 1970’s by former members of Black Consciousness who wanted to reshape the goals of the BC to focus upon state oppression while moving beyond its original formulation of racial identity. See, e.g., ANTHONY W. MARK, LESSONS OF STRUGGLE: SOUTH AFRICAN INTERNAL OPPOSITION, 1960-1990, at 73-4 (1992) (discussing generally the history and politics of AZAPO and BC).

374 See generally id. at 86 (explaining how through the goals of its constitution, the AZAPO sought to politicize and mobilize Black workers to demand their legitimate rights).

A. Background

One of the more unfortunate legacies of the physical and economic harm inflicted on the black majority in South Africa is the high level of psychological damage reflected throughout South African society. Although the wounds of apartheid may never completely heal—the Truth and Reconciliation Commission was specifically established to treat them.

AZAPO has a long history of providing aggressive advocacy for the rights of the underprivileged in South Africa. In Azanian Peoples’ Organization (AZAPO) and Others v. President of the Republic of South Africa and Others, the group sought to prevent the Truth and Reconciliation Commission from granting amnesty to those who participated in the events leading to the deaths of Steve Biko and Griffiths Mxenge. The descendants of these two men, martyrs to the cause of freedom in South African and killed in infamous circumstances, joined AZAPO in its challenge to the constitutionality of the legislative act creating the Truth and Reconciliation Commission, the Promotion of National Unity and Reconciliation Act 34 of 1995.

AZAPO based its challenge upon several points. The Petitioner’s core argument was that Section 20(7) of the Act, relating to the granting of amnesty, constituted a violation of Section 22 of the interim Constitution because it provided an exemption for the qualifying offender from criminal and civil liability. The Petitioners also challenged both the provisions that permitted the grant of amnesty to a particular confessor and the provisions that permitted amnesty to be granted to the political party or organization to which the confessor belongs, including the State. Petitioners contended that the grant of amnesty would deprive victims their right under Section 22 to settle their grievances. Section 22 of the IC provided that “[e]very person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum.” The Petitioners asserted that the Committee on Amnesty does not constitute either a “court of law” or an “independ-
ent or impartial forum" as required by Section 22.  

B. The Court's Analysis

The IC actually placed a positive obligation on the government of South Africa to provide a vehicle for amnesty. This obligation flowed from the statement on National Unity and Reconciliation:

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.  

This affirmative grant of legislative authority and obligation formed

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584 See AZAPO(I), 1996 (4) SALR at 569.
585 S. AFR. CONST. of 1993 (IC), ch. 15, § 251(4) (emphasis added).
the heart of the Justice Mahomed's lead opinion. Insofar as the statement of National Unity and Reconciliation appeared to conflict with Section 22, his analysis essentially focused on two constitutional questions:

1. Whether the statement of National Unity and Reconciliation constitutes a provision of the Constitution in terms of Section 33(2), and is therefore exempt from analysis under Section 33(1)'s limitation clause and, if not, whether the alleged violation of Section 22 can be justified in terms of the limitations clause; and
2. Whether the constitutional authority for Parliament to enact legislation providing for amnesty in terms of the statement of National Unity and Reconciliation was exceeded by (a) Section 20(7)'s provision allowing for individual amnesty from civil as well as criminal proceedings or (b) that provision's similar allowance of amnesty for the direct or vicarious liabilities of political organizations and the State.

The first question above was answered without difficulty. The Court held that Section 232(4) of the IC explicitly provided the answer. That section stated:

In interpreting this Constitution a provision in any Sched-

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586 See AZAPO, 1996 (4) SALR 671, 683 (CC) ("What is clear is that Parliament not only has the authority in terms of the epilogue to make a law providing for amnesty to be granted in respect of the acts, omissions and offences falling within the category defined therein but that it is in fact obliged to do so."). Justice Mohamed's opinion was joined by all but one of the Justices. Although agreeing with Justice Mahomed's rationale, Justice Didcott wrote separately and emphasized above all the relationship between the grant of amnesty and the purposes stated in the statement of National Unity and Reconciliation. See id. at 698 (Didcott, J., concurring). Didcott criticized parts of the Court's reasoning that he felt went beyond the interpretation of those purposes. For example, Didcott questioned reference to cost considerations:

Nor do I attach great weight to the cost that the state would inevitably incur in meeting not some obligations foisted freshly on it, but ones endured all along from which the Legislature has now seen fit to release it. We have no means of assessing that cost, even approximately. But, unless perhaps its amount unbeknown to us is prohibitively high in relation to our national revenue and expenditure, it does not strike me as a strong reason for depriving the persons to whom the obligations are owed of their normal and legal due.

Id. at 700 (Didcott, J., concurring). Justice Didcott first hinted at this position in the opinion he wrote on behalf of the Court in Vermaas. See Vermaas 1995 (3) SALR at 299-300 (CC) ("We are mindful of the multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform. But the Constitution does not envisage, and it will surely not brook, an undue delay in the fulfillment of any promise made by it about a fundamental right.").

587 Subsection (2) of Section 33 provided that: "Save as provided for in subsection (1) or any other provision of this Constitution, no law, whether a rule of common law, customary law or legislation, shall limit any right entrenched in this Chapter." S. AFR. CONST. of 1993 (IC), ch. 3, § 33(2).

588 See AZAPO, 1996 (4) SALR at 681.
589 See id. at 685.
590 See id. at 682-83.
ule, including the provision under the heading National Unity and Reconciliation, to this Constitution shall not by reason only of the fact that it is contained in a Schedule, have a lesser status than any other provision of this Constitution which is not contained in a Schedule, and such provision shall for all purposes be deemed to form part of the substance of this Constitution. 591

Based on this Section, the Court quickly found that the statement of National Unity and Reconciliation was entitled to equal status to all other provisions in the IC. 592 As such, it fell within the purview of Section 33(2), and the limitations clause was irrelevant to the analysis of its effects. 593

The Court’s, and Justice Mahomed’s, highly nuanced analysis regarding the second question was in sharp contrast to Mahomed’s more formal and legalistic analysis in Gauteng Provincial Legislature. The opinion in Gauteng Provincial Legislature flowed simply from the Court’s resolution of the primary issue, mooting the more complex issues. 594 Although the Court’s analysis in AZAPO was not technically complex, the second question could not be dispatched as easily as the first. Since the Court held that the Truth and Reconciliation Act was not subject to the general limitations clause, the Petitioner’s claim that it granted parliamentary authority in excess of the Statement of National Unity and Reconciliation mandate amounted to an assertion that the grant of authority under the Act must be subject to some other form of restriction. Therefore, the Court had to determine whether the grant of constitutional authority to Parliament contained any intrinsic boundaries. 595 The Court had to address what is intended by “amnesty” and analyze the manner in which the Act gave effect to that intention. 596

To address this question, the Court focused on the function of amnesty with regard to the objectives evident in the transition to constitutional democracy and outlined in the statement of National Unity and Reconciliation. 597 The key elements of Justice Mahomed’s eloquent and poignant assessment of the function of amnesty in the

591 See id. (quoting S. Afr. Const. of 1993 (IC) ch. 15, § 232(4)).
592 See id.
593 See id. at 698.
594 See Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995, 1996 (3) SALR 165, 173-174, 183 (CC) (holding that the Interim Constitution did not place a positive obligation on the National Government to develop culturally specific schools and, therefore, that provincial legislation outlawing tests designed to perpetuate segregation was constitutional). Since the threshold issue went against the Petitioners, the Court did not need to consider the more difficult balancing questions. See id. at 182. In AZAPO, the Court’s threshold conclusion required consideration of a second, more subtle, question. See AZAPO, 1996 (4) SALR at 681, 688.
595 See AZAPO, 1996 (4) SALR at 698.
596 See id. at 683-94.
597 See id. at 693.
South African context merit full inclusion:398

Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law. The Act seeks to address this massive problem by encouraging these survivors and the dependents of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and, crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible. That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the positions of the applicants so desperately desire. With that incentive, what might unfold are objectives fundamental to the ethos of a new constitutional order. The families of those unlawfully tortured, maimed or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the “reconciliation and reconstruction” which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue.399

Even more crucially, but for a mechanism providing for amnesty, the “historic bridge” itself might never have been

398 Although the Court’s judgment is broken into successive sections addressing the questions of amnesty for criminal offenses and for civil offenses, with regard to the civil liability of the State and the vicarious liability of organizations and person, the first subsection regarding amnesty for criminal offenses sets the analytical tone for the entire decision. For this reason, examination herein does not follow the distinctive headings outlining the judgment.

399 See AZAPO, 1996 (4) SALR at 684.
erected. For a successfully negotiated transition, the terms of the transition required not only the agreement of those victimized by abuse but also those threatened by the transition to a “democratic society based on freedom and equality”. If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming and, if it had, the bridge itself would have remained wobbly and insecure, threatened by fear from some and anger from others. It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimisation.490

In these passages, Justice Mahomed made it clear that in addition to benefiting from textual authorization, the very nature of amnesty serves the purpose of and objectives outlined in the statement of National Unity and Reconciliation. In effect, the Court held that amnesty is at the heart of South Africa’s rebirth; its inclusion in the IC was a necessary ingredient of the transition to majority rule and constitutional democracy.491 As such, it is one of the costs of liberty. So concluding, Justice Mahomed conceded that although the amnesty process created by the Act is an imperfect one, the contested provisions are flexible enough not to be constitutionally offensive.492

C. The Court Passes Beyond the Section 35 Mandate

Having determined that the statement of National Unity and Reconciliation does not conflict with Section 22, the Court was not required to refer to public international or foreign comparative law pursuant to Section 35 of the IC.493 Nonetheless, the Court found such reference useful and briefly reviewed the creation, purposes and powers of the truth commissions established in Argentina, Chile and El Salvador.494 He focused on points of commonality. Justice Mahomed explained that each was founded to deal with circumstances similar to those underlying the transition in South Africa, and each was empowered to grant amnesty.495 However, due to the differing and highly subjective historical contexts of the relevant countries, it is not surprising that the comparisons offered little instruction beyond these general observations.

In contrast to the comparison of the truth commissions, which was undertaken by the Court sua sponte, counsel for the applicants asked

490 See id. at 685.
491 See id.
492 See id. at 686, 688.
493 See S. AFR. CONST. of 1993 (IC), ch. 3, § 35.
494 See AZAPO, 1996 (4) SALR at 686-87.
495 See id. at 686.
the Court to consider whether Parliament should be bound by a number of international agreements requiring the prosecution of violators of human rights.\textsuperscript{406} In this regard, \textit{AZAPO} provided a new glimpse into the legal status of such instruments under the interim Constitution. Justice Mohamed wrote:

International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only in the interpretation of the Constitution itself... International conventions and treaties do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment.\textsuperscript{407}

Hence, the Court made it clear that under the IC, international agreements and laws only aid in interpretation. The Court found that the various provisions of Section 231 of the IC empower Parliament to make international agreements into laws.\textsuperscript{408} International agreements are not self-executing and they become part of South African law only \textit{via} an express legislative provision and only if they are not inconsistent with the Constitution.

The next logical step in this analysis would have been for the Court to review whether each of the international instruments was made part of South African law in accordance with Section 231 of the

\textsuperscript{406} See id. at 686.
\textsuperscript{407} See id. at 688.
\textsuperscript{408} See id. Section 231 of the IC, entitled "Continuation of international agreements and status of international law," stated:

(1) All rights and obligations under international agreements which immediately before the commencement of this Constitution were vested in or binding on the Republic within the meaning of the previous Constitution, shall be vested in or binding on the Republic under this Constitution, unless provided otherwise by an Act of Parliament.
(2) Parliament shall, subject to this Constitution, be competent to agree to the ratification of or accession to an international agreement negotiated and signed in terms of section 82(1) (i).
(3) Where Parliament agrees to the ratification of or accession to an international agreement under subsection (2), such international agreement shall be binding on the Republic and shall form part of the law of the Republic, provided Parliament expressly so provides and such agreement is not inconsistent with this Constitution.
(4) The rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic.

\textsuperscript{409} See S. AFR. CONST. of 1993 (IC), ch. 15, § 231. This provision is substantially similar to the homologue to Section 231 in the new Constitution that is also Section 231. \textit{See} S. AFR. CONST. of 1996, ch. 14, § 231. However, Sections 232 and 233 of the new Constitution contain additional clarifying provisions. \textit{See} id. at §§ 232-233. Raylene Keightly provides an astute analysis of the distinctions between the treatment given public international law and treaties under the IC and the new Constitution. \textit{See} Raylene Keightly, \textit{Public International Law and the Final Constitution}, 12 (3) S. AFR. J. HUM. RTS. 405 (1996).
\textsuperscript{410} See S. AFR. CONST. of 1993 (IC), ch. 15, § 231.
IC and to determine whether there was a conflict between it and the Act. Despite the potential benefit of a more protracted analysis, the Court’s limited analysis was justified because the Court determined that the IC was superior to any international instrument in the event these sources conflicted.

D. The AZAPO Challenge

Analysis of the substantive issues in AZAPO was quite straightforward. Nevertheless, the Court went to great lengths to demonstrate its understanding of and sensitivity to the important national question at the heart of the dispute. In the end, the amnesty process involves the most complex balance of rights and responsibilities in South Africa today. For those testifying before the Truth and Reconciliation Commission, their right to amnesty is conditioned on their fulfillment of the difficult obligation to be truthful. For the Truth and Reconciliation Commission and the people of South Africa, however, the right to the truth about the past entails a concomitant obligation to undertake the challenging task of forgiveness.

VI. CONCLUSION

Section II used Zuma to illustrate the Court’s first steps. It also introduced the provisions of the interim Constitution that profoundly influenced the Court’s interpretive approach: the limitations clause located in Section 33 and Section 35’s mandate to consider international and foreign law. The discussion of Makwanyane in Section III revealed the young Court’s greatest application of its intellect and its authority in the presence of great public interest as it decided the constitutionality of the death penalty. With a broad consideration of international authorities, the opinion exemplifies the Court’s enduring comparative constitutional methodology. Analysis of the opinion also reveals how the usefulness of comparative constitutional interpretation may be limited by differences in constitutional structure, social culture and national history. Section IV highlighted this point by briefly reviewing the judgment in Gauteng Provincial Legislature. Focusing on the Court’s discretion under Section 35, this section raised questions about how and when the Court can be expected to employ a comparative constitutional approach in its analysis of an

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40 See AZAPO, 1996 (4) SALR at 688. Justice Mahomed drew a distinction between the use of international instruments to determine the constitutionality of a provision and the use of instruments to color the content of a right actually granted. See id. ("International law and the contents of the international treaties to which South Africa might or might not be at any particular time are, in my view, relevant only in the interpretation of the Constitution itself . . . .").

41 See supra Section II.

42 See supra Section III.

43 See supra Section IV.
inherently local constitutional question.

A definitive answer to these questions would be speculative at best, and Section IV begins to introduce the elements which complicate the Court's ability to successfully embrace Section 35's mandate to consider foreign authority. These elements include the set of positive obligations introduced by the interim Constitution and further expanded upon in the new Constitution. Few countries have such extensive positive obligations. Perhaps, more importantly, the fulfillment of these obligations in South Africa may depend upon local political and fiscal constraints. Under these circumstances, the Court must undertake its analysis of such obligations creatively in order to accord the appropriate respect to its obligations under Section 35. Although the Court was understandably not very successful in this regard in Gauteng, the judgement in AZAPO, reviewed in Section V, stands as a clear victory. In AZAPO, the Court succeeded beautifully in rendering a judgment on a quintessentially local matter—the existence of a commission to record the truth about the apartheid years—while including poignant comparative constitutional jurisprudence.

Overall, the Court has made significant strides in its short existence. Defying early criticism, it has demonstrated its impartiality and autonomy while earning the esteem of the major political parties. It has eschewed the adoption of a political question escape hatch, ruled both for and against positions taken by the other branches of the national government and rendered judgments on sensitive issues. Despite sporadic outbursts of public opinion, each of the governmental organs has heeded the orders of the Court without rancor at the exercise of its power. The cooperation of the other branches of the government and the educational and judicious temperament of the Court's rulings have contributed to the firm establishment of the Court as an effective and even crucial element of the new South Africa. By sifting through a myriad of useful and less useful international and foreign approaches to rights interpretation, the Justices of the Court developed a modern constitutional jurisprudence of unique and rigorous sincerity. Their adoption of a hybrid "generous" and "purposive" approach is only natural in the historical context of South Africa.

As the more egregious legal remnants of apartheid are progressively discarded, and the judiciary digests and follows the Court's
early precedents, the Court’s jurisprudence will evolve. Discourse already has migrated away from the more technical and theoretical analysis characteristic of the early judgments like Zuma and Makwanyane. As if heeding their own counsel of incrementalism, the Justices have also moved away from providing a comprehensive treatment of all the matters before the Court and toward a more focused review of narrower issues. This trend is exemplified by Gauteng Provincial Legislature which also illustrates the different, but most often complementary, judicial styles of the Justices.

AZAPO represents a natural blending of styles. The easier, more technical issue of the status of the statement of national unity, was dealt with expeditiously, reminiscent of the key issue raised in Gauteng. The more complex issue, regarding whether there is an intra-constitutional limitation applying to the actual procedures enacted by Parliament for granting amnesty, was carefully considered on the basis of two analyses. The first involved a canvassing of international and foreign comparative experiences, similar to Zuma. The second involved an exercise of constitutional soul-searching at its most noble, in which the Court carefully contextualized the link between the relatively peaceful transition to constitutional democracy and the negotiated promise of amnesty.

AZAPO made clear that at least two interpretive forces, transnational and national, will continue their interplay in the Court’s deliberations. Equally clear was the realization that the Court will continue to undertake its responsibilities to consider foreign jurisprudence seriously under Section 39 of the new Constitution. Drawing from the decisions discussed, the CCT is more likely to resort to external sources in the context of perplexing questions which:

have not already been addressed in the context of the new Constitution—as was the case in both Zuma and Makwanyane;

(ii) are not easily resolved on the basis of the texts involved—the majority found this to be the case in Gauteng Provincial Legislature, although Justice Sachs’ erudite con-

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47 The CCT’s reasoning in these cases is discussed in Sections II and III. See Makwanyane, 1995 (3) SALR 642; Zuma, 1995 (2) SALR 642.
48 1996 (3) SALR 165 (CC).
AZAPO is discussed in Section V. See AZAPO, 1996 (4) SALR 671 (CC).
49 See AZAPO, 1996 (4) SALR at 682-3; Gauteng Provincial Legislature, 1996 (3) SALR at 177 (holding that Section 32(c) does not oblige the state to establish schools based upon a common culture, language or religion).
50 See AZAPO, 1996 (4) SALR at 686-87; Zuma, 1995 (2) SALR at 654-62. See supra Section V, Part B, for a discussion of the Court’s analysis in AZAPO.
51 See AZAPO, 1996 (4) SALR at 689-94. See supra Section V, Part C, for a discussion of the use of comparative sources by the CCT in AZAPO.
curring opinion provides a poignant counterweight; and
(iii) are not so fundamentally intertwined with uniquely
South African matters as to severely diminish the probative
value of extraterritorial references—the opposite was true
in AZAPO.424

Where these factors have not constrained comparative analysis, the
Constitutional Court has demonstrated that it takes its Section 35
mandate very seriously.425 As illustrated by the evaluation of the use
of probative legislative history in Makwanyane and the considera-
tion of commentary regarding examples of other truth commissions in
AZAPO,426 the Court has never hesitated to resort to external sources
in its interpretation whether or not the reference related directly to
the interpretation of a protected right as permitted under Section 35.
Although the Court has admittedly become more comfortable with
certain aspects of Canadian jurisprudence than any other country,427
it did explain in AZAPO that there is a limit to the usefulness of ex-
ternal sources. For South African jurisprudence, external sources are
at best an interpretive aid. They are neither binding holdings nor
authoritative suggestions of the Court’s ultimate position.

Even so, the Court continues to include jurisdictions other than
the older Western democracies in its analysis. In addition to refer-
ences to United States, German and English jurisprudence, the Court
makes intermittent references to judgments of courts in Africa,428
Central Europe,429 and South Asia.430 This cross-pollination must not
be undervalued. It is one of the most important aspects of the evolu-
tion of modern constitutional jurisprudence. The recent increase in
the number of independent states following the Cold War has re-
sulted in a concomitant increase in references to international and
comparative law. Many of the new constitutions contain provisions

424 Cf., e.g., Harksen v. Lane NO and Others, 1998 (1) SALR 300, 317-18 (CC) (discussing
the necessity of exhausting non-constitutional remedies for domestic issues) with AZAPO, 1996
(4) SALR 671 (CC) (resting upon the unique provisions of the IC regarding the special powers
granted the executive during the transition period) and Executive Council, Western Cape Leg-
islature, and Others v. President of the Rep. of S. Afr. and Others, 1995 (4) SALR 877 (CC)
(considering the validity of amendments to a local government act).

425 See supra Sections II(C), II(D), and III(E), discussing the role of comparative constitutional
analysis in the Zuma and Makwanyane decisions.

426 See AZAPO, 1996 (4) SALR at 687-88; Makwanyane, 1995 (3) SALR at 404-409.

427 See Makwanyane, 1995 (3) SALR at 436-38; Zuma, 1995 (2) SALR at 656.

428 The court has considered jurisprudence from courts in Tanzania and Botswana. See
Makwanyane, 1995 (3) SALR 391 at 428 n.105; id. at 490-91 (Mahomed, J., concurring). There
were even early attempts to include references to traditional African jurisprudence and value
systems reflected in the teachings of tribal elders and the writings of historians. See, e.g., Mak-
wanyane, 1995 (3) SALR at 516 (Sachs, J., concurring); id. at 481-83 (Langa, J., concurring); id.
at 483-84 (Madala, J., concurring); id. at 500-01 (Mokgoro, J., concurring) (all discussing the
traditional principle of ubuntu, which places significant value on life and human dignity).

429 See id. at 415 (explaining that the Hungarian Constitutional Court declared the death penalty to
be unconstitutional); id. at 423 (discussing the German approach to the death penalty).

430 See id. at 426-28 (discussing the development of death penalty jurisprudence in India).
similar to Section 35.43 Other courts should follow South Africa’s lead in reviewing comparative constitutional jurisprudence from other jurisdictions. In addition to finding potentially useful material, this international cross-citation also lets other countries know that their judicial decisions are being scrutinized for what they disclose about their society’s respect for human rights. The consideration of comparative sources also reveals the effect of textual, contextual and cultural distinctions on interpretive styles and substantive outcomes. Of equal importance, however, is that this exchange helps local judges in newer democracies feel welcomed and respected in what is becoming a global judiciary.

As the Court gains experience and precedents take root, the Court’s need to canvass international and foreign comparative jurisprudence for insights and guidance may diminish. The return of South Africa to the Commonwealth may contribute to this process. However, the new language of Section 39(1)(b) requires the courts to consider public international law in terms that appear to allow for less discretion than Section 35 provided.432

In the meantime, the Court has brought an impressive array of jurisprudence to bear on its interpretations while carefully tailoring its judgments to both the text and the spirit of the interim Constitution. Without the benefit of a body of acceptable jurisprudence developed over time, as has occurred in the United States, Section 35 and its homologue have forced the South African courts to rise to international standards concerning the protection of rights. Without foreign guidance, the mixture of old practices and new rules might have resulted in a system that appeared and functioned like the old regime.

The judicial system in South Africa has not expunged all the vestiges of apartheid. A few examples of the continued problem include judges who have sentenced youths to whippings even after Williams’ abolition of juvenile whipping,433 a judge who demanded only a 1,000 rand bail in the case of a man who beat a black child to death for playing with a white child,434 and the farmers who began pushing lifelong farm laborers and their families off their land in order to deny them rights under the Land Restitution Act.435

In this light, it is clear that the process of adaptation to the new

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431 See, e.g., CAN. CONST. § 1; EST. CONST. ch. 1, art. 3; HUNGR. CONST. § 7; RUSS. CONST., ch. I, art. XV, § 1; ch. II, art. XVII, § 1.
432 See supra text accompanying notes 189, 196.
433 See State v. Williams, 1995 (3) SALR 632 (outlawing the use of whipping as a punishment of juvenile defendants).
434 See Helen Grange, ANC Outraged By Farmers’ Cruel Acts, THE STAR, July 7, 1995. The article also describes five additional accounts of similarly horrific acts and followed by shameful judicial leniency. See id.
435 See Eddie Koch, Grave Dispute Stirs the Land Pot, MAIL & GUARDIAN, Sept. 8-14, 1995 (describing the struggles between labor-tenants and land-owners). But see Eddie Koch, Farmers are Ready to Sail on the Winds of Change, MAIL & GUARDIAN, July 7-13, 1995 (finding pragmatic farmers who support a new proposal for land distribution).
Constitution is not yet complete. So far, the Court has successfully balanced its Section 35 mandate and the necessary "South Africanization" of international references in its new constitutional jurisprudence. However, the Constitutional Court must continue to lead the judiciary in this direction. Although the Court's modus operandi is unlikely to change in light of the new Constitution, certain interpretive adaptations may be required to accommodate the differences in the text. First, although Section 36 no longer contains the "essential content" phrasing that existed in Section 33, one can only speculate as to how the Court will interpret Section 36's rephrasing of the limitations clause. Second, future interpretive turbulence might arise if a split emerges within the Court over the weight that should be given to the economic costs of its holdings given the expansive nature of the new Constitutions positive obligations. Justice Didcott's concurring opinion in AZAPO accents this potential difficulty. Although the issue may remain in the background of the Court's reasoning, the list of "relevant factors" in Section 36 of the new Constitution is not exclusive. This leaves room for cost considerations to figure into the Court's future limitations analysis. As Justice Didcott's observed, economic pragmatism is rarely an appropriate consideration in the context of rights interpretation. Further, outside of the context of the right to education, the rights and State obligations included in the Bill of Rights do not include an internal provision for their "progressive" implementation. This conundrum, I submit, is one of the primary reasons the Court is empowered under Section 172 of the new Constitution to suspend its declaration of invalidity.

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46 S. Afr. Const. of 1996, ch. 3, § 36 (1) (providing that limitations on rights must be "reasonable and justifiable in an open and democratic society.") with S. Afr. Const. of 1993 (IC), ch. 3, § 33(1)(b) (providing that limitations "shall not negate the essential content of the right in question.").
47 See supra note 386.
48 See supra text accompanying note 91.
49 See supra text accompanying note 365.
50 See supra text accompanying note 365.
51 See supra note 386.
52 See supra text accompanying note 91.
54 See S. Afr. Const. of 1996, ch. 8, § 172 (1) (b) (ii) (authorizing the Court to issue "an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect").
lation of orders by the Court and its exercise of discretion under Section 172 of the Constitution.

As the Court allocates more of its time to disputes concerning the national, provincial and local balances of power, it must be careful to safeguard the integrity of its precedents and, ultimately, to complete its construction of the judicial foundations on which the protection of South Africa's new rights will depend. It is too soon in the evolution of South African constitutional democracy to stop reminding the judiciary of its duties under the new Constitution. Turning off the beacon of external authority that guides the judiciary by revealing both the successes and the mistakes of other jurisdictions would be premature. The Court must continue to emphasize the relevance, utility, and importance of transnational jurisprudence in rights interpretation.