THE LIMITATION OF FUNDAMENTAL RIGHTS

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"I declare that 'THE LIMITATION OF FUNDAMENTAL RIGHTS' is my own work and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references."

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INTRODUCTION

South Africa's new Constitution has been hailed as one of the most democratic and sophisticated in history, surpassing even the Constitutions of many first world countries. Of paramount importance in the Constitution is the limitation clause. In this dissertation, an endeavour shall be made to shed light on the provision for the limitation of rights in section 36(1) of the 1996 Constitution.[1] Allusion will be made to section 33 of the 1993 Constitution[2] so that the rationale, relevance, content and context of section 36(1) can be more meaningfully appreciated. Even though there have been no Constitutional Court judgements and only a few articles and chapters in textbooks pertaining to the 1996 limitation clause, the approach of the courts and much of the material relating to the 1993 Constitution is still relevant and reference thereto shall accordingly be made since pending cases are still to be dealt with in terms of the 1993 Constitution.

In particular circumstances, constitutionally entrenched rights may be limited. It is section 36(1) of the Constitution which makes provision for such limitation:

> "*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*

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1 Act 108 of 1996.

2 *Constitution of the Republic of South Africa Act* 200 of 1993.

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."

However, enacting a bill of rights is by no means a panacea.[3] The functioning of the limitation clause will no doubt be instrumental in determining the success (or failure) of not only our bill of rights;[4] futhermore, it may well shape the course of our entire society.

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Without a mechanism for limiting rights, a complete *laissez faire* rights system might result; absolute non-interference with the rights of others would necessitate living in isolation thereby breaking down social relations (if not society *in toto*). The *dictum* of Jean-Paul Satre "Hell is other people" is an extreme statement of this point of view.[5] Rather than risk such an anti-social

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3 Nherere and d'Engelbronner-Kolf *The Institutionalisation of Human Rights in Sou Africa* 38.

4 Dlamini *Human Rights in Africa: Which Way South Africa?* 120.

5 Bottomore *Freedom* (1997) *The Blackwell Dictionary of Twentieth-Century Socia*
(continued...)

society, the state is more likely to either opt for disregarding the constitution[6] (neither a very likely nor agreeable option), or resort to a mechanism for limiting rights.

The United States Constitution, which has no provision for the limitation of rights, has pursued the latter option.[7] As a matter of necessity, qualifications have been developed by the American judiciary in order to place legitimate constraints on these rights. Clearly, rights in South African constitutional law are not absolute as is evidenced by the inclusion of a limitation clause in the 1993 and 1996 Constitutions.[8] By including a limitation clause in the Constitution, a mechanism is available to regulate the manner in which constitutionally entrenched rights should be limited.[9]

Section 36(1) places constraints on the manner in which rights may be limited.[10] Rights may only be limited according to the democratic values of human dignity, freedom, and equality - words that animate the Bill of Rights, occurring in section 7(1)[11] as well as section 39(1)(a).[12]

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5 (...continued)
Thought 236.

6 Nel and Bezuidenhout *Policing and Human Rights* 106.

7 Hogg *Constitutional Law of Canada* 853.

8 Davis *et al Fundamental Rights in the Constitution* 7; Dlamini *Human Rights in A Which Way South Africa?* 37.

9 Nel and Bezuidenhout *Policing and Human Rights* 105-106.

10 Chaskalson *et al Constitutional Law of South Africa* 12-1.

11 Section 7(1) of the *Constitution of the Republic of South Africa Act* 108 of 1996 p as follows:

(continued...)

Further, section 36 provides a mechanism for balancing competing interests[13] against one another. Such interests include private, public, government and constitutional interests. The limitation clause attempts to reconcile the contradictory claims of the constitutionally entrenched rights of the individual with the demands of a majoritarian based democracy.[14] The factors listed in paragraphs (a) to (e) of section 36(1) of the 1996 Constitution, which were not expressly provided for in the 1993 Constitution, promise to be most useful for this purpose.

The limitation clause provides direction for judicial review.[15] It is used to balance the extent to which constitutionally entrenched rights may on the one hand be limited by the democratically elected branches of government and on the other hand the extent to which the judiciary may override the will of such democratically elected bodies.

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11 (...continued)
"*This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom*" (my emphasis).

12 Paragraph (a) of section 39(1) of the *Constitution of the Republic of South Africa* of 1996 provides in pertinent part as follows:
"*must promote the values that underlie an open and democratic society based on human dignity, equality and freedom*" (my emphasis).

13 Chaskalson *et al Constitutional Law of South Africa* 12-1.

14 Davis *et al Fundamental Rights in the Constitution: Commentary and Cases* 22.

15 Chaskalson *et al Constitutional Law of South Africa* 12-1.

The approach to this dissertation follows the general sequence of the text of section 36(1) of the 1996 Constitution (with a few exceptions). It should, however, be noted that it is *not* the exclusive aim of this dissertation to present a comprehensive analysis of the orthodox mechanics of section 36(1). Of much concern in this dissertation are some of the themes that inhere in section 36(1) and how these themes form the backdrop against which the limitation of rights may be viewed.

Hiemstra CJ held in *Smith v Attorney-General, Bophuthatswana*[16] that a

> *"Bill of Rights is a declaration of values and a statement of the nation's concept of the society it hopes to achieve. It is the duty of the Court to make it identifiable as such.".*

The limitation clause is instrumental in transforming the society into the "nation's concept of the society it hopes to achieve" . This in turn requires a thorough understanding of the philosophy and sociology underlying the limitation clause, much of which has not been fully appreciated in legal circles.

Questions regarding the interpretation, limitation and the ultimate validity of the Constitution are not issues determinable exclusively by constitutional law.[17] These issues cannot be answered based solely on internal reference to the

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16 1984 1 SA 196 (B), 199H.

17 Davis *et al Fundamental Rights in the Constitution: Commentary and Cases* 17.

Constitution - one *must* have regard to politics and sociology.[18] Accordingly, reference in this dissertation is made to these social sciences.

Chapter One contains several preliminary legal issues pertaining to the limitation of rights. In order to fully appreciate the limitation clause, a discussion of how the limitation clause fits into human rights litigation will be undertaken. A mere glance at reported case law will indicate that terminology surrounding the limitation of a right is not consistent within the case law. Accordingly, attention will be paid to the terminology pertaining to the limitation clause. The different guises in which a diminution of a right may occur has been examined because it is relevant in order for one to have a more complete understanding of the ambit of the limitation clause. The position of foreign law and the limitation clause is also discussed in this chapter. The impact of the phrases "in terms of law" as well "general application", that appear in section 36(1) of the 1996 Constitution, is also discussed in the first chapter because, despite forming an indispensable part of the limitation clause, the aforementioned phrases usually operate in the background and are not commonly seen to form the main machinery of the limitation clause.

Chapter Two focuses on the essence of the test that judges normally use in order to constitutionally limit rights, namely the test of reasonableness and justifiability. Reference is also made to the absence of the requirement of necessity in the 1996 limitation clause. The fate of the "essential content of the right" required in terms of the 1993 limitation clause and whether this

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18 Davis *et al Fundamental Rights in the Constitution: Commentary and Cases* 17.

requirement has any bearing in terms of the 1996 limitation clause is also addressed in this chapter.

Anybody who has tried to read section 36(1) of the 1996 Constitution aloud (or recite it from memory as I have) is able to tell immediately that one has to pause for breath well before one reaches paragraph (a). When one refers to the limitation clause, perhaps because it is such a mouthful, almost invariably the phrase "open and democratic society" is glossed over to the extent that one tends to regard the phrase as amounting to a single concept; only cursory attention is paid to the word "open" frequently almost dismissively writing the word "open" off as amounting to nothing more than political correctness in these times where transparency is the buzz word. The truth is much deeper. Despite one society being referred to in the limitation clause, allusion is being made to two distinct elements of this society; the society must be both a *democratic society* and an *open society*.

Whereas reasonableness and justifiability are the *tools* that the judge uses on a day to day basis to determine whether a Constitutional limitation ought to be occasioned, it is *within* the ethos of an "open and democratic society based on human dignity, equality and freedom" that a judge must attempt to see whether one can harmonise a constitutional limitation rather than finding that a complete violation of a right has occurred. The terms "open and democratic society" and "human dignity, equality and freedom" are heavily loaded words. The subtle meanings that attach to these words flit by the unwary ear more often than not. *Chapters Three* and *Four* involve an examination of the implications of these

loaded words and how they may impact upon steering the mind of a judicial officer based upon meanings that are assigned to these words.

A concept that often escapes mentioning in legal circles is that of pluralism. Hence a discussion of the meaning of pluralism and how it relates to democracy is included in *Chapter Three*. The value of human dignity seems to have taken on heightened Constitutional significance in the 1996 Constitution and could well play a pivotal role in our budding democratic society and has accordingly been discussed in *Chapter Three*.

The notion of openness in particular circumstances implies that reasons for the official conduct must be given.[19] However, the notion of openness is also linked to the concept of society. *Chapter Four* is concerned with the implications of the "open society" mentioned in the limitation clause. An examination of the case law in South Africa reveals that even though judges use terms such as openness, in the main they are loath to qualify exactly what they mean. The exact meaning of the term "open society" has not been given much attention in legal circles. The meaning of the term and the implications of the term in relation to the limitation of rights will be discussed. Reference is also made to the five factors listed in section 36(1)(a) - (e) that must be taken into account when considering whether to constitutionally limit a right in an open and democratic society. These five factors are discussed in *Chapter Four* (rather than *Chapter Two*, that contains the more traditional mechanics of the limitation clause) since these factors may influence the way society is transformed.

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19 Van Wyk *et al Rights and Constitutionalism* 650.

The overall value of the terms "open and democratic society" is considered largely in the conclusion since only once one appreciates the implications of the term can one more readily appreciate the value of the notion of an "open and democratic society".

The manner in which sociology and jurisprudence are to be integrated is a major dilemma of legal sociology[20] - the writing of this dissertation was not without this problem. However, where law is isolated from the social sciences, law degenerates into nothing more than scholasticism *in vacuo*.

20 Selznick *Law: The Sociology of Law* (1968) 9 *International Encyclopaedia of the Sciences* 58.

CHAPTER ONE

1 CONTEXTUALISING THE LIMITATION OF RIGHTS

1.1 THREE STAGES OF HUMAN RIGHTS LITIGATION

Three stages in human rights litigation are discernible.[21] The preliminary stage includes determining matters such as jurisdiction, standing and application. It is the second stage, the substantive stage, that concerns the operation of section 36(1).[22]

The substantive stage involves an interpretation of the provisions of the Bill of Rights and whether the fundamental rights of the applicant have been infringed. If so, determining whether the infringement can be justified in terms of the limitation clause follows.

Where the court determines that an infringement has occurred and the requirements for a constitutional infringement provided in section 36(1) have not been complied with, the final stage of human rights litigation occurs. During this stage, the court considers appropriate remedies.

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21 Erasmus and Van Riet *Human Rights Practice* 16.

22 *S v Makwanyane and Another* 1995 6 BCLR 665 (CC), 676D-677A and 707 *Zuma and Others* 1995 2 SA 642 (CC), 650*ff*.

1.2 INFRINGEMENT, LIMITATION AND VIOLATION

Subtractions from rights are indicated by several terms, such as infringement, limitation, restriction, curtailment, suspension or derogation. The meanings of these terms will be examined below.

The court held in the Canadian case of *Attorney-General, Quebec v Quebec School Board*[23] that not every infringement of the Canadian Charter of Rights and Freedoms constitutes a limitation. The court held further that an infringement that amounts to more than a limitation would not be justifiable in terms of the Canadian general limitation clause. It was held that the offending provisions[24]

> *"collide directly with those of s 23 of the Charter, and are not limits which can be legitimized by s 1 of the Charter"* (my emphasis).

The Canadian court also distinguished between "limits" and "denials" of rights - a distinction that suffers the obvious criticism that no legal standard exists to facilitate classification into either category.[25]

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23 [1984] 2 SCR 66. The facts were briefly that in terms of the "Quebec clause" in Q Charter of the French Language (Bill 101), admission to English-language schools restricted to children who had been educated in English. This provision was blatan inconsistent with section 23 of the Charter.

24 [1984] 2 SCR 66, 88.

25 Hogg *Constitutional Law of Canada* 860; *Ford v Quebec* [1988] 2 SCR 712, 771-

A court cannot abstractly determine the constitutionality of an infringement without examining the circumstances of the case.[26] It would appear that South African judges do not always pay attention to the implications of a terminological distinction between an "infringement", "limitation" "and violation", the exact meaning of the judge determinable only by reference to the context in which the terms have been used.

The difference between an "infringement" and a "limitation" lies in the *constitutionality* of the diminution of the right rather than the *degree* that the right is diminished.[27] An "infringement" of a right will amount to a constitutional *limitation* if one complies with the requirements inhering within section 36(1) of the 1996 Constitution.

Only after examining the circumstances of the case is one able to determine whether a complete violation of the right has occurred resulting in an unconstitutional act. It is submitted that where the requirements of section 36 have not been complied with, a "violation" of a particular right will result, although the Constitutional Court has not been rigid in its adherence to such terminology.[28]

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26 Erasmus and Van Riet *Human Rights Practice* 83.

27 Carpenter *Internal modifiers and other qualifications in bill of rights - some probl interpretation* (1995) 10 *SA Public Law* 261.

28 For example, in *Coetzee v Government of the Republic of South Africa* 1995 631 (CC), Judge Sachs appears to use the terms "violation" and "infringed" interchangably at 655C-D.

1.3 DEMARCATIONS OF RIGHTS, GENERAL AND SPECIFIC LIMITATION CLAUSES

1.3.1 DEMARCATIONS

Where an internal qualifier (otherwise referred to as a *demarcation of the right*)[29] provides aid in delineating the right or the value that animates the right, the internal qualifier should be assimilated into the first stage of analysis, the determination of whether a right has been infringed.[30]

Such demarcations will be of use to the court in determining whether a right has been infringed.[31] Since the party relying on the right must aver its infringement, the distinction between a demarcation and a special limitation clause is crucial.

1.3.2 SPECIFIC AND GENERAL LIMITATIONS

29 De Waal and Erasmus *The Constitutional Jurisprudence of South African Courts Application, Interpretation and Limitation of Fundamental Rights During the Tra* (1996) *Stell LR* 203.

30 Chaskalson *et al Constitutional Law of South Africa* 12-13.

31 De Waal and Erasmus *The Constitutional Jurisprudence of South African Courts Application, Interpretation and Limitation of Fundamental Rights During the Tra* (1996) *Stell LR* 203.

Rautenbach and Malherbe[32] are of the opinion that the general limitation clause applies to *all* rights, but under certain conditions specific limitation clauses qualify elements of particular rights. The purpose for which such qualification is effected may well determine the relationship between the general and specific limitation clauses.[33] The following purposes may be served by the specific limitation clause: (a) to create more rigid requirements than the general limitation clause; (b) to relax the requirements of the general limitation clause; (c) to clarify uncertainty concerning one or more of the elements of the particular right.

Du Plessis and Corder[34] maintain that where the section in which the principal right is entrenched provides a *procedure* for the *circumscription* of the right, then this section is *not subject* to the general limitation clause. In this way, Du Plessis and Corder view the provision for affirmative action in the 1993 Constitution as not being subject to the general limitation clause.

1.4 THE DISTINCTION BETWEEN THE LIMITATION AND SUSPENSION OF RIGHTS

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32 Rautenbach and Malherbe *Constitutional Law* 318.

33 Rautenbach and Malherbe *Constitutional Law* 318.

34 Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 1

The general limitation clause is clearly distinguishable from the provision for the suspension (also referred to as "derogation") of rights in that the general limitation clause is of a permanent nature and is used to enforce fundamental rights under "normal" conditions.[35] The suspension of rights is provided for in section 37 and occurs only temporarily during times of public emergency in exceptional situations.[36]

Partial abatement of fundamental rights during times of national emergency is clearly not inconsistent with "universally accepted fundamental human rights, freedoms and civil liberties".[37] During the duration of the suspension, the right is not destroyed, but is rather held in abeyance.[38]

1.5 THE TWO STAGE APPROACH

The text of section 36 does not expressly provide for a particular standard of proof. However, strong jurisprudential arguments exist that favour the civil

35 Van Wyk *et al Rights and Constitutionalism* 652.

36 Nel and Bezuidenhout *Policing and Human Rights* 106; Van Wyk *et al Rights an Constitutionalism* 652.

37 *In Re: Certification of the Constitution of the Republic of South Africa, 199* 10 BCLR 1253 (CC), 1294C-D.

38 Carpenter *Internal modifiers and other qualifications in bill of rights - some probl interpretation* (1995) 10 *SAPL* 261.

standard of proof.[39] The limitation clause requires only "reasonable" justification, which is more akin to the civil standard of proof on a balance of probabilities. Moreover, the criminal standard, beyond reasonable doubt, is actuated by the protection of the innocent from the baneful misfortune of a deprivation of liberty. The standard of proof is clearly the civil standard of proof.[40]

1.5.1 THE FIRST ENQUIRY

The first stage involves an enquiry into whether a constitutional right has been infringed. This entails determining both whether the activity requiring constitutional protection falls within the ambit of the right as well as whether the exercise of this activity is impaired.[41]

Demarcating the scope of the benefit provided by the right involves constitutional interpretation (as well as to a lesser degree the interpretation of statutes). A major difference between constitutional interpretation and the interpretation of statutes is that constitutional interpretation affords the court

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39 Chaskalson *et al Constitutional Law of South Africa* 12-17.

40 Cachalia, Cheadle, Davis, Haysom, Maduna and Marcus *Fundamental Righ New Constitution* 107.

41 Basson *South Africa's Interim Constitution: Text and Notes* 50; Nel and Bezuiden *Policing and Human Rights* 107.

more opportunity to shape society.[42] Section 39 of the 1996 Constitution provides for the interpretation of the bill of rights as follows:

> "*(1) When interpreting the Bill of Rights, a court, tribunal or forum -*
>
> *(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
>
> *(b) must consider international law; and*
>
> *(c) may consider foreign law.*
>
> *(2) When interpreting legislation, and when developing the common law, or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.*
>
> *(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.*"

This section is a welcome departure from the position during the Apartheid era in which judges often pretended to merely "declare" the law and were discouraged from openly discussing the role of the judiciary with regard to

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42 Sarkin *The Political Role of the South African Constitutional Court* (1997) 114 *S* 136.

interpretation.[43] The way has now been paved for the courts to abandon formalist, positivist ways of interpreting in favour of a value orientated approach.[44]

The principles of constitutional interpretation play an important part in this process. South African courts have held that the onus of proving the existence of the right and its infringement rests on the party averring its existence.[45] Only an affirmative answer to the first stage of enquiry will bring the second stage into operation.

The implications of a negative answer to this enquiry would be that the relevant area of law would not be subject to constitutional oversight.[46] Clearly, the first enquiry can have serious implications in determining the balance of power between the judiciary and the other organs of state.

Interpreting the right will include constraints of not only language, constitutional tradition and the history of the text, but will also include the underlying philosophy of society itself.[47] Even if a very wide meaning to a

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43 *Discussion of Constitutional Interpretation Provision* 16/9/97 *Altavista Search En* http://www.constitution.org.za/drafts/tdrafts/34interp.htm.

44 Kruger and Currin *Interpreting a Bill of Rights* 133; *Discussion of Constitutional Interpretation Provision* 16/9/97 *Altavista Search Engine* http://www.constitution.org.za/drafts/tdrafts/34interp.htm.

45 *Nortje and Another v Attorney General of the Cape and Another* 1995 2 BCLR 23 248F-G; *Zantsi v Chairman, Council of State, Ciskei* 1995 2 SA 534 (Ck), 560G-

46 Cachalia *et al Fundamental Rights in New Constitution* 107.

47 Davis *et al Fundamental Rights in the Constitution: Commentary and Cases* 308.

particular right is established in the first stage of enquiry, the infringement may fall foul to the second stage of enquiry - the limitation of rights.

1.5.2 THE SECOND ENQUIRY

During the second stage, the onus is on the party seeking to uphold the infringement to show that such infringement is reasonable and justifiable.[48] The court must consider the provisions of the limitation clause in this regard. Having evaluated the arguments, the court must balance the enjoyment of the constitutional right with the interest in justifying the infringement.[49]

The values and purpose of the Constitution should be given full effect during this stage of the enquiry. The values mentioned in the limitation clause, namely an "open and democratic society" as well as "human dignity, equality and freedom", are of importance during this stage.

1.6 THE RELATIONSHIP BETWEEN GENEROUS AND PURPOSIVE APPROACHES

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48 *Nortje and Another v Attorney General of the Cape and Another* 1995 2 BCLR 23 248F-G; *Zantsi v Chairman, Council of State, Ciskei* 1995 2 SA 534 (Ck), 560G-

49 Basson *South Africa's Interim Constitution: Text and Notes* 50; Nel and Bezuiden *Policing and Human Rights* 107.

While an in-depth discussion of every theory of constitutional interpretation is well beyond the scope of this dissertation, two approaches are worthy of consideration: the generous and purposive approaches. Generous interpretation refers to the widest possible meaning to language being ascribed to the particular right in question.[50] On the other hand, purposive interpretation refers to interpretation that is effected to fulfill or promote the purpose for which the right was entrenched taking into account the values underlying the Constitution.[51]

In *S v Zuma and Others*[52] and *S v Mhlungu*,[53] the Constitutional Court expressed approbation for generous interpretation. However, the Constitutional Court favoured the purposive approach to interpretation in *S v Makwanyane and Another*[54] and *S v Zuma and Others*.[55]

The Canadian authors Funston and Meehan incisively resolve the tension between the generous and purposive approach to interpretation as follows.[56] The right must be interpreted according to the purpose and interest which the right was formulated to safeguard. However, the following qualification is added: in addition to interpreting in accordance with the purpose of the right, a generous

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50 Nel and Bezuidenhout *Policing and Human Rights* 69.

51 Nel and Bezuidenhout *Policing and Human Rights* 69.

52 1995 2 SA 642 (CC), 651B-E.

53 1995 7 BCLR 793 (CC), 800A.

54 1995 6 BCLR 665 (CC), 676E.

55 1995 2 SA 642 (CC), 652E-H.

56 Funston and Meehan *Canada's Constitutional Law in a Nutshell* 157.

interpretation is also required. However, the aim of this secondary generous approach must be to engage the full benefit of the entrenched right; indeed, the Canadian Supreme Court has cautioned against going beyond the purpose for which the particular right was entrenched.[57]

Judge O'Regan in *S v Makwanyane and Another*[58] held that the purposive approach is to be followed and that the purposive approach could in turn require not only a generous meaning to be inferred, but perhaps even a narrower meaning. In this way, the tension between the generous and purposive approach may be harmonised.

1.7 THE RELATIONSHIP BETWEEN INTERPRETATION AND APPLICATION

Interpretation is traditionally viewed as being a separate step occurring prior to application.[59] Gadamer, however, is of the opinion that interpretation *adds* meaning.[60] The meaning of the text only reveals itself[61]

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57 Funston and Meehan *Canada's Constitutional Law in a Nutshell* 157.

58 1995 6 BCLR 665 (CC), 777A-B.

59 Kruger and Currin *Interpreting a Bill of Rights* 131.

60 Jones *Defusing Gadamer's Horizons* 25/10/97 *Altavista Search Engine* http://capo.org.premise/95/sep/p950804.html.

61 Cornell, Rosenfeld and Gray Carlson *Deconstruction and the Possibility of Justice*

"*in concretely engaged interpretation which, in turn, remains embedded in the social fabric of understanding*".

Thus, in order to interpret, one must also engage in application. This results in a definite blurring of the traditional legal distinction between the interpretation and application stages.

Converting the exercise of interpretation into the establishment of meaning involves fixing parameters for factors which ought to be taken into account.[62] This is not an objective or neutral decision, but is rather an ethical decision involving the socio-political context wherein the case arises.

It is submitted that the limitation of rights should be viewed organically - interpreted and applied in such a way that fits the prevailing conditions in a manner that is sustainable by society. On a more philosophical note (that is curiously analogous to Heisenberg's uncertainty principle),[63] the limitation clause can never be *perfectly* applied to society because the very *application* of the limitation clause *changes* society.

The distinction (or unity) between interpretation and application is, however, by no means the main focus of this dissertation. Accordingly, let it suffice to say

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62 De Ville *Eduard Fagan in Context* (1997) 2 *SA Public Law* 493.

63 Werner Heisenberg (1901-1976) was a German physicist, who won a Nobel prize physics in 1932. Heisenberg's *uncertainty principle* states that the position and ve of an electron in motion cannot be measured simultaneously with perfect accuracy because the very act of determining the electron's position affects the velocity of t electron. In 1958 he published *Physics and Philosophy*.

that the existence of the values of "an open and democractic society based on human dignity, equality and freedom" in both the interpretation and limitation clauses narrows the gap between the interpretation and limitation of a right.

1.8 THE LIMITATION CLAUSE AND FOREIGN LAW

1.8.1 THE APPROACH OF THE SUPREME COURT PRIOR TO *S V MAKWANYANE AND ANOTHER*[64]

The following cases indicate how the limitation clause was approached by the Supreme Court. The cases also indicate how reference to foreign law was made with regard to the limitation clause.

The Supreme Court in *Nortje and Another v Attorney General of the Cape and Another*[65] endorsed the decision of *R v Oakes*.[66] The court does, however, acknowledge that section 1 of the Canadian Charter of Rights and Freedoms is not identical to section 33(1) of the 1993 Constitution and that due allowances should accordingly be made.

64 1995 6 BCLR 665 (CC).

65 1995 2 BCLR 236 (C), 248F-I.

66 [1986] 26 DLR (4th) 200.

Tebbut J in *Park-Ross and Another v the Director, Office for Serious Economic Offences*[67] engages in a lengthy discussion of what he "conceive[s] the approach to section 33(1) should be". In Judge Tebbut's mind, Canadian law is no doubt of immense value as is illustrated by the way the judge at 215A temporarily confuses our constitutional requirement of an "open and democratic society" with the Canadian requirement of a "*free* and democratic society". Judge Tebbut refers to section 1 of the Canadian Charter as an analogous limitation clause and then proceeds to cite *R v Oakes*[68] for guidance concerning the interpretation of section 33(1). It is worthy of note that *no* consideration is given to any other alternative approach to section 33(1).

1.8.2 THE APPROACH OF THE CONSTITUTIONAL COURT

The Constitutional Court has been rather reticent in its approach to interpreting the general limitation clause.[69] This is indicated well in the approach of the Constitutional Court in the following cases.

The discussion of the court in *S v Ntuli*[70] concerning the instances in which infringements amount to constitutional limitations is not very edifying:

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67 1995 2 BCLR 198 (C), 214G-216E.

68 [1986] 26 DLR (4th) 200.

69 Nel and Bezuidenhout *Policing and Human Rights* 109; Woolman Coetzee: *The Limitation of Justice Sach's Concurrence* 1996 *SAJHR* 103.

70 1996 1 BCLR 141 (CC), 152C-D.

"*They are not in my opinion.* (ie not constitutional limitations) *They fail another test too, I believe, the test of justifiability in a 'society based on...equality'. How they fare on the rest I need not consider.*"

The bold statement that the infringements "are not in my opinion" limitations without substantiating the reason, causes difficulty in gleaning an underlying reason for why this is so. Thereafter, the judge states that the test of justifiability too has failed, having neatly parenthetically inserted "I believe" into the sentence, which dilutes the conviction of the argumentation making it seem almost like mere personal opinion.

In *Case and Another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and others*,[71] the majority again avoided providing criteria for the limitation of rights with the entirety of Judge Didcott's discussion of whether an infringement amounts to a limitation reading as follows:

"*It does not in my opinion. For the intrusion into personal privacy that flows from the prohibition fails, I am satisfied, the first and second tests set for its tolerability, the tests requiring it to be reasonable and justifiable*". (my emphasis)

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71 1996 5 BCLR 609 (CC), 647F-G.

Again the Constitutional Court uses parenthesis to refrain from giving guidelines concerning the operation of the limitation clause. One cannot determine much of a reason other than that Judge Didcott is of that opinion.

Judge Kentridge in *S v Zuma and Others*[72] was apprehensive to fit the 1993 limitations clause into the Canadian pattern:

> "*I see no reason, in this case at least, to attempt to fit our analysis into the Canadian pattern.*"

The judge does not explicity state that the Canadian pattern would in fact be inappropriate to that particular case. Nor is it clearly stated whether the Canadian approach is in line with our limitation clause.

The approach in *S v Makwanyane and Another*[73] deserves consideration. In paragraphs 100-104, Judge Chaskalson states the approach to follow when considering the limitation of rights. Judge Chaskalson's view on reasonableness dealt with in paragraph 104 is extraordinary in that it fails to substantiate why these factors are the factors to be considered. The learned judge at 708D justifies his refusal to supply details concerning the limitation of rights by saying that "different rights have different implications for democracy" and that there is "no absolute standard for determining reasonableness".[74] The idea that

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72 1995 2 SA 642 (CC), 660E-F.

73 1995 6 BCLR 665 (CC).

74 Woolman Coetzee: *The Limitation of Justice Sach's Concurrence* 1996 *SAJHR* 10

the public is waiting for the court to pronounce a judgement cast in stone laying down immutable criteria is fallacious.[75] The alternative is to adopt an *ad hoc* approach, which carries the dangers that legal practitioners will not know how to build cases and that very weak protection of constitutionally entrenched rights may result.[76]

In the ensuing five paragraphs, Chaskalson JP concisely states the law pertaining to the limitation of rights in Canada (paragraphs 105-107), in Germany (paragraph 108) and under the European Convention (paragraph 109). These paragraphs are crisp statements of foreign law with no attempt whatsoever being made to apply the foreign jurisprudence to the South African limitation clause. At the end of paragraph 109, Judge Chaskalson noncommittally dismisses his incursion into the European Convention using litotes as follows:

> *"It is not necessarily a safe guide as to what would be appropriate under section 33 of our Constitution."*

The aforementioned sentence augurs the ensuing paragraph in which Chaskalson JP methodically undermines the value of the foreign law referred to in paragraphs 105-109. Canadian law is subverted by Chaskalson JP agreeing with the *dictum* of Kentridge AJ in the *Zuma* case alluded to *supra*. The court similarly distances itself from the German Constitutional Court and the

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75 Chaskalson *et al Constitutional Law of South Africa* 12-21.

76 Chaskalson *et al Constitutional Law of South Africa* 12-22.

European Court of Human Rights in the same sentence. The *dictum* of Kentridge AJ that is quoted in *S v Makwanyane and Another*[77] is as follows:

> *"Like Kentridge AJ, 'I see no reason in this case...to attempt to fit our analysis into the Canadian pattern' or for that matter to fit it into the pattern followed by any of the other courts to which reference has been made."*

The astute reader will notice that the statement of Judge Kentridge is not accurately quoted. Two aspects of this quotation are worthy of note. First, a comma is omitted between the word "reason" and "in". This might appear like a rather banal omission done for the sake of ease of reading. However, the inaccuracy looks more deliberate when one considers the second unusual aspect, namely the two words selectively omitted - "at least". The reference to Judge Kentridge's *dictum* is perturbing in that it appears that the originally less than compelling *dictum* has been quoted in a manner that creates a stronger meaning than originally present.

Therefore, one can initially see a striking difference between the approach of the Constitutional Court and the Supreme Court. This manifests itself particularly in the difference in attitude of the Supreme Court and Constitutional Court towards the case of *R v Oakes*.[78] After *S v Makwanyane and Another*[79] the

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77 1995 6 BCLR 665 (CC), 711F-G.

78 [1986] 26 DLR (4th) 200.

79 1995 6 BCLR 665 (CC).

approach of the Supreme Court has been in line with that of the Constitutional Court.

In the recent case of *De Lange v Smuts NO and Others* 1998 7 BCLR 779 (CC), the Constitutional Court (per O'Regan J) focuses on the limitation clause. Judge O'Regan deals with section 36(1) by quoting the 1996 limitation clause (at 847A-C) and stating that, even though the language differs from the equivalent provision in the 1993 Constitution, the test to be adopted is in most respects similar to the approach in *S v Makwanyane and Another*[80] (at 847C-D), whereafter the *Makwanyane* approach is quoted (at 847E-G).

Unfortunately, the Constitutional Court has not elaborated on the impact of the dissimilarities between the 1993 and 1996 limitation clauses. The Constitutional Court has to date steadfastly adhered to the approach in *S v Makwanyane and Another*.

1.9 PRELIMINARY TERMS IN THE LIMITATION CLAUSE

1.9.1 "IN TERMS OF LAW"

The word "law" encompasses legislation, common law as well as customary law.[81] Article 19(1) of the German *Basic Law* contains the phrase "by or pursuant" to a law, from which two distinct elements are discernible: "by law"

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80 1995 6 BCLR 665 (CC).

81 Rautenbach and Malherbe *Constitutional Law* 311.

(*durch Gesetz*) and "pursuant to a law" (*auf grund eines Gesetzes*). Limitations "by law" require no executive acts to take effect, whereas limitations "pursuant to law" require executive acts for the realisation of the limitation.[82]

There are two elements flowing into phrases such as "prescribed by law" or "in accordance with the "law" that are commonly found in foreign constitutions.[83] First, it must be adequately accessible to citizens in the sense that they should be able to have access to the legal rules concerned in their particular case. Second, the law must enable the citizen to foresee the degree to which particular actions will cause certain legal consequences to flow.[84] Such phrases refer to the quality of the law;[85] only if the law is comprehensible, accessible and predictable will it qualify as a "law" in terms of section 36(1).[86]

1.9.2 "GENERAL APPLICATION"

Only laws of general application may limit constitutionally entrenched rights. That a law should apply generally serves two objectives: first, it should give effect to the rule of law; second, bills of attainder should be filtered out.[87]

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82 De Ville *Interpretation of the general limitation clause in the chapter on fundame rights* (1994) *SAPL* 291.

83 Sieghart *The International Law of Human Rights* 91; Hogg *Constitutional Law of Canada* 862.

84 *Sunday Times v United Kingdom* (6538/74) Judgement: 2 EHRR 245, 270-273.

85 Van Dijk and Van Hoof *Theory and Practice of the European Convention on Hu Rights* 579.

86 Rautenbach and Malherbe *Constitutional Law* 311.

87 Chaskalson *et al Constitutional Law of South Africa* 12-17; Nel and Bezuidenhout (continued...)

In *Matinkinca and Another v Council of State, Ciskei and Another*,[88] the court found that the protection provided by a decree applied only to particular persons involved in an act envisaged in the *Special Indemnity Decree 7 of 1993* and affords no protection to any other person not involved in such act. The court accordingly found that the law did not apply generally. The court held in *S v Makwanyane and Another*[89] that the "new order" has a "regstaat" at its foundation and consequently cannot permit arbitrary application of the law. Judge Ackermann held further at 726A that:

> "*Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution.*"

The argument was also made in *S v Makwanyane and Another*[90] that because the death sentence had already been abolished by military decree in what was formerly Ciskei, that section 277 of the *Criminal Procedure Act* 57 of 1977 was

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87 (...continued)
Policing and Human Rights 110. Black's Law Dictionary defines "bills of attainde "Legislative acts, no matter what their form, that apply either to named individual easily ascertainable members of a group in such a way as to inflict punishment on without judicial trial.".

88 1994 1 BCLR 17 (Ck), 41D.

89 1995 6 BCLR 665 (CC), 725H.

90 1995 6 BCLR 665 (CC), 684A-685B.

not a law of general application.[91] The court rejected this argument on the basis that one need not have inter-geographical consistency and parity of laws. What is required is rather *intra*-geographical consistency and parity of law.

Laws that are not of general application will infringe the right to equality[92] - a value mentioned in the constitution as forming the basis for an open and democratic society. Therefore, it is clear that the purpose of only permitting limitations in terms of laws of general application is to prevent arbitrary and discriminatory laws from prevailing.[93]

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91 De Waal and Erasmus *The Constitutional Jurisprudence of South African Courts Application, Interpretation and Limitation of Fundamental Rights During the Tra* (1996) *Stell LR* 204.

92 Rautenbach and Malherbe *Constitutional Law* 312.

93 Chaskalson *et al Constitutional Law of South Africa* 12-18.

CHAPTER TWO

2 "REASONABLE AND JUSTIFIABLE" AND THE POSITION OF FOREIGN LAW

2.1 REASONABLENESS AND JUSTIFIABILITY

Contained in the idea of reasonableness are notions of fairness or moderation.[94] Reasonableness seeks to prevent decisions based on arbitrary, unfair or irrational considerations,[95] which can only be determined by reference to the circumstances of each case.[96]

Reasonableness in a public law context is concerned with setting constraints on the scope of state activities.[97] A stricter norm of reasonableness is adopted in public law owing to the position of subordination in which the individual is placed.[98]

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94 Hanks *The Collins Concise Dictionary of the English Language* 962.

95 Blaauw-Wolf and Wolf *A comparison between German and South African Limitat Provisions* (1996) 113 *SALJ* 291.

96 *S v Makwanyane and Another* 1995 6 BCLR 665 (CC), 708E.

97 Blaauw-Wolf and Wolf *A comparison between German and South African Limitat Provisions* (1996) 113 *SALJ* 291.

98 Van Wyk *et al Rights and Constitutionalism* 649.

The question arises concerning the distinction between "reasonable" and what is "justifiable". Judge Kriegler in *S v Makwanyane and Another*[99] appears to draw a distinction between reasonableness and justifiability. We are unfortunately not given the benefit of the reasoning concerning why this distinction is made. The issue is avoided by the judge stating at 748E that he finds it "unnecessary to probe the outer limits of what is reasonable". Further down the page at 748I-J, Judge Kriegler states concerning the distinction between reasonableness and justifiability as follows:

> "*The questions may well be asked what the distinction is between reasonable and justifiable and whether one test can be met and not the other. Be that as it may, this case is so clear that the distinction, if any, between the two criteria need not be considered.*" (my emphasis)

Thus, it would appear that Judge Kriegler is not certain whether there is any distinction between reasonableness and justifiability as is indicated by the words "if any".

Judge Kentridge in *S v Zuma and Others*[100] directly states that the tests for reasonableness and justifiability "are not identical", but in that particular instance "may be looked at and assessed together". Again, addressing the distinction between reasonableness and justifiability is avoided. Other similar

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99 1995 6 BCLR 665 (CC), 748D-F.

100 1995 2 SA 642 (CC), 660F-G.

distinctions between reasonableness and justifiability that are touched upon, but not elaborated on, may be found in *Case and Another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and others,*[101] *S v Ntuli,*[102] *Coetzee v Government of the Republic of South Africa*[103] and *S v Zuma and Others.*[104]

The word "justifiable" is defined in the *Collins Concise Dictionary*[105] as capable of being "justified". The word "justify" is in turn listed as having seven meanings, most of which contain elements of proving, seeing or showing something. Particularly useful are the definitions "to show to be *reasonable*" (my emphasis) and the *legal* definition "to show good reason in court for some action taken".

The Canadian standard that an infringement must be "demonstrably justified"[106] could be useful in determining the distinction between the two concepts. The first meaning of "demonstrate" is defined as "to show or prove, esp. by

101 1996 5 BCLR 609 (CC), 647F-G.

102 1996 1 BCLR 141 (CC), 152C-D.

103 1995 4 SA 631 (CC), 658F-659A.

104 1995 2 SA 642 (CC), 660F-G.

105 Hanks *The Collins Concise Dictionary of the English Language* 616.

106 Section 1 of the Canadian Charter of Rights and Freedoms (being Schedule B to t Canada Act of 1982) providing for the general limitation of rights reads as follows
"*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.*"

reasoning evidence, etc.".[107] The other meanings of "demonstrate" include elements of explaining, displaying, manifesting and evincing.

Unfortunately, Canadian jurisprudence has viewed reasonableness and justifiability cumulatively.[108] Hogg takes the view that since both reasonableness and justifiability have to be satisfied, there is little value in attempting to separate the concepts and even goes so far as to suggest that the existence of two concepts in section 1 of the Charter may be nothing more than redundancy.[109] With the greatest of respect to Peter Hogg, it is submitted that this proposition is somewhat shortsighted; if *both* reasonableness *and* justifiability have to be satisfied, proving the absence of *either* could be crucial, albeit a gossamer distinction between the two.

It is submitted that reasonableness and justifiability are in fact two parts of a single *process* (rather than a test) that must be completed before an infringement can amount to a constitutional limitation. First, the judge must be satisfied (in his or her own mind) that the infringement is reasonable. Second, the judge must outwardly manifest why he or she is of that opinion in such a way that the judge's reasoning can objectively withstand logical scrutiny.[110] Ironically, the aforementioned excerpt of Judge Kriegler, who *makes* the distinction between

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107 Hanks *The Collins Concise Dictionary of the English Language* 298.

108 Hogg *Constitutional Law of Canada* 866.

109 Hogg *Constitutional Law of Canada* 866.

110 Hosten, Edwards, Bosman and Church *Introduction to South African Law and Le Theory* 989.

reasonableness and justifiability, is in fact an example of reasoning without outwardly justifying.

By providing reasons for judgements, judges are accounting for the actions of the judiciary. By failing to outwardly articulate the reasons for (ie justifying) a judgment from which there is no appeal (as is the case with matters before the Constitutional Court), judges could in practice escape most forms of accountability. Even if the judge were to be removed from office in extreme cases, doing so would not reverse the particular decision. Clearly, it is in the interest of accountability that judges justify their decisions.

2.2 REASONABLE VERSUS REASONABLE AND NECESSARY

The normal requirement for justifying a limitation under the 1993 Constitution was reasonableness. However, other rights required a stricter test for a constitutional limitation. These "super-fundamental" rights required not only reasonableness for a constitutional limitation, but carried the additional requirement of necessity.

In article 9 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, necessity is also required for a limitation to be effected. However, in the abovementioned European Convention, the requirement of necessity is the only hurdle for a limitation to be justified, and therefore whether

"necessary" had the same meaning in a South African context is subject to doubt.[111]

While the American strict scrutiny test,[112] that affords a greater degree of protection to particular fundamental rights, was mentioned in drafts of the limitation clause of the 1993 Constitution, caution should be exercised before borrowing this notion from American jurisprudence for two reasons:[113] first, the strict scrutiny test is deeply rooted in American history. Second, employing a stricter test for the limitation of particular rights has the danger that certain fundamental rights lose their fundamental quality.

In the 1996 Constitution, section 36(1) provides one universal test for the limitation of rights making no reference to the notion of necessity. The notion of "necessity" is by no means an international prerequisite for the limitation of rights.[114] Indeed certain countries, such as Canada, have no requirement of necessity at all, the important criteria being that effect be given to proportionality.[115] Clearly, paragraphs (a) - (e) of the limitation clause in the 1996 Constitution give effect to the requirement of proportionality.

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111 Basson *South Africa's Interim Constitution: Text and Notes* 49.

112 Tribe *American Constitutional Law* 1451.

113 Chaskalson *et al Constitutional Law of South Africa* 12-9.

114 *In Re: Certification of the Constitution of the Republic of South Africa, 199* 10 BCLR 1253 (CC), 1293E-F.

115 *In Re: Certification of the Constitution of the Republic of South Africa, 199* 10 BCLR 1253 (CC), 2394A-B.

Therefore, it is submitted that the omission of the term "necessary" is to be welcomed in that it establishes a *uniform* test in the general limitation clause and still conforms to internationally accepted standards. Furthermore, the incentive to *forum shop* by placing more weight on those rights receiving greater judicial solicitude has been removed by the uniform test in the 1996 limitation clause.[116]

2.3 "THE ESSENTIAL CONTENT OF THE RIGHT"

The 1993 Constitution contained the provision that the essential content of the right should not be negated during the limitation of the right. The notion of essential content of the right originates from the *Wesengehaltsgarantie* in article 19.2 of the German *Basic Law*.[117]

Giving meaning to the notion of the mysterious essential content of a right has been a problematic exercise not only for South African courts, but also the German courts from which the concept originates.[118] This is no doubt owing to the "essential content" in the German *Basic Law* serving much the same function as the reasonable and justifiable provision in our limitation clause.

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116 Woolman *Out of Order? Out of Balance? The Limitation Clause of the Final Constitution* (1997) 13 *SAJHR* 104.

117 Blaauw-Wolf and Wolf *A comparison between German and South African Limitat Provisions* (1996) 113 *SALJ* 293.

118 De Waal *A comparative analysis of the provisions of German origin in the Interim Rights* (1995) 11 *SAJHR* 25; Basson *South Africa's Interim Constitution: Text and* 51.

It is submitted that the removal of the "essential content" notion from the limitation clause in the 1996 Constitution has cleared up much discussion on an essentially barren notion, the content of which has not yielded much more of an answer than that the term serves a function similar to the Canadian notion of reasonableness.

The phrase "essential content" could well still be in existence in Section 36(1) of the 1996 Constitution in the guise of reference being made to "the nature of the right" in Section 36(1)(a). The *Collins Concise Dictionary*[119] defines "nature" as "fundamental qualities; identity or *essential character*" (my emphasis). One could infer from this that the vexed idea of the "essential content" of the right still exists in a latent form within the "nature of the right" since the "nature" of the right could well be seen to encompass the "essential content" of the right.

Thus, one could argue that the "essential content" of the right is still in existence in section 36(1)(a). It is submitted that admitting the "essential content" surreptitiously into the limitation clause in this manner is preferable to an explicit inclusion of the term (as occurred in the 1993 Constitution); by indirectly including the "essential content" in the guise of "the nature of the right" the court will not be obliged to give specific meaning to the term "essential content", but may still refer to the German notion of the "essential content" as a species of the "nature of the right" should the need ever arise.

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119 Hanks *The Collins Concise Dictionary of the English Language* 756.

CHAPTER 3

3 "DEMOCRACTIC SOCIETY BASED ON HUMAN DIGNITY, EQUALITY AND FREEDOM"

3.1 DEMOCRACY - A COMMON DENOMINATOR TO THIS COMMONLY (AB)USED TERM?

Democracy is probably one of the most misunderstood and abused concepts in history and politics. Incredibly, the United States Army Training Manual No. 2000-25 (1928-1932) states the following concerning "democracy":[120]

> "***Democracy, n.:*** *A government of the masses. Authority derived through mass meeting or any other form of direct expression. Results in mobocracy. Attitude toward property is communistic... negating property rights. Attitude toward law is that the will of the majority shall regulate, whether it is based upon deliberation or governed by passion, prejudice, and impulse, without restraint or regard to consequences. Results in demagogism, license, agitation, discontent, anarchy.*"

120 *Democracy: They probably didn't mean it...* 16/9/97 *Hotbot Search Engine* http://lyre.mit.edu/~powell/sherman/files/demo_quote.html.

One has difficulty reconciling the abovementioned definition of "democracy" with our conventional understanding of the term, particularly considering that the United States army is often viewed as the global champions of democracy. Needless to say, this definition of democracy has since been withdrawn from the United States Army Training Manual. Clearly, the United States now has an opinion of democracy that is more in vogue.

The Soviets of old viewed Western "bourgeois democracy" as a sham and communism as being the only correct form of democracy.[121] Even Hitler represented himself as "democratically" acting on behalf of the German people.[122] During the early half of the twentieth century it became increasingly clear that at the very least, symbolic respect to democracy must be accorded even as a tactic against democracy itself.[123] Indeed, a thread that can be found in all doctrines of democracy is that it is a principle of legitimacy; the term "democracy" has been used to legitimise almost every type of political power arrangement.[124]

It is universally agreed upon that democracy is contrary to autocracy and is derived from the authority of the people.[125] There are two diverging interpretations of the nature of the consent: (1) the consent of the people can be

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121 Hamilton *A Critical Dictionary of Sociology* 109.

122 Hamilton *A Critical Dictionary of Sociology* 109.

123 Laswell and McDougal *Jurisprudence for a Free Society* 1011.

124 Marshall *The Concise Dictionary of Sociology* 112.

125 Sartori *Democracy* (1968) 3 *International Encyclopaedia of Social Sciences* 112.

merely *presumed*; (2) consent must be *verified* through *ad hoc* procedures.[126] The structures and procedures existing in the 1996 Constitution, such as schedule 3 providing for election procedures, are safeguards against a government switching from verified consent to presumed consent. In this way, it is hoped that the value of "democracy" in the Constitution will function not merely to presume the consent of the people, but to verify such consent.

Because a democracy is such a pliable[127] concept and since it is often difficult to infer the legal implications of "democracy" in the context of limiting rights, the judiciary tends only in exceptional cases to view a law passed by a democratically elected legislature as not being reasonable and justifiable.[128]

Many have opted not to use the term at all in that they have found the meaning of "democracy" to be intellectually fruitless owing to its amorphous usage.[129] This course of action is not available to us owing to the usage of the term in both the 1993 Constitution as well as the 1996 limitation clauses. Indeed, the following has been held concerning the meaning of democracy:[130]

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126 Sartori *Democracy* (1968) 3 *International Encyclopaedia of Social Sciences* 112.

127 The notion of "democracy" is so pliable a concept that Judge Van den Heever in *P Minister of the Interior and Another* 1995 2 SA 485 (A) uses "democracy" as simile to convey elasticity of meaning at 493H.

128 Dlamini *Human Rights in Africa: Which Way South Africa?* 37.

129 Marshall *The Concise Dictionary of Sociology* 112; De Jouvenel *On Power: Its N and the History of Its Growth* 237*ff*.

130 *Commissioner of Taxes v C W (PVT) Ltd* 1990 2 SA 245 (ZSC), 265I-266A.

> "*The ambiguous nature of the phrase* [democracy] *causes it to mean different things to different persons. It is, with the passage of time, continually open to a change in perceptions. In short, there is no single immutable standard of what constitutes a democratic society.*"

Appreciating the meaning of "democracy" in the limitation clause is of paramount importance in giving effect to the limitation clause in such a way that the ideal of a democratic society be furthered. Accordingly, lest the term "democracy" be abused purely for ceremonial purposes, as often occurs during changes between regimes, and lest democracy be viewed as a useless term that is nothing more than a principle of legitimacy, an analytical dissection of democracy has been undertaken *infra*.

3.2 STANDARDS OF DEMOCRACY

While democracy is commonly understood in its etymological sense[131] of "power of the people", who exactly constitutes "the people" is somewhat nebulous. Dahl refers to democracies as in fact amounting to poliarchies.[132] Thus, democracy may be seen as as a system based on competitive parties wherein the governing majority respects the rights of minority parties. Woodrow

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131 The word "democracy" etymologises from the Greek word *demos* ("the people") a *krateein* ("to rule").

132 Dahl *A Preface to Democratic Theory* 63*ff*.

Wilson is quoted to have said that democracy is the most difficult system of government:[133]

> "[I]*t is equally obvious that the new states and developing nations cannot pretend to start from the level of achievement at which the Western democracies have arrived. In fact, no democracy would ever have materialised if it had set for itself the avanced goals that a number of modernising states currently claim to be pursuing. In a world-wide perspective, the problem is to minimise arbitrary and tyrannical rule and to maximise a pattern of civility rooted in respect and justice for each man–in short, to achieve a humane polity. Undue haste and ambitious goals are likely to lead to opposite results*".

The word democracy has been used (and abused) over the centuries since its original Greek etymological meaning.[134] In addition to the primary political implication of the term, several other usages of the term have been employed, such as "social democracy" and "economic democracy". Furthermore, various groups within society use the term "democracy" with a particular ideal in mind. The different standards applied to what amounts to democracy has frequently been a source of confusion. When a judge faced with the question of whether to limit a right, invariably the political ideology of the judge pertaining to what democracy ought to be will be underlying his or her decision, thereby effecting

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133 Sartori *Democracy* (1968) 3 *International Encyclopaedia of Social Sciences* 120.

134 Janda, Berry and Goldman *The Challenge of Democracy: Government in America*

a particular standard of democracy.[135] In order to shed light on the multifarious uses of the term "democracy" and how the usage of the term may impact upon the decision of a judge, a discussion on three different standards of democracy will follow.

A *minimal standard* often applied includes all political systems falling short of a blatant dictatorship allowing no independent judiciary, freedom or opposition.[136] In this standard of democracy, the polity amounts to a democracy owing to the political machinery, (such as a representational system of government, fair elections and a competitive party system) rather than the state of society.

Since no political systems are perfectly delineated from the moment of their commencement, this minimal standard, while very low and unspecific, may aptly indicate a political system that is at the onset of entering into a "democratic society", but is still searching for direction to flesh out the details of such a society.[137] As this standard tends to focus much more on procedural aspects of democracy[138] that are not found in the bill of rights[139] rather than the substantive policy orientated aspects of democracy that are more commonly based on the Bill of Rights, the values in the limitation clause (that relates only

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135 Janda, Berry and Goldman *The Challenge of Democracy: Government in America*

136 Sartori *Democracy* (1968) 3 *International Encyclopaedia of Social Sciences* 118.

137 Sartori *Democracy* (1968) 3 *International Encyclopaedia of Social Sciences* 113.

138 Janda, Berry and Goldman *The Challenge of Democracy: Government in America*

139 Section 36(1) of the 1996 Constitution clearly pertains only to "[t]he rights in the Rights" and not the rest of the Constitution.

to the Bill of Rights) are clearly not germane to the enforcement of this standard of democracy. It is, however, worthy of incidental note that the values that flavour the limitation clause, in particular the values of "equality", "freedom" and "an open and democractic society", are of significance in maintaining the procedural aspects of democracy.

In addition to representative institutions, the existence of a constitutional state is also used as an indicator of democracy. Political freedom, impartial justice and personal security provided by a constitutional government is what is commonly referred to as democracy.[140] It is in this sense that a *medium standard* of democracy may be understood. It is submitted that a medium standard of democracy is currently applicable in South Africa.

In Scandinavian and Anglo-American countries, an *advanced standard* of democracy exists, the concept of democracy indicating more than mere political machinery - a maximisation of status and opportunities has been effected in the form of what is often referred to as "social democracies" or "economic democracies".[141]

140 Sartori *Democracy* (1968) 3 *International Encyclopaedia of Social Sciences* 118.

141 Sartori *Democracy* (1968) 3 *International Encyclopaedia of Social Sciences* 117.

A social democracy is a state in which society itself is democratized, in particular in relation to treating all people *equally* and with *respect*.[142] In this way a levelling of status differences is effected through a social democracy.

The history of the pre-constitutional Apartheid regime is such that equality and dignity was not accorded to the majority of the country. That the right to *dignity* and *equality* are specifically mentioned in the limitation and interpretation clauses is a strong *indicium* of the desire of the drafters of the 1996 Constitution to build a social democracy.

In *Segale v Government of Bophuthatswana and Others*,[143] Waddington J *et* Khumalo J quoted two definitions of democracy. It was held that the two definitions were similar, yet the former definition refers *inter alia* to a social democracy (at 244E-F) and the latter definition makes no such reference to a social democracy (at 244F-G). For a social democracy to be implemented, it would be very useful for the judiciary to recognise the definition of a social democracy. Recognising that South Africa is a *social* democracy, that gives heightened value to dignity and equality, can be of great significance in determining whether to limit rights.

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142 Janda, Berry and Goldman *The Challenge of Democracy: Government in America* Sartori *Democracy* (1968) 3 *International Encyclopaedia of Social Sciences* 113. term "social democracy" is quite distinct from the term "socialist democracy", the referring to enforcing a state policy on society.

143 1987 3 SA 237 (B).

In *Prinsloo v Van der Linde and Another*,[144] the court addressed the issue of unfair discrimination on the basis of a denial of the recognition of *equal human dignity*. Even though the Constitutional Court did not use the term "social democracy" *per se*, the use of "human dignity" in an unfair discrimination matter, which is traditionally viewed in relation to the right to equality, is an indication that the Constitutional Court is in fact using the standard of a social democracy.

Whereas social democracies are primarily concerned with the equalisation of status, the goal of economic democracies is the equalisation of wealth.[145] However, an economic democracy presupposes a political democracy before the redistribution of wealth and equal economic opportunities may be promoted.[146]

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144 1997 3 SA 1012 (CC), 1026D-F.

145 Janda, Berry and Goldman *The Challenge of Democracy: Government in America* Sartori *Democracy* (1968) 3 *International Encyclopaedia of Social Sciences* 113*f*

146 Sartori *Democracy* (1968) 3 *International Encyclopaedia of Social Sciences* 114. Marxist sense of "economic democracy", however, does not presuppose the existence of a political democracy - an economic democracy is rather seen t replace the political democracy, which is seen as nothing more than a superstructure of capitalist oppression and an instrument of the bourgeois. B "political democracies" are viewed by Marxists to be little more than "capit democracies", political democracies are seen to have no value in themselves aforementioned Marxist usage of the term "economic democracy" suffers th criticism that once the political dimension of democracy is eradicated, one i pressed to see what is left to characterise the polity as a democracy. The ter "economic democracy", as used by Marxists, is an oppositional concept that juxtaposed with "capitalist democracy"; in truth, however, Marxists confuse capitalist *democracy* with capitalist *economy*. Clearly two fallacious assump exist: democracy refers only to an economic system and that politics may be dislodged from politics.

In a country with a vast disparity in wealth, such as South Africa, the value of "equality" may be used to justify a decision involving a redistribution of wealth.[147] That "equality"is mentioned in close proximity to "democracy" in section 36(1) of the 1996 Constitution could help justify a decision in which the question of the limitation of rights with regard to the redistribution of wealth is in issue.

Using the standard of an economic democracy, there can be no equalisation of wealth unless the country itself is wealthy.[148] Thus, it would appear that economic growth is a condition not for the establishment of a democracy, but is rather a condition for the *growth* towards this advanced standard of democracy.

In deciding cases, in which rights may be limited, it is submitted that consideration should be given to the economic implications for democracy. However, it should be borne in mind that court orders may have onerous repercussions on the finances of the state since an economic democracy involves the redistribution of wealth. It is submitted that South Africa is not currently economically wealthy enough to qualify for the status of an economic democracy and is rather a social democracy.

There is a distinct practical difference between the aforementioned *minimal*, *medium* and *advanced* standards. One should guard against manipulation of the

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147 Janda, Berry and Goldman *The Challenge of Democracy: Government in America*

148 Sartori *Democracy* (1968) 3 *International Encyclopaedia of Social Sciences* 118.

standard being applied resulting in a country being classified as "democratic" or "undemocratic".

Little is known of the *conditions* that are required for a democracy to exist; such conditions are subject to much academic and public debate.[149] It has been said that[150]

> "*the kind of soil that favours democracy is the soil that has been cultivated*".

When examining conditions for democracy, one is often confronted with such circular arguments.[151] It is difficult to speak of conditions that are necessary or sufficient for a democracy; it is rather more constructive to refer to conditions that *facilitate* democracy.

Human rights and democracy often appear as two sides of the same coin.[152] Despite "democracy" not being synonymous with "human rights", the two terms do seem inextricably linked in that they would appear to presuppose each other. The nature of rights in international human rights instruments is such that it is

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149 Marshall *The Concise Dictionary of Sociology* 113; Sartori *Democracy* (1968) 3 *International Encyclopaedia of Social Sciences* 118.

150 Sartori *Democracy* (1968) 3 *International Encyclopaedia of Social Sciences* 119.

151 Sartori *Democracy* (1968) 3 *International Encyclopaedia of Social Sciences* 118.

152 Rosas and Helgesen *Human Rights in a Changing East-West Perspective* 17.

difficult to see how human rights, such as the right to vote and freedom of association, can exist in a society other than a democracy.[153]

The conditions of an advanced democracy should be viewed as the outcome rather than the antecedents of democracy. The crucial question is "What conditions are required for the purpose of a *particular standard* of democracy to be effected in the process of constitutionally limiting a right?". Clearly, no single factor will determine whether a system is democratic or not.[154] Rather, it would appear that there are a number of factors occurring closely together with a historical dimension that can be regarded as a *progression* taking into account the order of their succession as well as their timing that are commonly found in democracies.

While the legislature may create statutes that are intended to build a democracy, contravention of such "democratic laws" is dealt with by the government in the courts. It is in the courts that the adherence to a particular standard of "democracy" is decided upon. The crux of the decision is very often how the limitation clause is to be used in order to effect a particular standard of democracy.

It would appear that particular objective factors are less significant than (1) capable and effective leadership; and (2) regulation of the demands placed on the political system. A sudden demand being placed on a government incapable

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153 Rosas and Helgesen *Human Rights in a Changing East-West Perspective* 17.

154 Sartori *Democracy* (1968) 3 *International Encyclopaedia of Social Sciences* 119.

of meeting such expectation is likely to throw a political system, especially a democracy, off balance.[155]

It is submitted that, even though the 1996 Constitution is the most advanced constitution in the world, the courts should enforce a particular standard of democracy at a time when the country is capable of sustaining such a standard of democracy. For example, when using the limitation clause to consider the extent of the constitutional rights of a criminal, the judiciary should consider whether the political system is capable of regulating the demands that would be placed upon it by effecting a particular standard of democracy during the limitation of the right in question. Similarly, the South African judiciary should be apprehensive about using the limitation clause to limit rights in such a way that an advanced standard of democracy, such as an economic democracy, is promoted before the South African economy is capable of sustaining such a standard of democracy.

With the inception of the 1993 Constitution, the onus in bail applications shifted to the state to show why the accused should not be granted bail.[156] This particular standard of democracy, despite being referred to in the Constitution was not sustainable by the state. For this reason, bail legislation has been

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155 Gandhi *Law and Social Change* 26; Sartori *Democracy* (1968) 3 *International Encyclopaedia of Social Sciences* 119.

156 Sectoin 25(2)(d) of the *Constitution of the Republic of South Africa Act* 200 of 19

implemented shifting the onus onto the accused to show why bail should be granted for particular serious offences.[157]

3.3 MONISM, PLURALISM AND DEMOCRACY

Monism refers to a group of views in metaphysics in some way stressing the onenes of reality.[158] Plato formulated a monistic hypothesis, the substance of which is that the stability of a constitution is contingent upon moulding a suitable form of personality.[159] Plato thought that a stable public order would result in uniform types of personality in harmony with the prevailing regime; conversely, the emergence of a new type of personality would eventually result in the modification of the government.

A strict monist view of society rejects the existence of individuality and quirkiness within society and is opposed to pluralism, which is a view that often arises out of an instinctive rejection of monism. Pluralism sees the world as having an essential disconnectedness that enables change and free will.[160]

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157 *Criminal Procedure Act Second Amendment Act* 85 of 1997.

158 Hall *Monism and Pluralism* (1972) 5 *The Encyclopaedia of Philosophy* 363.

159 Laswell and McDougal *Jurisprudence for a Free Society* 685.

160 Hall *Monism and Pluralism* (1972) 5 *The Encyclopaedia of Philosophy* 364.

A plural society is a society composed of a diversity of communities.[161] Nation states and confederacies consisting of distinct social groups in particular are commonly referred to as "plural societies".[162] The number of official languages in the 1996 Constitution is indicative of a plural society,[163] although this by no means indicates all the groups within our plural society.

Inherent in the notion of pluralism is both the idea that society comprises of a diversity of independently organised cultural, religious, economic, professional and educational associations as well as the idea that individuals join these private associations out of their free will.[164] A society is morally (as opposed to culturally, ethnically or organisationally) pluralistic if it includes moral views that have a comprehensive scope that is incompatible in at least certain of the material viewpoints.[165] In spite of political theories prophesising the end of ideology as a result of political and social modernisation, modern democracies have remained pluralistic.[166] Political consensus is not discordant with

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161 Mitchell *A New Dictionary of Sociology* 132.

162 Mitchell *A New Dictionary of Sociology* 132.

163 Section 6(1) of Act 108 of 1996 provides as follows:
"*The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.*"

164 *Strengthening Democracy Abroad: The Role of the National Endowment for Dem* 18/09/97 *Altavista Search Engine* http://www.ned.org/page_6/nedstml.html#demo Karriel *Pluralism* (1979) 12 *International Encyclopaedia of Social Sciences* 164.

165 Cohen *Pluralism and Proceduralism* 16/09/97 *Altavista Search Engine* http://ww polisci.mit.edu/Projects/drafts/josh/pluralismandproc.html.

166 Cohen *Pluralism and Proceduralism* 16/09/97 *Altavista Search Engine* http://ww polisci.mit.edu/Projects/drafts/josh/pluralismandproc.html.

pluralism, but is rather concordant with the view that democratic procedures are appropriate for resolving disagreements.

Despite formal constitutional mechanisms, such as representative elections, democracy in the sense of an opportunity to influence government decision making is influenced by the plurality of voluntary associations, that are independent of state control, within civil society.[167] The state is constrained from degenerating into a tyranical majoritarian democracy as a result of the influence of the sentiments of these established competing bodies of citizens.[168]

Judge Farlam held in *Ryland v Edros*[169] that

> "*the values of equality and tolerance of diversity and the recognition of the plural nature of our society are among the values that underlie our Constitution*" (my emphasis).

Thus, the values of a plural society are recognised in the 1996 Constitution, even though a plural society is not expressly provided for in the Constitution. The value of "equality" provided for in the limitation clause strengthens the effect that can be given to the notion of a plural, democratic society.

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167 Hirst *Pluralism* (1997) *The Blackwell Dictionary of Twentieth-Century Social Tho* 472.

168 Hirst *Pluralism* (1997) *The Blackwell Dictionary of Twentieth-Century Social Tho* 472.

169 1997 2 SA 690 (C), 708J.

3.4 HUMAN DIGNITY

Whereas "freedom" and "equality" may contribute toward the procedural aspects of a democracy, such as elections or a multi-party system, dignity is a value that tends to have a more substantive aspect. Hence, reference in the Constitution to "dignity" in the limitation clause would seem to be indicative of a value that pertains much more to the "human" aspect of the democracy - the substantive rights embodied in the Bill of Rights. Human dignity is intertwined with the African concept of *ubuntu*, that has become "a notion with a particular resonance in the building of a democracy".[170] The importation of the phrase "human dignity" into the general limitation clause is a new feature of the limitation clause in the 1996 Constitution. Already prior to the 1996 Constitution, dignity had been accorded much importance by the Constitutional Court. Judge O'Regan has said the following concerning human dignity:[171]

> "*[R]ecognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.*"

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170 *S v Makwanyane and Another* 1995 6 BCLR 665 (CC), 772A-B.

171 *S v Makwanyane and Another* 1995 6 BCLR 665 (CC), 778C-D.

In South Africa, our history of violations of human dignity and equality has resulted in the right to dignity being imported into the limitation clause of the 1996 Constitution.[172]

There are two aspects to dignity that are often attributed to human beings.[173] First, human beings may *express* dignity. This refers to the way one is *outwardly* perceived or conducts oneself, such as speaking with dignity or one's position in a social hierarchy.

Second, human beings are often also said to *have* dignity. This refers more to a moral characteristic that *inheres* within human beings and is independent of the way one is outwardly perceived or conducts oneself. The conception of ıman dignity by Immanuel Kant (1724-1804), an influential proponent of this ɔtion of dignity is as follows:[174]

> "*[A]ll things have either a price or a dignity. In short, Kant claims that when things have a price, there is something for which it would be morally acceptable to trade them. By contrast, a human being has dignity, and there is nothing else—neither power, nor pleasure, nor good consequence for all society—for which it is morally acceptable to exchange any human being*".

172 Nel and Bezuidenhout *Policing and Human Rights* 70.

173 Meyer *Dignity* (1992) 1 *Encyclopaedia of Ethics* 262.

174 Meyer *Dignity* (1992) 1 *Encyclopaedia of Ethics* 263.

Examination of the difference between the 1993[175] and 1996[176] constitutional provisions for the right to dignity reveals only one significant change - the qualification of dignity with the word "inherent". This is a clear indication that the right to dignity is to be understood in the second of the abovementioned two aspects of dignity.

Where no express mention is made of the right to dignity, in several democracies, such as India, Canada and the United States, the existence of dignity has very often been extrapolated from other enunciated rights or the justification for such rights, for example privacy, equality, the prohibition against cruel and inhuman punishment, and so forth.[177] Even in countries where dignity is expressly provided for, such as article 1 of the German Basic Law, the meaning of dignity eludes precise definition and is accorded a broad moral purpose by German commentators, serving the function of conveying the values and purpose underlying the entire Constitution - the individual should not be treated merely as an object in considering the relationship between the individual, who is dependent on the community, and the community, that has a commitment to the individual.[178]

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175 Section 10 of Act 200 of 1993 provides for the right to dignity as follows: "*Every person shall have the right to respect for and protection of his or her dignity.*"

176 Section 10 of Act 108 of 1996 provides for the right to dignity as follows: "*Everyone has inherent dignity and the right to have their dignity respected and protected.*"

177 Davis *et al Fundamental Rights in the Constitution: Commentary and Cases* 71.

178 Davis *et al Fundamental Rights in the Constitution: Commentary and Cases* 73.

Laswell and McDougal devote a vast portion of their book *Jurisprudence for a Free Society* to what is revealed only on page 740 as none other than "human dignity".[179] Human dignity is defined abstractly as "shared power, enlightenment, wealth, well-being, skill, affection, respect and rectitude".[180] This broad definition shows the wide potential implications of human dignity as a vehicle for analysing society.[181]

The addition of dignity to the limitation clause is a very salutary development in the 1996 Constitution in that dignity is very sensitive to the morality of law. Where law and morality part, dignity is more often than not detrimentally affected. Human dignity is a commendable addition to the freedom and equality values and is likely to supported by the libertarians and egalitarians respectively. The addition of dignity to section 36(1) could well lead to more humane limitation of rights by serving to[182]

> *"give meaning and texture to the principles of our society based on freedom and equality".*

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179 Laswell and McDougal *Jurisprudence for a Free Society* 740.

180 Laswell and McDougal *Jurisprudence for a Free Society* 740.

181 Laswell and McDougal *Jurisprudence for a Free Society* 30-740 *lata*, especially p and 740.

182 *S v Makwanyane and Another* 1995 6 BCLR 665 (CC), 772C-D.

CHAPTER 4

4 "OPEN SOCIETY" AND CHANGE

4.1 THE ORIGINS OF THE "OPEN SOCIETY"

Whereas difficulty is often experienced in defining what amounts to a "democratic society", not to mention what a democratic society finds "reasonable and justifiable",[183] the relatively recent term "open society" has a much more well delineated meaning. The term, despite reference often being made in passing, is rarely considered directly.[184]

The distinction between open and closed societies has gained popularity since the advent of totalitarian democracies. Though such terms have not yet permeated down into the vocabulary of lay persons, these terms enjoy increasingly frequent usage among politicians and writers.[185] Popular support for the state does exist in totalitarian democracies; however, such support is orchestrated through controlled elections, indoctrination and manipulation of

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183 Dlamini *Human Rights in Africa: Which Way South Africa?* 37.

184 For example, under the subheading "'Justifiable in an open and democratic society'" (at 659G) in *Coetzee v Government of the Republic of South Africa* SA 631 (CC), other than repeating the term "open and democratic society", there discussion concerning what amounts to an open society.

185 Watkins *Open Society* (1997) *The Blackwell Dictionary of Twentieth-Century Soc Thought* 430; Mitchell *A New Dictionary of Sociology* 207.

select information through the media and educational institutions.[186] In addition to totalitarian societies, societies that *resist change* are also referred to as "closed societies".

It was in juxtaposition to such societies that the notion of an "open society" first gained currency.[187] The introduction of the terms "open society" and "closed society" are often erroneously attributed[188] to the Austrian philosopher and methodologist of natural and social science, Karl Raimund Popper, who did in fact expand on the notion of an "open society" in his book *The Open Society and its Enemies* (1945).

Judge Ackermann in *Ferreira v Levin and Others; Vryenhoek and Others v Powell NO and Others*[189] refers to Karl Popper's book, *The Open Society and its Enemies*. At paragraph 50 he indicates in particular the relationship between the value of "freedom" and the "open society" in which minimal limitations are placed on the individual by the State. It is submitted the existence of not only the value of freedom, but also the value of an open society in the limitation clause, is fitting for enforcing the ideal of an open society.

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186 Mitchell *A New Dictionary of Sociology* 207.

187 Mitchell *A New Dictionary of Sociology* 207.

188 For example, Gordon Marshall in the *Concise Oxford Dictionary of Sociology* ma error at 367. These terms were in fact introduced by Henri Bergson in 1932. Popp however, did vastly increase the *popularity* of such terms.

189 1996 1 SA 984 (CC), 1014.

Being concerned with history and social theory, Popper aimed at refuting the belief that history is determined by a discoverable law.[190] Science and history are seen by Popper to be neither predictable nor static.[191] Historicist theories are viewed by Popper to always be at the heart of totalitarian regimes.[192]

Popper uses the social theory underlying the open society in a formidable attack on historicism.[193] The view that the laws of history were predictable was viewed by Popper to be lacking in scientific basis as well as being politically precarious; cruel, authoritarian regimes which would prevent individuals rising according to merit was the result in such "closed societies".[194] They were referred to as "closed societies" because such societies are closed to the normal mechanisms of change.

At the heart of open societies are individuals engaging in creative and innovative activities.[195] Attention is placed on new ideas in open societies with no particular religion or ideology being propounded and the government having no ultimate aims.[196] To the principle that all opinions should be tolerated,

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190 Quinton *Popper, Karl R* (1979) 18 *International Encyclopaedia of Social Sciences*

191 Marshall *The Concise Dictionary of Sociology* 367.

192 Quinton *Popper, Karl R* (1979) 18 *International Encyclopaedia of Social Sciences*

193 See Karl Popper's book *The Poverty of Historicism* (1957) *lata.*

194 Bullock and Stallybrass *The Fontana Dictionary of Modern Thought* 608.

195 Marshall *The Concise Dictionary of Sociology* 368.

196 Bothamley *Dictionary of Theories* 386; Watkins *Open Society* (1997) *The Blackw Dictionary of Twentieth-Century Social Thought* 430.

Popper adds an interesting rider: tolerate all that does not seek to destroy tolerance.[197]

Henri Bergson, who coined the term "open society", valued individual spontaneity and intuition rather than religious convictions and authoritarian standards as prerequisites for the founding of an open society.[198] For Popper, it was the unrestrained exercise of critical reason that is the quintessence of an open society.[199] Life, according to Popper, in an open society could well be arduous and individuals could well suffer from "the strain of civilisation".[200] It is quite conceivable that people in an open society might not necessarily be happier than in a closed society; some people might prefer the blissful ignorance of being told what to think in a closed society rather than having to wield individual thought. Both Popper and Bergson agree that closed societies are natural occurrences, whereas open societies require a struggle before being established because *inter alia* one will have to recognise that social institutions are nothing more than the conventions of human beings - an idea that was rather revolutionary at the time.[201]

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197 Quinton *Popper, Karl R* (1979) 18 *International Encyclopaedia of Social Sciences*

198 Watkins *Open Society* (1997) *The Blackwell Dictionary of Twentieth-Century Soc Thought* 431.

199 Watkins *Open Society* (1997) *The Blackwell Dictionary of Twentieth-Century Soc Thought* 431.

200 Watkins *Open Society* (1997) *The Blackwell Dictionary of Twentieth-Century Soc Thought* 431.

201 Watkins *Open Society* (1997) *The Blackwell Dictionary of Twentieth-Century Soc Thought* 431.

Rulers in open societies who fail to respond to justified criticism concerning their decisions should be removable.[202] A critical concern of politics, according to Popper, should be *not* who should rule, but rather how to design systems whereby bad rulers can be removed as easily as possible causing as little harm as possible.[203] Judge Mahomed held in *Shabalala & Others v Attorney-General of Transvaal & Another*[204] that our current culture of "an open and democratic society" should be premised *inter alia* on accountability.

Therefore, clearly justification and accountability are pivotal in an open society, such as South Africa. Executive or legislative actions may well be challenged by means of judicial review. While the autonomy of the judiciary is no doubt an important consideration, it is submitted that it is in harmony with the tenor of an open society that the limitation clause requires that limitations be "justifiable". As has been alluded to *supra*, the Constitutional Court has not always been clear in justifying its decisions.[205] It is submitted that a greater degree of justification for Constitutional Court decisions, from which there is no appeal, is required in the open society into which South Africa is emerging.

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202 Marshall *The Concise Dictionary of Sociology* 368.

203 Quinton *Popper, Karl R* (1979) 18 *International Encyclopaedia of Social Sciences*

204 1996 1 SA 725 (CC), 740F.

205 See for example *S v Zuma and Others* 1995 2 SA 642 (CC), 660F-G; *Case and Another v Minister of Safety and Security and others; Curtis v Minister of S and Security and others* 1996 5 BCLR 609 (CC), 647F-G; *S v Ntuli* 1996 1 141 (CC), 152C-D.

4.2 SOCIAL DEVELOPMENT IN AN OPEN SOCIETY

The terms "social engineering" has over the years evoked multifarious reactions within the judiciary. During the mid 1980's "social engineering" had the rather sinister connotation of the enforced removal of people in order to perpetuate racial segregation under the Apartheid regime.[206] Since then, social engineering has lost much of this rather sinister connotation.

Judge Friedman held in *Nyamakazi v President of Bophuthatswana*[207] that he could not accept the position that judges "should, in fact, indulge in social engineering". Three years later in *Baloro and Others v University of Bophuthatswana and Others*,[208] the same judge held that, in order to promote the values which underlie an "open and democratic society based on freedom and equality",[209] judges

> "*are cast in the additional role of social engineers, socal and legal philosophers*".

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206 *More v Minister of Co-operation and Development* 1986 1 SA 102 (A), 113

207 1992 4 SA 540 (BG), 561E-F.

208 1995 4 SA 197 (BOP), 244B.

209 These values are found in the constitutional provisions for both the interpret and limitation of rights.

Ironically, Judge Friedman points out the reluctance of judges "to assume this role".[210] The Constitution does not operate mechanically; rather it must be administered and applied in accordance with the aims and spirit of the Constitution "in the quest to change South African society".[211]

Judge Mokgoro held in *S v Makwanyane and Another*[212] that the Constitution makes it imperative for the Courts "to develop the entrenched fundamental rights" in terms of a "cohesive set of values, ideal to an open and democratic society". Therefore, the judicary clearly has a role "to develop" society by means of social engineering in terms of values that exist in the limitation clause. Accordingly, the nature of what "social engineering" in an open and democratic society entails and the degree of "social engineering" required is worthy of further consideration.

The less grand the aim of a legal rule is, the more prepared for development the prevailing social processes are likely to be and therefore, the greater the likelihood of success.[213] Such ambitious rules, that often occur in closed societies are often complex and sophisticated to such an extent that they run the serious risk of becoming completely incomprehensible or inapplicable. Such legislation is often characterised by the arrogance of the enlightened elite

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210 1995 4 SA 197 (BOP), 244B-C.

211 1995 4 SA 197 (BOP), 244D.

212 1995 6 BCLR 665 (CC), 769C-D.

213 Gandhi *Law and Social Change* 38.

against the rude *plebs miser* and tends to treat society from only one perspective.[214]

Social development in open societies occurs in a gradualistic piecemeal manner.[215] This is in contradistinction to closed societies that enforce and monitor large scale social engineering, which often produces unforeseen consequences. That social engineering is piecemeal does not mean that large scale changes are beyond reach. On the contrary, piecemeal changes allow for critical constructive surveillance and revision thereby preventing a multiplicity of unintended results; such unforeseen repercussions occur more regularly in closed societies employing unwieldy large scale social engineering.[216]

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214 Gandhi *Law and Social Change* 38.

215 Quinton *Popper, Karl R* (1979) 18 *International Encyclopaedia of Social Sciences* Marshall *The Concise Dictionary of Sociology* 368. Karl Popper championed the principle methodological individualism against the horrors of a "planned society" rather advocated piecemeal social engineering.

216 Quinton *Popper, Karl R* (1979) 18 *International Encyclopaedia of Social Sciences* One of the more horrid contemporary examples of large scale social engineering unintended results in a closed society is China's policy with regard to containing i population explosion - a laudable goal. The Chinese government attempted to limi number of children allowed to couples to one child per couple by imposing crimin sanctions. The totalitarian government, however, failed to take into consideration t effect of the Chinese dowry system. Because parents had to pay a vast dowry for a daughter to get married, daughters were viewed as liabilities. Conversely, sons we viewed as assets. Therefore, parents often killed their daughters (who were financi burdens to the parents) at birth in the hope of the next child being a son (an asset t parents). This resulted in the unforeseen result that China now has too few female satisfy Chinese men. Thus, gang rape has risen to alarming proportions in China. forecasts predict that in the next generation the population of China is now at risk detrimental decline!

One view of the function of the judiciary is that the judiciary exists merely to ensure that the "rules of the game" as provided in the bill of rights are adhered to by the state.[217] Even though judicial policy making may simplistically be viewed in such a way, the Constitution may be used as an organic document to re-evaluate the implications of controversial political issues in light of the prevailing socio-political conditions.[218]

The bill of rights, being part of the Constitution, is intimately bound up with politics. Though the political consequences of applying the bill of rights may be extensive, the bill of rights is not linked to any party.[219] Constitutional interpretation is often not exact, but is often rather a question of making political choices.[220]

The chief obstacle in evaluating law as an instrument for directed social change arises because legislation is *not* the only policy instrument available for effecting social change.[221] Thus, paying exclusive attention to law as an instrument of social change will result in tunnel vision.[222] However, since the judiciary may limit rights only in accordance with *inter alia* an open society, it is submitted that the judiciary has a clear constitutional role to perform

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217 Kruger and Currin *Interpreting a Bill of Rights* 21.

218 Kruger and Currin *Interpreting a Bill of Rights* 21.

219 Kruger and Currin *Interpreting a Bill of Rights* 20.

220 Sarkin *The Political Role of the South African Constitutional Court* (1997) 114 *S* 137.

221 Nagel *Law and Social Change* 76.

222 Nagel *Law and Social Change* 76.

piecemeal social development. The existence of the concept of an "open society" in the limitation clause is a clear indication that legislation that aims at effecting sweeping social changes on a grand scale, should be less easily permitted to be the vehicle for constitutional limitations than piecemeal social changes.

4.3 CONFLICT AND CONCILIATION IN OPEN AND CLOSED SOCIETIES

Law normally only becomes a significant event in the lives of private individuals when conflict arises. Judge Mokgoro in *S v Makwanyane and Another* held that the spirit of *ubuntu* (generally translated as "humaneness"), that is entwined in the notion of human dignity, "marks a shift from confrontation to conciliation".[223] Inherent in the limitation of rights is conflict. The difference in impact of conflict in both open and closed societies will be discussed *infra*.

In plural societies, as has been alluded to previously, individuals are free to have multiple affiliations depending on the interest of the particular individual and form new interest groups as new needs arise.[224] In open pluralistic societies, paradoxical as it may sound, *conflict* that aims at resolving the societal tension

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223 1995 6 BCLR 665 (CC), 772B.

224 Janda, Berry and Goldman *The Challenge of Democracy: Government in America*

produces a stabilising function establishing unity. A plurality of associations will inevitably result in individuals who are antagonists in a particular conflict being allies in another conflict. This will no doubt result in the intensity of any single conflict not being vastly volatile; it is difficult to hate your antagonist when he is your ally on another front.[225] Thus, the overall conflicts are balanced by the segmented participation in a plurality of institutions by individuals.

In societies with closed groups, because the parties are more likely to become personally involved, the repercussions of conflict are likely to be much more explosive. Indeed, it has been said that[226]

> *"[c]losed groups tend to absorb the total personality of their members; they are jealous of members' affiliation with other groups and desire to monopolise their loyalty. The resultant deep involvement of the members and the intimate association among them is likely to lead to a great deal of hostility and ambivalence, a hostility, however, to which the group denies legitimate outlets."*

Acute, incessant conflicts that polarise people are likely to militate against the development of democratic institutions and may well render developing rights and liberties meaningless.[227] Subcultural conflicts in closed societies are often so intense, non-rational and deeply rooted that they may create a very real

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225 Coser *Popper, Karl R* (1979) 3 *International Encyclopaedia of Social Sciences* 23

226 Coser *Popper, Karl R* (1979) 3 *International Encyclopaedia of Social Sciences* 23

227 Eide and Hagtvet *Human Rights in Perspective: A Global Assessment* 241.

obstacle rendering the democratic settlement of conflict an unsuccessful option.[228]

It should be noted that the intensity of conflict resulting from the rigid structures and closed groups should not necessarily be equated with a increased degree of violence.[229] Whereas intensity refers to the degree of involvement of the participants, violence pertains to the *method* chosen to carry out the conflict. Conflicting parties who have other common affiliations are less likely to choose violence as an option lest their common bonds be severed. It must be borne in mind that even though interest groups often form as a matter of course in response to a particular disturbance, a lack of good leadership may result in the failure of the formation of interest groups.[230] Therefore, conflict with organised leadership need not be destructive and may in fact strengthen interpersonal relationships.[231] Where an institutionalised outlet is provided for conflict, such as strikes, violence is much less likely to occur.

Judge Kriegler held in *Fose v Minister of Safety and Security* that a rights violator causes[232]

> "*a harm to the society as a whole, even when the direct implications of the violation are highly parochial*".

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228 Eide and Hagtvet *Human Rights in Perspective: A Global Assessment* 241-242.

229 Coser *Popper, Karl R* (1979) 3 *International Encyclopaedia of Social Sciences* 23

230 Janda, Berry and Goldman *The Challenge of Democracy: Government in America*

231 Coser *Popper, Karl R* (1979) 3 *International Encyclopaedia of Social Sciences* 23

232 1997 3 SA 786 (CC), 835E.

By "violating the Constitution", the rights violator "impedes the fuller realisation of our constitutional promise".[233] It is submitted that the limitation clause, that contains values of "human dignity, freedom and equality", may be used as a vehicle to effect constitutional limitations thereby resolving conflict within an open, pluralist society.

4.4 THE FIVE FACTORS IN SECTION 36(1) AND THEIR FUNCTION WITHIN AN OPEN SOCIETY

Contained in the term "reasonable" is the notion of proportionality.[234] In its most general sense, proportionality functions to effect reasonableness, fairness and good administration.[235]

Proportionality is by no means a concept given birth to by South African law.[236] In addition to being used in Canada, proportionality has been used during the

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233 *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC), 835F.

234 Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* Plessis *The genesis of the provisions concerned with the application and interpret the chapter on fundamental rights in South Africa's transitional constitution* (199 720; Van Wyk *et al Rights and Constitutionalism* 649.

235 Blaauw-Wolf and Wolf *A comparison between German and South African Limitat Provisions* (1996) 113 *SALJ* 289.

236 De Ville *Interpretation of the general limitation clause in the chapter on fundame rights* (1994) *SAPL* 304; Nel and Bezuidenhout *Policing and Human Rights* 112.

process of limiting rights in Germany[237] and the European Court of Human Rights[238] as well. Proportionality also inheres in the various levels of scrutiny applied in the United States.[239]

Both the Supreme Court and the Constitutional Court have endorsed the principles of proportionality under the 1993 Constitution, despite no direct reference thereto in section 33(1).[240] Unlike section 33(1) of the 1993 Constitution, section 36(1) refers directly to factors used in determining proportionality, the origin of which can be traced back to the judgement of Judge Chaskalson in *S v Makwanyane and Another*.[241] Having stated that proportionality calls for the balancing of different interests, the court in *S v Makwanyane and Another*[242] states that

> *"the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly*

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237 Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany*

238 Sieghart *The International Law of Human Rights* 94.

239 Tribe *American Constitutional Law* 1454-1465, 1590-1593, 1610-1613 *lata.*

240 *S v Makwanyane and Another* 1995 6 BCLR 665 (CC), 708E; *Phato v Attorney G Eastern Cape and Another* 1995 1 SA 799 (E), 833C-E; *Jeeva and Others v Recei Revenue, Port Elizabeth and Others* 1995 2 SA 433 (SE), 454H-J.

241 1995 6 BCLR 665 (CC); *In Re: Certification of the Constitution of the Republ South Africa, 1996* 1996 10 BCLR 1253 (CC), 1294A.

242 1995 6 BCLR 665 (CC), 708E-F.

where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question".

From the quoted excerpt above, one can discern the five factors listed in section 36(1)(a)-(e). The five factors listed in section 36(1), unlike the crisply formulated *test* for proportionality formulated in *R v Oakes*,[243] are merely *factors* to be taken into account,[244] the perfect fulfillment of which is not required. Paragraphs (a)-(e) of section 36(1) will nevertheless be discussed below with allusion to Canadian law owing to certain conceptual similarities. The actual test in section 36(1) is formulated in the wording that precedes the five factors that are listed; such factors must be considered in the light of the main test. Although the precise weight to be attached to the five factors in section 36(1) have not been spelled out, by virtue of the fact that such factors *must* be "taken into account", the reasonableness and justifiability requirements are likely to be promoted.[245]

Section 36(1) provides that one should take into account "all relevant factors, including–" (my emphasis). Thus, paragraphs (a) - (e) in the limitation clause do

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243 [1986] 26 DLR (4th) 200, 227. Hogg in his book *Constitutional Law of Canada* summarises the criteria to be satisfied for a reasonable limitation as follow: (i) the objective must be sufficiently important to justify limiting a charter right; (ii) ther be a rational connection between the limitation and the objective; (iii) the law mus impair the right "as little as possible"; (iv) the limitation must not have a disproportionately severe effect on the individual.

244 Davis *et al Fundamental Rights in the Constitution: Commentary and Cases* 318.

245 Rautenbach and Malherbe *Constitutional Law* 313.

not form a *numerus clausus*. Those factors listed in section 36(1) are only some of the considerations to be taken into account. A discussion of the factors in paragraphs (a)-(e) of section 36(1) follows.

4.4.1 THE NATURE OF THE RIGHT

It is only fitting that the nature of the right be the first consideration for the following reasons. First, the location of the limitation clause is in the Bill of Rights and therefore rights rather than limitations should be the primary consideration. Second, the other factors listed in paragraphs (b)-(e) all pertain to the limitation, which lends to ease of juxtaposing the right in paragraph (a) and the factors pertaining to the limitation in paragraphs (b) to (e).

The 1996 Constitution does not contain the additional test of necessity, which was found in section 33(1) of the 1993 Constitution. Omitting to mention the additional requirement of necessity could result in a very weak test.[246] However, the omission of the necessity test does not preclude stricter tests for the limitation of rights being developed by the judiciary.[247] Therefore, in spite of the

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246 Woolman *Out of Order? Out of Balance? The Limitation Clause of the Final Constitution* (1997) 13 *SAJHR* 105.

247 Rautenbach and Malherbe *Constitutional Law* 314.

absence of the necessity test, the door is still wide open for an enquiry into the nature of the right to pave the way for differential scrutiny analysis.[248]

4.4.2 THE IMPORTANCE OF THE PURPOSE OF THE LIMITATION

When a right is limited, a lawful public interest must be protected or promoted.[249] In this way, despite the fact that the rights of an individual have been limited, it is done in the pursuit of the advancement of an "open and democratic society". The importance of the purpose of the limitation would be influenced by "pressing and substantial" concerns, rather than concerns that are merely trivial.[250]

Important collective goals would be another consideration that would strongly influence the court in finding that a limitation is unconstitutional. However, it should be noted that should the legislation be sweeping and all-encompassing to the extent that it is almost draconian, a judge could well find that such legislation is incompatible with the tenor of an open society and accordingly refuse to limit the right in question.

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248 Davis *et al Fundamental Rights in the Constitution: Commentary and Cases* 319.

249 Rautenbach and Malherbe *Constitutional Law* 315.

250 Hogg *Constitutional Law of Canada* 870.

4.4.3 THE NATURE AND EXTENT OF THE LIMITATION

The interest protected by the impugned right, that must be considered in terms of section 36(1)(a) of the 1996 Constitution, must be weighed against the nature of the limitation and degree that the limitation impacts on the nature of the right.[251] The grounds of justification would have to be much more persuasive in instances where the infringement of the right is more substantial.[252]

The mere fact that a limitation is the only effective way of achieving a particular purpose will not necessarily result in the infringement amounting to a constitutional limitation. The seriousness of the restriction may be totally disproportionate to the benefit resulting from achieving the purpose.[253]

4.4.4 THE RELATION BETWEEN THE LIMITATION AND ITS PURPOSE

The limitation must contribute towards achieving a particular purpose. The *extent* that the limitation furthers the *purpose* of the limitation must also be considered. One should consider whether the limitation is over-inclusive or

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251 *S v Mbatha; S v Prinsloo* 1996 2 SA 464 (CC), 475D-E.

252 *S v Bhulwana; S v Gwadiso* 1995 12 BCLR 1579 (CC), 1586C.

253 Rautenbach and Malherbe *Constitutional Law* 316.

under-inclusive.[254] A limitation may be over-inclusive in that it affects the rights of too many people than is required in order to achieve the purpose of the limitation. A limitation that is under-inclusive is inconsistent with the notion of equality embodied in section 36(1).

Under this factor could also be subsumed a whole host of sociological considerations, such as the possibility of effecting the desired social change. Desired changes are often not achieved owing to factors that are well beyond the law.[255] If the state does not have at its disposal the power to bring about the desired change, limiting the right of the individual seems rather futile.

Whether the accomplishment of the purpose is possible by means of the law is another sociological consideration that could also be embraced by this factor. The decretist attitude to legislation - the belief that the mere passing of a law may change the *mores*, institutions or even the law - has been widely criticised "by everybody who has dealt with the sociology of legislation".[256] Based on the erroneous tacit assumption that declared law will result in the desired social change, governments that are struggling to make ends meet often succumb to the decretist attitude of using the law to effect a desired social change.

254 Rautenbach and Malherbe *Constitutional Law* 317.

255 Gandhi *Law and Social Change* 25.

256 Gandhi *Law and Social Change* 48.

4.4.5 LESS RESTRICTIVE MEANS TO ACHIEVE THE PURPOSE

Consideration will have to be given to alternative methods of achieving the same purpose that have a smaller impact on the interest protected by the right.[257]

The requirement in *R v Oakes*[258] wherein Chief Justice Dickson held that the infringement "should impair 'as little as possible'", leaving not even a narrow margin of appreciation,[259] is much more stringent than taking into account "less restrictive means" in that "less" is merely a comparative adjective. However, the same Judge in *Edwards Books and Art Ltd v The Queen*[260] held that one should rather enquire whether there is "some reasonable alternative scheme" that impacts on the right "as little as is reasonably possible". Therefore, giving the legislature leeway in how it chooses to carry out its objectives is not unacceptable in constitutional law.[261]

257 Rautenbach and Malherbe *Constitutional Law* 317.

258 [1986] 26 DLR (4th) 200, 227.

259 De Ville *Interpretation of the general limitation clause in the chapter on fundame rights* (1994) *SAPL* 304.

260 [1987] 35 DLR (4th) 1, 44.

261 De Ville *Interpretation of the general limitation clause in the chapter on fundame rights* (1994) *SAPL* 304.

CONCLUSION

Arguments before court are monopolised by lawyers. Our perception of not only what the Constitution is, but also how we are to view the Constitution, is shaped by lawyers.[262] Settled law is a safe fortress for lawyers with the doctrine of *stare decisis* a trustworthy weapon. Therefore, it comes as no surprise that the South African legal community has in the main been hesitant to venture into the relatively unknown territory between law, sociology and philosophy in order to breathe life into the limitation clause. Not surprisingly, the Constitutional Court has not been willing to commit itself to the mammoth task of crafting a detailed analysis of the 1996 limitation clause, adhering instead steadfastly to the *Makwanyane* approach referred to *infra*.[263]

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The open-ended phrase "open and democratic society based on human dignity, equality and freedom" was recommended by the technical committee instead of listing a number of particular factors, such as public safety, national security or the prevention of disorder.[264] The use of specific considerations was avoided for

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262 Nagel *Constitutional Cultures: The Mentality and Consequences of Judicial Revie*

263 *De Lange v Smuts NO and Others* 1998 7 BCLR 779 (CC), 847A-G.

264 Du Plessis *The genesis of the provisions concerned with the application and interpretation of the chapter on fundamental rights in South Africa's transitional constitution* (1994) *TSAR* 720.

two significant reasons.[265] First, certain of the specific considerations, such as "public safety", "national security" or "the prevention of disorder", have obtained an egregious meaning under the old Apartheid regime, which is discordant with the promotion of a rights culture. The courts might unfortunately fall into the rut of such unhealthy jurisprudence. Second, on a more positive note, open-ended statements more easily lend themselves to adaptation to changing circumstances, thereby obviating the cumbersome task of changing the text of the Constitution. One might argue that the risk exists that open-ended statements may cause too few or too many limitations. However, it is submitted that this potential danger is tempered by the other requirements in section 36(1), most notably the principle of proportionality.

Encapsulated in the term "democracy" is both a set of ideals and a political system that offers simultaneous protection to society as well as the individual.[266] The notion of a democracy has, however, never been identified with a particular doctrinal source; democracy is rather somewhat of a by-product of the entire evolution of Western civilisation and has lately become more of a universally accepted honorific term that has been stretched to fit several political and ideological systems.[267] The term "democracy" occurs in the limitation clause, which in turn impacts upon the extent of the enjoyment of every right in the

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265 Du Plessis *The genesis of the provisions concerned with the application and interpretation of the chapter on fundamental rights in South Africa's transitional constitution* (1994) *TSAR* 720.

266 Van der Westhuizen *Introductory notes on South African Human Rights Law* 3; S *Democracy* (1968) 3 *International Encyclopaedia of Social Sciences* 112.

267 Sartori *Democracy* (1968) 3 *International Encyclopaedia of Social Sciences* 112.

Constitution. That the limitation clause contains reference to a particular standard of democracy, namely an open democracy grounded upon values of human dignity, equality and freedom, presents the limitation clause as an effective tool to help fashion society in such a way that this particular standard of democracy is maintained by the judiciary. However, demands that are too great should not be placed on our democracy to such an extent that it is incapable of sustaining such demands.[268]

Judge Mahomed held in *Shabalala & Others v Attorney-General of Transvaal & Another* that we have a[269]

> "*constitutionally protected culture of openness and democracy and human rights for all*".

Even though this "culture of openness and democracy" is a praiseworthy step away from the closed Apartheid society that was "pervaded by inequality, authoritarianism and repression",[270] there is often societal disillusionment owing to the standard of an "open and democratic society" being applied in South Africa. Although most South Africans would not mind living in such an ideal society, many feel that such an Utopian standard has no place in what is often perceived as a rather barbarous society. The objections that are commonly

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268 Gandhi *Law and Social Change* 26; Sartori *Democracy* (1968) 3 *International Encyclopaedia of Social Sciences* 119.

269 1996 1 SA 725 (CC), 740E.

270 *Shabalala & Others v Attorney-General of Transvaal & Another* 1996 1 SA (CC), 740E.

canvassed against the Constitution essentially amount to people being dissatisfied that rights are limited in accordance with the standard of "an open and democratic society" - a standard seen to be too idealistic during a time when our society does not in fact match up to the ideal.

In order to have a more publically agreeable approach to rights and their limitation, it is submitted that *society itself* will have to undergo change. Instrumental in such societal change will no doubt be educating society, particularly concerning the content and philosophy underlying the bill of rights.[271] The permeation of a rights culture through South Africa is vital if the notion of an "open and democratic society based on human dignity, equality and freedom" is to be worth the paper it is written on.

As has been alluded to previously, full democracy is likely to be achieved only at the end of a process, that is often lengthy.[272] Circumstances are changing and adapting in constitutional law all the time to meet with new levels of technology, ideas, ways of living and standards of social responsibility.[273] The use of the limitation clause is a means to ensure that a healthy rights culture is created and thereafter perpetuated.

At some stage during constructing a rights culture, conveying to the public a feeling for the *values* underlying the Constitution must occur. Certain rights and

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271 Dlamini *Human Rights in Africa: Which Way South Africa?* 100.

272 Eide and Hagtvet *Human Rights in Perspective: A Global Assessment* 245.

273 Pritchett *Constitutional Law: Introduction* (1979) 3 *International Encyclopaedia Social Sciences* 298.

liberties are unlikely to endure or even exist without attaining other rights and liberties as prerequisites.[274] The "values of an open and democractic society"[275] require the operation of fundamental rights in a culture dedicated to human dignity, equality and freedom. It is submitted that it would be beneficial that both the public and the judiciary understand the *basic values* that underlie the constitution - such values may be found in the limitation clause.

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The success of our fledgling open and democratic society depends on the ability to limit rights in a reasonable and justifiable manner. It is submitted that it is in the interest of *openness* that the Constitutional Court more adequately justify its reasons for refusing limitations.

If the court sets too low a standard on what is reasonable and justifiable, rights will be limited to such an extent that injustice will clearly result. However, where too high a standard is set by the court, individual rights may be given import to such an extent that giving effect to the utilitarian aspect of democracy as realised by duly elected legislators will not be achieved;[276] the government should be given reasonable leeway to formulate effectual legislation and

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274 Eide and Hagtvet *Human Rights in Perspective: A Global Assessment* 245.

275 *Ferreira v Levin and Others; Vryenhoek and Others v Powell NO and Othe* 1 SA 984 (CC), 252E.

276 Woolman *Riding the push-me pull-you: constructing a test that reconciles the con interests which animate the limitation clause* (1994) *SAJHR* 77.

undertake actions.[277] Failure to defer sufficiently to legislation may well emasculate majority rule resulting in an impotent Parliament that will have difficulty in realising any significant objective.[278]

By their very nature, constitutions tend to be liberal documents, the 1996 Constitution being no exception. The general limitation clause itself contains elements of liberalism, such as the notion of an open society wherein people are free to exercise their rights.[279] Liberals would prefer section 36(1) to be used to ensure minimal incursions by the state into the private life of individuals. This results in a tension between liberalism and the utilitarian aspect of democracy as put forth by duly elected legislators.[280] This can be seen to manifest itself in the constitutional reference to an "*open* and *democratic* society". A court could well give a liberal or democratic reading of section 36(1). It will depend on the judiciary to harmonise the internal tension resulting from the political doctrines in the limitation clause by considering constitutional jurisprudence from foreign and international jurisdictions.

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277 Davis *et al Fundamental Rights in the Constitution: Commentary and Cases* 314; Chaskalson *et al Constitutional Law of South Africa* 12-23.

278 Nherere and d'Engelbronner-Kolf *The Institutionalisation of Human Rights in Sou Africa* 51.

279 Woolman *Riding the push-me pull-you: constructing a test that reconciles the con interests which animate the limitation clause* (1994) *SAJHR* 78.

280 Woolman *Riding the push-me pull-you: constructing a test that reconciles the con interests which animate the limitation clause* (1994) *SAJHR* 77.

The concept of an "open and democratic society" is a difficult notion for a judge to use. Judges do not use the notion of an open and democratic society as a tool to justify their judgements very often. When judges do use the concept, it is normally by way of mere reference to the concept without defining it. Even when attempting a definition of an "open and democratic society",[281] judges do not make use of their own definition to justify their judgments. What then is the value of the vexed phrase that does not lend itself to precise definition.

Democracy is often seen to refer to the machinery of government, such as free and fair elections. Where the very machinery of democracy does not exist, an open society will never take root. Whereas one can create the political structures of a democratic society, one cannot actively create an open society. One must merely allow it to take root and stimulate its growth.[282]

The way that society responds, is permitted to respond or encouraged to respond to a limitation of rights determines whether the limitation occurred in an open society. Allowing society to openly engage promotes an open society.

Even though an "open and democratic society" is not directly used by judges, one may often *infer* a particular decision has made an impact on an open and democratic society.

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281 For example *Ferreira v Levin and Others; Vryenhoek and Others v Powell N Others* 1996 1 SA 984 (CC), 1014C-F.

282 Davis D *Democracy and Integrity: Making Sense of the Constitution* (1998) *SAJHR* 142.

Where limitations are effected in a way that is less than adequately justified, the impact made on society will detract from the values of an open society.

In an open society, even though judges may not be able to use the notion of an open society with ease, the very act of criticising the the government as a whole furthers the aim of an open society.[283] The very writing of this dissertation is in fact a micro-aspect of an open society.

An "open and democratic society" is the type of society that the Constitution purports to create. Owing to the abstractness of the notion of an open society and the subjectivity inherent in our pluralist South African society, one would be hard pressed to determine whether an open and democratic society has been attained.

The notion of an "open and democratic society based on human dignity, equality and freedom" is an ideal society that the Constitution creates. Inherent in an "open society" is encouraging the criticism of the degree to which society in fact measures up to the ideal.

To expect to reach the ideal would be to misunderstand the very function of an ideal, namely to strive toward a perfect, highly desirable state of affairs. An ideal is not a destination, but is rather a direction.

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283 White *Open Democracy: has the Window of Opportunity Closed* (1998) 14 SAJHR 109.

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If individual provisions in the bill of rights are initially offended, the bill of rights is not rendered a failure. The bill of rights transcends being merely a set of rules that must not be transgressed; a rights culture should be engendered by the bill of rights.[284] To have a successful bill of rights, one must have not only a good understanding of the values in the bill of rights, but also have a serious commitment to such values, especially the values in the limitation clause. No document, no constitution can ever provide absolute protection from the abuse of power.[285] Ultimately, only devotion to the ideals and ethos of the bill of rights will prevent abuses of power. Only once both the leaders as well as the people of South Africa pledge themselves to the creation of a rights culture as envisaged in the bill of rights will South African society approach the idealistic standard referred to in the limitation clause.

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284 Dlamini *Human Rights in Africa: Which Way South Africa?* 101; Nherere and d'Engelbronner-Kolf *The Institutionalisation of Human Rights in South Africa* 38.

285 Nherere and d'Engelbronner-Kolf *The Institutionalisation of Human Rights in Sou Africa* 52.

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286 The material available on the Internet while often both of immense interest as well relevance, has been a problem to reference. The download time has been a factor preventing my being able to make hard copies of all the materials. Furthermore, of opinions are anonymous or form part of a chat group. Also articles often lack title well as dates. In addition, files that I have downloaded into ASCII format for print have more often than not lacked an *http* location. In the absence of any known con for referencing material on the Internet, where possible I have elected to use the fo system of referencing: Surname, Initials, Title, Date, Search Engine and *http* locat The exact page numbers of printed ASCII and HTML material have not been men as these are printer dependent and are consequently rather meaningless.

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