Inconsistencies in the adjudication of rights:

An examination of three South African Constitutional Court decisions

By

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DECLARATION

I, Cyril Simphiwe Mlotshwa, declare that the work contained in this thesis is my own original work and has not previously in its entirety or in part been submitted to any academic institution for degree purposes.

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ABSTRACT

The Republic of South Africa has a constitution that is often lauded as among the best in the world. This can be attributed, at least partly, to the fact that at the heart of it lies transformative constitutionalism, which has the objective of addressing the injustices of the past with the entrenchment of fundamental human rights. Last but not least, the Constitutional Court has to give teeth, metaphorically, to all the human rights in the Bill of Rights. The question this project seeks to answer is whether or not the Constitutional Court does a good job – is consistent - in applying the Bill of Rights to the facts of particular cases. The cases examined in this research project demonstrate that there are inconsistencies in the approach that the Constitutional Court adopts in the adjudication of rights. This study, therefore, attempts to explain why these inconsistencies arise, why they are a problem, and to some degree, how they can be avoided.

In an effort to satisfy the above research question and aim of this study, this dissertation is divided into five chapters followed by the requisite bibliography. Chapter 1 introduces the project and gives a historical background to the South African Constitutions with a view to putting the current constitutional position in context. As the inconsistencies seem to play themselves out in the adjudication of rights, the focus of Chapter 2 shifts to the concept of transformative constitutionalism in the hopes of shedding light on why there are inconsistencies in the adjudication of rights. Chapter 3 details the theoretical framework within which judicial decision-making takes place, referring specifically to the work of Ronald Dworkin. This chapter is inextricably linked to Chapter 4 which is an examination of actual applications of judicial decision-making. Finally, Chapter 5 concludes the study and offers some suggestions for the way forward. To briefly note, all the authorities that were consulted for the research are acknowledged in the bibliography.

CHAPTER 1

South Africa has had five constitutions since 1910. The first was adopted when the British government decided to withdraw, an action that culminated in a situation whereby the South African government had to be invariably in the hands of the minority who happened to be the white residents of South Africa. This move, which resulted in the unification of the four colonies in South Africa, namely, Natal, Cape, Transvaal, and the Orange Free State, kick-started legal developments in the country. Of particular significance is the legal development that relates to the establishment of a single Supreme Court with powers to hear the appeals emanating from the Lower Courts and featuring in the legal system of South Africa as the Court with the final say in relation to the decisions that would have been taken by the Lower Courts, with the Lower Courts bound by the decision of the Court of Appeal (although until 1950 there was the right of appeal from the Appellate Division to the Judicial Committee of the Privy Council in London).

This 1910 Constitution had legal existence until 1961, the year in which South Africa made the decision to leave the Commonwealth with the result that it became a fully-fledged Republic. The piece of legislation that enabled this development was the South African Act No 32 of 1961, which existed for many years. Extremely important is the structure of the government as the Republic because the 1961 Constitution adopted the Westminster system with similarities to that of the Union that was regulated by the South Africa Act of 1909, with the exception that the Queen and the appointed Governor-General were done away with and a State President was elected by Parliament. In effect, parliament was the highest law of the land.

After years of existence, the 1961 Constitution was affected by the decision of the government at the time which enacted the third constitution. The difference between the first two constitutions and the third constitution was that the third constitution allowed the creation of the tricameral parliament. The tricameral parliament envisaged a situation whereby there was a separate parliament for the White, Coloured, and Indian groups. Well pronounced in the promulgation of the third constitution was the situation that still had the effect of excluding Black Africans who were the majority group.

Common to all these constitutions was the fact that although the Appellate Division as the apex court at the time had a major influence in the development of law in South Africa, the courts were not imbued with the authority to challenge the content of legislation prior to enactment of the interim Constitution, Act 200 of 1993 ('the interim Constitution'). The legal position preceding the passing of the interim Constitution indicates that parliament reigned supreme while the role of the South African courts was limited as they were enjoined to apply clearly unfair and unjust discriminatory laws, especially to the majority of South Africans.

The 25th of January 1994 is the date on which the interim Constitution was assented to, although it only came into operation three months later on the 27th of April 1994. A remarkable point about the interim Constitution was that it was the end product of protracted discussions with the realisation of a multi-party conference that was held at the Kempton Park World Trade Centre. The interim Constitution came to be known as an 'interim Constitution' on the basis that it was not a democratically elected government and had not been written by a democratically elected government, and as such, its existence was limited to a period of only two years. It became necessary to include a clause in the interim Constitution that would specifically call and cater for a democratically elected government to form a constitution-making body called the Constitutional Assembly with the assignment of writing the final Constitution.

There had been no precedent in South Africa whereby all South Africans were given the opportunity to express their opinions equally with great care in writing the final Constitution in all eleven official languages that could be understood by every citizen. The interim Constitution also set out 34 constitutional principles that needed to be satisfied before it could be certified by the newly established Constitutional Court – the final appellate court for constitutional matters, with its first session beginning in 1995. The coming into operation of the current Constitution on 4 February 1997 effectively replaced the interim Constitution permanently as the new Republic of South Africa Act 108 of 1996 kicked in with the status of being superior to all other laws.

The signifying characteristic of the South African Constitution is change from the unequal situation that prevailed before its enactment and not to preserve those inequalities. In *Understanding the Constitution of the Republic of South Africa,* Freedman (2013:6) refers to a 'preservative constitution' as one that aims to preserve in law a set of values and a system of

government that has been in place for many years without any disturbance in respect of which there is a general consensus. While England has no written constitution because its laws aim to preserve the system of government and the values on which this system is based, which have evolved over hundreds of years and are supported by the majority of the British people, it can be described as 'thoroughly preservative', notes Sunstein (2001). In contrast, continues Freedman (2013), a transformative constitution is not aimed at preserving the systems and values that have evolved over years and instead, a transformative constitution is one that rejects the past and aims to create a new society that is different from the one that existed previously. Roux (2013:204) asserts that the 1996 Constitution is a 'never again' Constitution, and if there is a consistent theme that runs through it, it is a focus on the past as a lesson for the future.

Taking up Freedman's distinction, Bilchitz, Metz, and Oyowe (2017:68) in *Jurisprudence in an African Context* argue that the South African democratic Constitutions are 'transformative' in that they do not seek to preserve the status quo, but instead aim to utilise the law to lead society in the direction of greater justice and equality. For Freedman (2013:1), an important characteristic of the South African Constitution is that it imposes a mandatory duty for the government to use its powers in a way that contributes to the transformation of society from one that was previously based on inequality and injustice to one that recognises norms and rights.

In terms of rights, Roux (2013) contends that the range of rights in the 1993 Constitution was initially intended to be restricted to rights that were necessary to guarantee free and fair political competition in the lead up to the first democratic elections. However, according to Roux (2013:203), by the time the 1996 Constitution came to be drafted, the ANC's overwhelming electoral support helped it ensure that the Bill of Rights reflected its hybrid human rights. In this regard, Roux (2013:203) remarks that not only were civil and political rights included, but also a number of socio-economic rights. Consequently, explains Roux, the 1996 Constitution extended the liberal constitutionalist tradition of rights-based judicial review into unchartered waters, and although the basic institutional form of the Constitution was quite familiar, the scope of the Bill of the Rights was wider than in any previous liberal-democratic constitution.

A glance at section 7(1) of the Constitution evidences that the Bill of Rights features as a cornerstone of democracy in South Africa. The same section stresses the rights of all human beings in the country and highlights human dignity, parity, and liberty. A closer look at the

section makes it clear that the state shall also respect, defend, encourage, and enforce the rights found in the Bill of Rights. Inherent in the Constitution is the notion that the rights in the Bill of Rights are not absolute, but are limited under conditions found in section 36, or elsewhere in the Bill. Roux (2013:204) argues that the two major innovations the post-apartheid Constitutions introduced – constitutional supremacy and a requirement that the validity of all legal rules should depend on a test for moral conformity with the Bill of Rights – can be seen to be at odds with the crude positivist view of law that had prevailed before 1994. Roux (2013:209) asserts that the rejection of positivism by the new Constitutions threw the South African legal-professional culture into flux as the formalist reasoning methods that had characterised both statutory interpretation and common-law adjudication before the transition to democracy had to change.

Roux (2013:1) looks carefully at the role and responsibility of the Court in the light of the Constitution. He further highlights the lack of extensive study on the rationale behind bestowing a massive politically awkward and morally contested mandate upon the Court, which several mature democracies have been reluctant to give to their courts. He claims that nevertheless, the Court was able to carry it out successfully. This study seeks to examine this claim of success. While the selection of three cases cannot purport to be an extensive study, the hoped-for outcome is that this research will contribute to the current body of literature on the topic focusing on the complexities involved in Constitutional Court decision-making in South Africa. Perhaps even more importantly though, I hope to show that Roux's characterisation of the Court's 'success' is generous at best.

The analysis of the Constitutional Court cases that have been selected for the purpose of this study seems to suggest that the question of whether or not the Constitutional Court does a good job of applying the Bill of Rights to the facts of particular cases is not an easy one to answer. The cases examined in this research reveal inconsistencies in the approach that the Constitutional Court adopts in the adjudication of rights. This study attempts to explain why these inconsistencies occur, and why they are problematic. In brief, the 1996 Constitution requires legal professionals to engage in moral reasoning in the interpretation of the Bill of Rights. I argue that the inconsistencies are caused by the fact that the Court sometimes considers morality in the adjudication of rights whereas sometimes the Court concentrates mainly on legal rules to adjudicate the rights. The inconsistent implementation of the Bill of Rights to the facts of a case leads to both confusion and uncertainty, the very things we expect

the law to avoid, or at least minimise. By means of this research, I show that the Court vacillates between considering moral principles and legal rules, and explain why this vacillation occurs by drawing on Roux's (2013:1) analysis of a "legal-cultural lag effect in terms of which pre-existing attitudes to law exert an inertial force on the capacity of a legal-professional culture to adjust' to the forms of legal reasoning 'suggested but not necessarily entailed" by a new constitution.

The research methodology used is a comprehensive study of the available literature on the issues relating to the topic. This comprehensive study of the available literature includes textual analysis which is the method most commonly used to interpret written texts. Textual analysis is a scholarly method researchers use to describe and interpret the characteristics of recorded texts. According to Frey, Botan and Kreps (1999:225), the aim of textual analysis methodology as a systematic technique is mainly to analyse, interpret, and evaluate the persuasive force in the message embedded within the texts with the purpose of shedding light on unresolved issues in the missing links or gaps. This supports the suitability of this methodology for the current study. However, no empirical research, such as surveys or interviews, was carried out. Primary and secondary data was sourced from the University's library and reports. A case study design was used for this project. This is an in-depth study of a particular situation rather than a sweeping statistical survey. Three cases were selected for the purpose of this study, namely: (1) *Ellen Jordan and others v The State & others Case* CCT 31/ 2001 ('the Jordan case'); (2) *Prince v President of the Law Society of the Good Hope* CCT 36/00) [2002] ZACC (2) SA 794, 2002 (3) BCLR 231 (25 January 2002) ('the Prince case'); and (3) *DE v RH* [2015] ZACC 18 ('the DE case') to demonstrate the inconsistency of Constitutional Court judges' justifications for their decisions.

The Court faced the question of whether the right to economic activity enshrined in section 26 of the Constitution could be interpreted to also allow commercial sex work in the matter of Jordan. The section relied on the right of every citizen to engage freely in economic activity and seek a living anyplace in the state territory. In answering the question that confronted the Court, the Court took into account the existence of the Sexual Offences Act 17 of 1956 and concluded that allowing commercial sex work would contravene the Sexual Offences Act 17 of 1956.

The Prince case dealt with the constitutionality of the Drugs and Drugs Trafficking Act 140 of 1992, particularly sections 4(a) and 4(b). At the heart of the case was the concern that section 15 of the Constitution grants the right to freedom of religion and Prince's Rastafarian religion recognises the use of cannabis (locally known as *dagga*) as part of religion. The Court looked at the fact that the attack on the provisions of the above-mentioned Act was intended to exempt the litigant for religious reasons, a situation that was extremely difficult for the Court in the light of the criminal law of general application. As a consequence, the Court did not make a ruling in favour of the litigant.

The DE case centred around the issue of adultery and whether there is a justified delictual claim arising therefrom. Madlanga J made a ruling that in the light of the changing moral landscape in contemporary South Africa, the existing claim was outdated and could no longer be sustained. He explained that adultery lacks the delictual element of wrongfulness and that legislations against it must be repealed in order to bring the notion of wrongfulness in line with the general sense of justice of the 'the community'.

The inconsistency referred to above can be seen in the fact that in the Jordan and Prince cases, the Constitutional Court invoked the (archaic and antiquated) Sexual Offences Act 17 of 1956 and the (pre-democratic South Africa) Drugs and Drugs Trafficking Act 140 of 1992, respectively, in its adjudications of rights, whereas in the DE case, the Court rejected existing law in making its decision, instead looking to the moral values in the current society to make its decision.

It is argued in the following analysis that the explanation for why these and other inconsistencies in the adjudication of rights occur, is two-fold: on the one hand, it can be linked to the failure of the Constitutional Court to grasp completely the fact that the Constitution of South Africa is not a *preservative* but a *transformative* constitution, and on the other hand, by the uneven shift away from a positivist approach to judicial decision-making.

CHAPTER 2

The concept of 'transformative constitutionalism' never featured prominently before the enactment of the South African Constitution. The notion regarding transformative constitutionalism first reared its constructive and progressive head in the interim Constitution. The same Constitution confirms that it is supreme law of the country, with any law that is inconsistent with it being of no force and effect. Of significance is the underlying goal that considers the wrongs or injustices of the past, thereby serving as an ancient bridge between the past of a profoundly divided society marked by strife, hardship, and oppression, and a future centred on the respect and recognition of fundamental rights, democracy, and development opportunities for all South Africans, regardless of their skin colour, class, race, religious beliefs, or sexual orientation. It therefore becomes prudent and helpful to unpack the meaning of transformation before looking at constitutionalism.

In relation to the concept of transformation, delivering a Prestige lecture at Stellenbosch University on October 9, 2006, former Chief Justice of the Republic of South Africa, Justice Pius Langa, conceded that it is unfortunate that there is no single accepted definition, and according to him, the interpretation of transformation in legal terms is as contentious as it is hard to formulate. The same can be said about the 'Report on the Assessment of the Impact of Decisions of the Constitutional Court and Supreme Court of Appeal on the Transformation of Society' (2017:15) as it recognises that transformation generally has diverse meanings for different groups of people. Nevertheless, the report highlights the general consensus that transformation should be incremental. It further reiterates that the courts must be prudent in their approach to transformation within South Africa's particular local, constitutional, and historical context. It additionally asserts that the courts cannot implement their own judgements but have to depend on the law-making arm of government as well as the executive to be able to comply with their most transformational orders.

On 14–15 November 2014 the International Institute for Democracy and Electoral Assistance and the International Development Law Organisation (Daly, 2014) generally agreed that judiciaries have become increasingly important actors in constitution-making and democracy-building whether a state seeks to strengthen democracy or transition from undemocratic to democratic rule. In either context, judiciary that is independent without interference ends up

performing a duty that is akin to that of the guardian of the Constitution and drivers of transformation.

An example of the role the courts play in transformation can be seen in a decided case that was the first to be handed down by the South African Constitution Court, the case of *S v Makwanyane* 1995 3 SA 391 (CC) 262. It is an exemplary case evidencing the Court's acceptance that what the Constitution clearly wishes to achieve is to ensure a shift from the utterly unforgivable mischiefs that characterised the history of our country to a brighter future of equality. Echoing this, Justice Langa in the Prestige lecture (2006) emphasised that the focus of the Constitution is on ensuring that the wounds of the past are healed while at the same time guiding society towards a better future. He thus asserts that transformation consists of socio-economic transformation and the transformation of a legal culture. In terms of the former, he notes that high premium must be imposed on the need to ensure that services are provided to all and that it is significant that the economic playing fields that were so drastically distorted during apartheid are levelled out. Accordingly, he gave a stern warning against viewing transformation as only involving the fulfilment of socio-economic rights, as transformation makes also a clarion call to provide broader access to opportunities and education via different measures, including affirmative action.

With reference to the transformation of a legal culture, Mureinik (1994:31) in 'A Bridge to Where? Introducing the Interim Bill of Rights' observes a pronounced shift that differentiates post-apartheid South Africa from the previous apartheid South Africa – a shift from a culture of authority that dominated apartheid South Africa to a way of justification that is now part and parcel of post-apartheid South Africa. Accordingly, any exercise of power is supposed to be substantiated by the cogency of the case offered by the government in defence of its decision in terms of the culture of justification and not the fear inspired by the force of its command which was the main property of apartheid South Africa. The phenomenon that comes out of the post-apartheid South Africa places high premium on the community that is built on persuasion and not coercion.

After discussing socio-economic transformation and the shift in legal culture as the two fundamental ideas of transformation, Justice Langa (2006) notices that some scholars are critical of the two basic ideas of transformation, promulgating a third formulation that not only relies on but goes beyond the other two. The conventional metaphor of a bridge is deceptive

for these critical scholars, Justice Langa (2006) continues, as it seems to imply that transformation is a transient occurrence, and that at some stage we can enter the other side of the bridge. The problem with this vision of transformation, according Justice Langa, lies in the fact that there is no longer room to believe that things could be different and that there could be more possibilities than and more challenging options to the two linking locations. Thus, Justice Langa reasoned that the bridge's strength lies in staying there, so that we can perceive, alter, and envision new and innovative ways of being.

Accordingly, Judge Langa (2006) asserted that transformation is not really a temporary phenomenon that ceases when judges and lawyers adopt a new justification culture, but rather a lasting ideal, a form of viewing the world where there is room for conversation and disagreement, where different ways of being are frequently pursued and generated or rejected, and where change is unpredictable yet constant. According to Justice Langa, this principle of transformation serves to remind us of the old Nissan slogan: "Life is a journey. Enjoy the ride." The tag line informs us that we must enjoy driving ourselves instead of simply seeing life (the ride) as a way of reaching a destination.

The International Institute for Democracy and Electoral Assistance and International Development Law Organisation (Daly, 2014) noted in their 2014 report that the past decades have witnessed a shift from traditional constitutions to transformational constitutions. It was further affirmed that traditional constitutions have tended to focus on designing a minimal blueprint for the division of public power by creating a presidential or parliamentary system and the formal powers of each branch of government. They were also inclined to include a limited number of elements that constrain the decision-making power of elected institutions – principally civil and political rights, such as the freedoms of speech and assembly. These constitutions placed little emphasis on the state's precise obligations or guidance on the exercise of public power.

In contrast, the report further notes that transformational constitutions are much more ambitious and comprehensive and seek to provide the basis for a radical transformation of the state's fundamental values and governance, as well as foster social change within communities and family structures. Furthermore, they tend to detail rules for the exercise of power which include structural elements to constrain majoritarian decision-making, such as ombudsmen and eternity clauses, which preclude the amendment of key constitutional provisions. Moreover, they seek

to establish a more inclusive political system by recognising and empowering minorities as well as address discriminatory social practices, for example, gender-based discrimination. In addition, they usually lay down expansive bills of rights that enshrine justiciable social and economic rights.

In 'Transformative constitutionalism and the adjudication of constitutional rights in Africa,' Kibet and Fombad (2017:341) assert that transformative constitutionalism is a system model to ensure the protection of substantive human rights. In contrast to classical liberalism which assumes formal equality, Kibet and Fombad explain that transformative constitutionalism focuses on fundamental equality and structural justice. This entails a concerted effort to strengthen historically marginalised sections of society by means of interventions such as the defence of socio-economic rights and others aimed at creating social justice, which includes a wider view of justice more than a narrow definition of negative rights. This necessitates less reliance on technicalities and processes in order to maximise the enjoyment of fundamental rights, and it implies forms of legal arguments that surpass formalism or positivism in order to guarantee that rights are effectively enjoyed. In 'Legal culture and transformative constitutionalism', Klare (1998:146) argues that a post-liberal interpretation of the Constitution is appropriate because it is post-liberal in that it requires more than the minimal assurances of a liberal conception and, therefore, it demands effort in the legal understanding of the law and its role in society.

Mashele Rapatsa (2015:5) in 'The Right to Equality under South Africa's Transformative Constitutionalism: A Myth or Reality?' propounds that the crux of transformative constitutionalism is that it aspires to realise equality and creates an obligation for the government to guarantee that there is equitable access to social services such as health, education, water and sanitation; equal access to justice (i.e. following a lawful arrest), such as legal counsel and a fair trial; equitable access to sustainable development; and equal participation in public affairs. Accordingly, Rapatsa (2015) affirms that transformative constitutionalism is far more geared towards achieving meaningful equality than structured equality and aims to guarantee that all individuals have fair access to sustainable living, even if it is at the cost of the government. It also envisages achieving fundamental equality in two ways: firstly, by removing current discriminatory practices, and secondly, by implementing steps such as affirmative actions to protect and promote historically marginalised groups of people.

Rapatsa further elucidates that if we take the third conception of transformation – permanent state of change – and link it to our understanding of transformative constitutionalism, we arrive at the conclusion that a constitution is not transformative because of its peculiar socio-economic or legal goals but because it foresees a society that will always be open to change and challenge, and a culture that will always be determined by change. While this ideal may seem desirable in a post-liberal era, it does bring with it its own set of problems, more specifically, uncertainty.

However, transformative constitutionalism is not free from criticism. This is affirmed by Kibet and Fombad (2017:353) who indicate that transformative constitutionalism has received a reasonable level of criticism. More particularly, for obfuscating the law–politics divide as the objective of achieving social or substantive justice, though regulations unavoidably obliges courts to participate in policy decision-making or to issue orders with major budgetary implications, such as in the implementing of socio-economic rights, which inexorably leads to disputes with the political arms of government that mainly retain the power over policy and government spending. Kibet and Fombad (2017:353) opine that the most contentious component of transformative constitutionalism is perhaps that it involves the judiciary in the tumultuous waters of politics and policy-making. It is also more debateable because the contours of judicial activism that sometimes go with transformative constitutionalism are vague or undefinable. This transformational facet of constitutionalism, continue Kibet and Fombad, might imply judicial pragmatism in bringing about socio-political change and could also impact the credibility of the judiciary, as it could lead to a direct collision with political actors who feel more able to push the political agenda.

A further criticism noted by Kibet and Fombad (2017) is that transformative constitutionalism is insufficient as a remedy for persistent poverty and discrimination in post-colonial Africa. Despite the praising of transformative constitutionalism in academic discourse, South Africa's ground-breaking court rulings and growth achievements since the end of apartheid, deep poverty and inequality remain a great challenge. Hence, the argument for this failure is partly because, although the concept is perceived as post-liberal, it fits nicely within liberal discourses and fails to place the eradication of poverty at the centre of constitutional discourses.

Of course, whether a constitution is transformative or preservative, the notion of constitutional supremacy itself is not uncontroversial. According to Roux (2013:203) in *The Politics of*

Principle: The First South African Constitutional Court, 1995–2005, the post-apartheid Constitutions clearly signal a shift away from a parliamentary system of authority to a constitutional one, as they established a Constitutional Court and the power of judicial review as a foundation therein. In this regard, Roux (2013:1) asserts that two and a half years after apartheid ended, South Africa's final Constitution gave eleven judges of the country's Constitutional Court the power to strike down any 'law' or 'conduct' the judges found to be incompatible with the new supreme law, the 'Constitution'. In fact, it is written unequivocally in section 2 of the Constitution that this Constitution is the supreme law of the Republic to the effect that, on the one hand, law or conduct that is inconsistent with it is invalid, and on the other, that the obligations which it imposes shall be fulfilled.

The power that determines whether law or conduct is repugnant to the Constitution, known as the 'power of review' or the 'testing power', is also not immune from criticism. Freedman (2013: 13) says that although the power of judicial review is a vital characteristic of a constitutional democracy, it is criticised on the grounds that it is counter-majoritarian and therefore undemocratic. This is because it particularly gives unelected judges power to declare laws made by democratically elected legislatures unconstitutional and invalid. When an unelected judge declares a law to be unconstitutional and invalid, therefore, he or she is not acting on behalf of the majority, but against it. Given the history of South Africa, in which the voices of the majority were silenced for so long, such concerns are perhaps unsurprising.

Freedman (2013:14) observes that although the criticisms have cast doubt on the legitimacy of judicial review, constitutional law scholars have developed a number of arguments that are aimed at justifying its role in a constitutional democracy. The first argument is that the power of judicial review is legitimate because democracy is not simply about majority rule. Democracy is also about the political process by which a decision is made, and the power of judicial review can help ensure that this process is democratic. This is because the courts can use the power of judicial review to ensure that the disadvantaged and minority groups are not unfairly excluded from the decision-making process by dominant and majority groups.

The second argument noted by Freedman (2013:15) is that in the South African context, the power of judicial review is legitimate because it is conferred on the courts by the Constitution and the Constitution was written and accepted by the democratically elected people's leaders. It is in section 65 of the South African Constitution 108 of 1996 where it is written that the

judiciary authority of the Republic shall be entrusted to the courts and the courts shall be independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. According to this section, no state agency may interfere with the operation of the courts and state agency by means of legislative and other steps, but must assist and protect the courts to ensure the freedom, integrity, accessibility, impartiality, and efficiency of the courts. An instruction or decision issued by a court binds all individuals to whom and state institutions to which it applies. The Chief Justice is the chief of the judicial and is responsible for setting and controlling norms and practices for the exercise of the judicial duties of all the courts. This means that once a dispute has arisen, the Constitutional Court becomes the final arbiter in terms of making a decision in the resolution of the dispute.

Freedman (2013:13) explains that because the constitutional rights are written in broad terms and are based on moral values, it is possible to have reasonable disagreements about what a particular right means. Given this fact, the question of why the views of unelected judges should be favoured above those of an elected legislature in a democracy arises. The counterargument, Freedman maintains, is that the power of judicial review is legitimate because even though arriving at 'the' correct answer may be arduous and contentious, there is in fact one correct answer to a constitutional problem. The correct answer is the one that fits best with the network of principles and precedents that make up a particular country's legal system, and judges are best placed to find these answers because of their training and their experience, and because they do not have to be elected and are removed from the political process.

Moreover, the South African Constitution provides some guidance on how judges should utilise their powers. Section 39(1)(a) of the South African Constitution, for example, provides that, in interpreting the Bill of Rights, a judge, court of law, or forum must uphold principles underpinning an open and democratic culture based on human dignity, liberty, and equality. Bilchitz, Metz and Oyowe (2017:68) argue that this Constitution expressly directs judges to utilise values in interpreting it and provides an understanding of the central values that must be considered.

Noteworthily, central to a transformative constitution is a commitment to rational reasoning, to reviewing the underlying principles guiding the laws itself and judicial response to those laws. However, as explained by Justice Pius Langa (2006), caution should be exercised in that

while it is important that we accept the idea of practical adjudication, there is a clear limitation on what we can do and judges do not have carte blanche to decide what the law is, because laws, including the Constitution, do not mean anything we want them to mean, and that limit on judicial legislation is embodied in the idea of the separation of powers. Additionally, the Constitution itself ensures the concept of various roles for the different branches of government: the legislature shall legislate, the judiciary shall interpret the law, and the executive shall enforce the law. Were the courts to completely dismiss all adherence to the document in favour of principles, they will join firmly as creators in the sphere of the legislature rather than as interpreters of the regulations, which is simply not what the Constitution aims to achieve. This is not to say that the courts have no law-making obligation. The upholding of the Constitution's transformative vision allows judges to change the law in order to bring it into line with the human rights and principles for which the Constitution stands. According to Justice Langa, the problem is to find the fine line between change and regulation, but unnecessarily, activist judges can be as risky as unduly passive judges to fulfil the constitutional dream.

This is complicated by the fact that, at least according to Meyerson (2004:144), the drafters of the South African Constitution chose 'ruleness' rather than flexibility when they included in the Constitution a Bill of Rights which picks out in relatively specific language certain particular interests for special protection. Thus, Meyerson continues, they did not impose obligations to promote the abstract background goals and values which protection of these more specific interests usually, but not always, serves. The Constitution therefore commands respect for the specific rights it protects, regardless of whether respect will, in a particular case, serve whatever background justification may underlie protection of the right. It follows that if, in scrutinising legislation, judges ignore the specific categories used by the drafters and instead focus attention on the presumed background justifications that lie behind them, or if infringements on rights are not tested by the higher standard which is implicit in the notion of special protection, then the Bill of Rights has not been taken seriously. To take these rights seriously, therefore, demands recognition of their substantial priority over public interest. In this sense, judges may come into conflict with policy-makers, as the former are interested in individuals, while the latter, in society at large.

Kibet and Fombad (2017:356) observe that since the 1950s, the judiciary has evolved to a point where the courts frequently intervene in issues that can be considered political or have

significant political ramifications, such as the annulment of legislation and other political results, and the analysis of policy decisions, or even participation in policy-making. Despite the criticisms against constitutionalism generally, and transformative constitutionalism in particular, Kibet and Fombad (2017: 364) claim that there would be no fulfilment, protection, respect, and promotion of fundamental rights without transformative constitutionalism. They argue that as guardians of the revolution, the South African courts have been pivotal in handling landmark decisions which confirm a determined commitment to human rights and the new order in general. In a very real sense, the combination of constitutional supremacy and transformational constitutionalism has placed a much greater burden on the judiciary to act as an agent of transformation in South Africa. This shift to a greater focus on the judiciary appears to have been spurred on by a sense that traditional government structures have proven unable to deliver on the aims of transformation. Similarly, many societies worldwide have adopted 'judicialism' as the notion that courts have the sole power to declare the meaning of the law in such a way that all other state bodies must adhere to their determinations.

That the decisions made by judges are increasingly more important and wide-reaching is largely uncontroversial in the post-liberal era of constitutionalism. How they make these decisions – and how they should make these decisions – is not. The following chapter examines one of the central debates about judicial decision-making.

CHAPTER 3

A debate over the nature of judicial decision-making figures prominently in the literature of jurisprudence. The central figures in the debate have been H.L.A. Hart and his defenders, on the one side, and Ronald Dworkin, on the other. In an article published in the *Michigan Law Review* in 1976, Dworkin presented the most comprehensive and systematic statement of his theory of how judges should decide cases. In this article, Dworkin (1976) explicates the notion of the 'soundest theory of law', and in so doing, demonstrates with great precision the role played by moral and political theory in its construction and application. Dworkin's principal contention, his so-called 'rights thesis', is that court verdicts in civil cases, even in alleged 'hard cases', typically are and ought to be produced by principle not policy.

Dworkin points out how significant the basic distinction within political theory is, in that the difference lies between arguments of principle on the one hand, and policy arguments on the other. Policy arguments substantiate a political decision by demonstrating that the decision advances or defends some of the community's collective goals as a whole. Arguments of principle justify a political decision by demonstrating that the decision protects or guarantees the right of some individual or group.

It appears that the confusion arises due to the fact that principle and policy are the main reasons behind political justification. Hence, the justification of a legislative programme of any complexity always require arguments of policy, but also of principle. The judiciary may only, according to Dworkin, make decisions based on arguments of principle.

When a legislature adopts a programme generated by an argument of policy, for example, offering subsidies for aircraft manufacturers on the basis that the subsidy will protect national defence, it is plainly competent to do so. But Dworkin argues that even a programme that is mainly a matter of policy, subventions for major industries, for example, might require strands of principle to explain its specific design. For instance, the programme may provide equal grants for manufacturers of different abilities on the supposition that weaker aircraft manufacturers have some right not to be put out of business by government intervention although without them the industry would be more proficient. In this instance, the conferred rights are produced via policy and qualified by means of principle.

Dworkin points out that if courts are deputy legislatures, then it must be able to do the same then – make decisions based on arguments of principle and policy. But he insists that judges neither are, nor should be, deputy legislators. He explicates that judicial decisions that are not original simply implement the clear terms of some clearly legal law and are always justified on grounds of principle, even though the statute itself was produced by means of policy. He gives the example that if an aircraft manufacturer sues to recover the subsidy provided by statute, his right to the subsidy is therefore based on argument of principle on the ground that he does not argue that the national defence would be enhanced by subsidising him, as he may even admit that the statute was incorrect on policy grounds when it was adopted, or should have been retracted on policy grounds. His right to subsidy is no longer dependent on any policy argument, since the statute made it a matter of principle.

The arguments of principle appeal to a special type of right which Dworkin calls 'abstract rights.' An abstract right, as contrasted with a concrete right, is one which is not specific to an individual, but to classes of individuals who satisfy certain general conditions. For example, the right of all citizens to be free from racial discrimination is an abstract right, but the right of a particular person, say John Smith, not to be denied the right to vote on account of his race is a concrete right. Dworkin obviously has abstract rights in mind when he says that "principles are propositions that describe rights", for principles do not describe a right of just a single individual. John Smith may have a concrete right to vote, but it is hardly a principle that he individually be able to do so. In contrast, the abstract right to be free from racial discrimination corresponds with the principle that one should not be discriminated against on account of race.

As it were, the abstract right functions to create concrete rights once a particular individual fulfils the conditions stated in the abstract right. To illustrate this further using the example of John Smith, once he becomes a United States citizen of voting age, he has acquired a concrete right to vote that cannot be denied on account of his race. For Dworkin, abstract rights are essentially the basic values that justify specific legal standards, normally referred to as rules. For example, the abstract right to decide for oneself what speech is worth hearing or expressing justifies the rule that the government may not suppress a person's speech because of the ideas it contains, unless that speech would cause a clear and present danger. Or to use one of Dworkin's own examples, the abstract right to life justifies the rule that denies an heir to a will his inheritance under the will if the heir murders the testator to collect his inheritance. This is

so because respect for the testator's right to life requires that we not reward the heir for the murder.

Confusion arises if and when the case is a tough one and there is no established rule dictating a decision either way. If there was an established rule, a proper decision could be made by either policy or principle. Dworkin's 'rights thesis' suggests that judges should decide hard cases by approving or denying specific rights after considering all relevant principles. For Dworkin, a judge is never free to strike out on his own and weigh conflicting social policies. Rather, his decisions must be determined by legal principles consistently in alike cases. Since there is only one correct adjudication of rights in every case, one litigant always has the right to win a right that Dworkin views as genuine political right. Even in a hard case, when no established rule dictates a decision either way, it is a judge's legal obligation to determine which party has an institutional right to win.

In a very obvious and direct assault on positivism in general, and Hart particularly, Dworkin rejects the contention that a presiding officer who runs out of rules exercises strong discretion in the way that he is not restricted by any law enforcement requirements, and is thus free to go beyond the law for some other level to guide him in the development of a fresh legal rule, or enhance an old one. For Dworkin, Hart's argument is that when a case arises within the open texture of a legal rule, a judge exercises discretion to make a choice between open alternatives, and thus engages in a creative or legislative activity. Because open alternatives exist in uncertain cases, there is no possibility of approaching the question raised in the different cases as if a particular correct answer was found to be distinct from an answer which is a reasonable compromise between several conflicting interests. Hart asserts that this creative function of courts is similar to the exercise of delegated rule-making powers by an administrative body.

Again, Dworkin opposes the idea of courts 'creating' laws. He thus situates the judging process in the shade of legislation in terms of which judges must apply the law enacted by other institutions, and refrain from making new law with the familiar story of the adjudication being subordinated to legislation backed by two objections to judicial originality. The first argument is that a community should be administered by men and women who were voted into office and accountable to the majority. Since judges are not generally elected, and since they are not, in practice, accountable to the electorate in the way legislators are, it seems to compromise that proposition when judges make law. The second argument is that if a judge introduces a new

law and applies it retroactively in the case in hand, the losing party will be penalised, not because it has violated some duty, but rather because it has created a new duty after the event. The first and the second arguments pair up to support the traditional ideal of making judgements as unoriginal as possible. Instead, Dworkin claims that when a judge runs out of textbook rules, he must base his decision not on non-legal standards or norms, but rather on what he calls 'legal principles', which are as much a part of the law as are the rules, and are equally binding on judges. While no single principle is dispositive of a given case, a fair consideration of all relevant principles points to a uniquely correct answer in even the hardest of cases. Sartorius, who shares Dworkin's rejection of judicial discretion, explains that a litigant before a Court of law is not in the position of one begging a favour from a potential benefactor, but rather in that of one demanding a particular decision as a matter of right as something to which the law entitles him.

It is Dworkin's (1977:564) view in *Taking Rights Seriously* that in attempting to explain the mechanism used to make decisions in hard cases, it becomes apparent that easy cases do not pose a problem because they can be decided on rules which may be applied to the factual situation with logic and reason. For instance, Dworkin continues, in the case that the speed limit is fifty miles an hour and yet a driver travels sixty miles an hour, he is liable of speeding up. Dworkin asserts that hard cases nevertheless present problems. Bishop (2017:4) in 'A critique of Dworkin's right answer theory: The very hard cases' asserts that in the majority of legal cases before a judge, it will be an easy case in which an answer can be found within the existing legal rules, be it statute or common law. However, explains Bishop, in the minority of cases it will not be an easy case but instead a hard one which has no recourse to the rules. But in order to solve the situation of having extinguished the rules, Dworkin sets out the right answer theory on how these hard cases may be resolved.

Bishop (2017:3) states that the single right answer theory explains particular ways in which a judge, when faced with extinguished legal rules, may instead turn to legal principles to resolve the case. If the judge were to do this, then he would be able to solve all legal cases no matter what the issue before him. In other words, he would see that the law is a web without seams from which he may always construct the right answer. For Dworkin, this method was not only correct but preferable to any other methods, including that of the positivist school expounded by Hart, in that it awarded judges no legislative discretion. Further expounding on Dworkin's view, Bishop explains that discretion is not a tool that judges should wield in that it has the

ability to create law – something which is only reserved for those who have been democratically elected. However, Bishop disagrees with Dworkin and instead argues that there will not always be a right answer for judges to find because, as time passes, the court will struggle more and more to find the right answer before it.

In 'Dworkin and the one law principle: A pluralist critique', Rosenfeld (2005:2) states that for many years Dworkin has unwaveringly argued that, despite numerous objections and criticisms, there is a single correct answer for each case. He additionally admits that pluralistic contemporary liberal societies have undergone wide-ranging disagreements concerning ethics and politics. Nevertheless, acknowledging the dynamics involved to reconcile the constitution, statutes and related criteria issued from the common law, ordinary judges may indeed be unable to find the exact answer, and as a result, may have little option but to choose from among a limited number of answers that reasonable judges may disagree with.

A further noteworthy point is that Dworkin rightly asserts that this does not imply that there is no correct answer. To prove his point and illustrate his theory further, he resorts to the heuristic system of imagining a superhuman judge called Hercules. This superhuman judge, Hercules, has the ability to understand all the legal interpretation issues with all their nuances and implications. In the judicial decision-making process, explains Dworkin, Hercules should exercise caution when making moral and political rulings because judgements may differ amongst judges, decisions must therefore not be decided merely on the basis of an individual judge's view. Dworkin recommends that a judge should hold a view as to what the law or precedent itself demands. Although judges will of course reflect their own philosophical and intellectual beliefs when making judgements, it is somewhat different from the assumption that such views have some inherent impact in their reasoning merely because they belong to them. Hercules does not automatically adhere to the mainstream view and does not use a theory-based precedent that judges exercise discretion in open-textured areas. Instead, Hercules uses his own judgement to decide what legal rights the parties before them have, and when that decision is made, nothing remains to submit to either their own or the public's convictions.

Rosenfeld (2005:364) further notes that although it may seem to be easy to challenge at first, the one right answer theory, as exemplified by the case that in a pluralist constitutional democracy that encompasses, in a broad sense, the rights of liberty, equality, and privacy without speaking specifically about abortion, constitutional judges are requested to determine

if a statute banning abortion infringes the civil rights of women, presumed further that the state is profoundly divided in the sense that some believe that abortion is similar to murder, whereas others consider the rights of women to abort to be an essential component of their rights to constitutional freedom, confidentiality, and fairness, and the legislation on the prohibition of abortion was passed in parliament with the assistance of the majority. The circumstances under which both the prohibition of abortion and the woman's decision to protect herself as fairly reasonable responses to the constitutional issue at hand suggests that Dworkin's one right answer theory is incorrect, at least for some difficult cases.

However, continues Rosenfeld (2005:370), Dworkin's thesis:

> [W]hen given due consideration is not dismissed so easily because by opposing certain theories of law and adopting a particular political philosophy and ethical stance, Dworkin makes it harder to disprove his one right answer for everyone who adheres to his liberal egalitarian premises and Dworkin acknowledges that given the complexities involved in seeking to reconcile the constitution, statutes and the relevant norms that are issued from common law, the ordinary judges may find it difficult to discover the right answer and may thus be relegated to choosing among several other answers over which reasonable judges may disagree.

It cannot be disputed that the single right answer theory of Dworkin has greatly influenced and continues to influence the judicial decision-making process, including the positive impact in the South African legal system. In 'Constitutional interpretation in the so-called "hard cases": Revisiting *S* v *Makwanyane*', Klaasen (2017:5) states that in the majority of cases before the Courts, the legal sources suggest a clearly articulated outcome after review of the facts and legal arguments. The sources of law to be interpreted by the judge in order to arrive at a fair and equitable conclusion are clear. If the complainant in a criminal lawsuit proves by fact or legal argument that the defendant deliberately and unlawfully harmed him, he has the right to claim damages that can be proved. The legal resources point out that a criminal offense has been committed and that the claimant is entitled to damages. Hence, there is conformity in the purpose of the legal explanation of the sources. Nevertheless, adjudication is also pursued in situations where the agreed sources of law are unclear, will possibly contradict one another, or may not provide valid and suitable lawful sources for the resolution of the conflict. These are described as 'hard cases', in which an impartial way of making a judgement based on the recognised sources of law is problematic.

It would appear that Dworkin's approach of adjudication is both constructive and progressive. According to Roux (2008:282) in 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?', Dworkin's adjudication theory allows judges to make strategic decisions about when to push constitutional arguments and when to compromise on principle so as to keep alive the ideal of a community of principle. Citing Dworkin, Roux (2008) states that an actual justice must sometimes change what it considers to be right as an issue of principle, and thus as a legal matter in order to obtain the votes of other officials to make their collaborative decision more appropriate for the society. Inherent in Dworkin's school of thought is that deciding cases as his imaginary judge Hercules would decide them is an ideal that cannot always be realised in practice, not that it is conceptually difficult to always offer the best interpretation of the Constitution, but because there are some practical limitations on constitutional adjudication. The first problem, continues Roux, is the condition that decisions should be supported by a majority. In the event of a choice, Dworkin says that Hercules would tend to 'adjust' his decision as a matter of principle with a view to securing the votes of other judges rather than handing down a fully-fledged but endorsed minority view. In this way, a judge should change his decision strategically as a matter of principle to make that decision reasonably appropriate to continue acting in the spirit of a community of principle at the constitutional level.

In 'Does Dworkin's thesis succeed in solving the problem of judicial discretion', Faller (1984:22) highlights the essential difference between arguments of principle and arguments of policy. The former, he explains, are arguments that appeal to rights in sustenance of a decision, whereas the latter are arguments that appeal to collective goals in support of a decision. Van Doren (1980:304) criticises the distinction Dworkin makes between principles and policies on the grounds that Dworkin bases the basis of the disparity on the presupposition that the courts demand a degree of consistency, which is often not the case. Furthermore, he objects to the distinction of policies and principles on the grounds that this difference does not constitute principles that determine the rights of parties to litigation, while policies are general public objectives that the legislature adequately addresses in its legislative role. Dworkin's view, argues van Doren, that court rulings should be backed with principles is not, however, the way in which the judicial process functions, as it always has been part of the court decision-making process, so that a decision can be abstracted taking into account the consequences of a principle for its related policies and principles, since they exist in a spectrum whereby they are embodiments of policy.

Faller (1984: 22) argues that Dworkin's theory fails to give us a satisfactory account of the bounds of judicial discretion. At the bare minimum, a satisfactory account of judicial discretion must give judges, lawyers, and commentators useful guidance in making or criticising legal decisions. Without such guidance, judges are left to their own best judgement to determine what constitutes a correct weighing of these goals. As it stands, continues Faller, Dworkin's rights thesis basically admonishes judges against making decisions without reference to institutional sources but does not explain how these sources are properly used to arrive at a legally correct decision. Others have argued that Dworkin does offer limits that can be based on the principles used to settle conflicts in difficult cases where such restrictions are derived from the moral and political realms. In summary, Dworkin argues that judicial collection of principles is subject to the requirement of normative quality and that their primary claim to value lies in their political and moral significance, not in the fact that most, or even some other judge or official follows them.

In the South African current legal system, Klaasen (2017:4) holds the view that the Constitution features as the primary source for the judicial decision-making process, which is supplemented by the existing legislation in the form of statutory law, customary law, common law as well as court precedent, foreign and international law, but it is nevertheless necessary for the courts to make a just and equitable decision based on other sources in hard cases. According to Klaasen (2017:4), these other sources are rooted in the subjective identity of the judge – the sum of her/his culture, religious background, and political views. This creates a mystery as it is the responsibility of the courts to make informed decisions, and therefore, the decision-maker should deliberate before making a decision and justify the decision.

It appears that Dworkin's approach finds easy application in real practical situations. In this regard, Klaasen (2017:5) expounds that in difficult cases where the court is requested to settle a matter equitably, the court is involved in deciding something that the parties themselves are unable to agree on, and for which there is no standard with no precedent before the court, and where the law on the matter is also uncertain. The impartial implementation of the law to the facts of the case and the legal claims before the court are therefore questionable. Hard cases, explains Klaasen, requires the judge to interpret the law from other sources that are not law related, including his own political views or policy decisions, even their peculiarities. This necessitates a subjective application of the law by the judge; a self-imposition of his/her own moral, religious or political beliefs. According to Freedman (2013:13), judges are best placed

to find these answers because of their training and experience, and because they do not have to be elected and are removed from the political process.

Dworkin's theory is pertinent for the South African system. Particularly in light of the fact that the South African system views the Constitution as the supreme law. In 'Theories of professors H.L.A. Hart and Ronald Dworkin: A critique', van Doren (1980:303) argues that a closer look at Dworkin's rights affirms the idea that rights are intrinsic in the Constitution and that its interpretative proceedings, including other factors, restrict and monitor the exercise of judicial discretion, and that judges discover rights by drawing up a political theory and then applying historical precedents systematically to a given scenario. Although personal penchants might influence judges, they essentially confirm what already exists.

Van Doren asserts that judges should make political and moral rulings in pursuit of the right answer to a difficult case. Judges should also be mindful that if colleagues face a similar situation, the outcome may be very different, although the decision should not be based solely on individual convictions. There is formal test to help the judge obtain the right answer. Dworkin says that judges frequently disagree, not only on how some rule or principle should be interpreted, but also as to whether the rule or principle cited by one judge should be regarded as a principle or rule at all. For example, in some cases, the majority and view of the dissenting accept the same earlier cases as applicable but disagree with the rule or principle that these precedents should be comprehended and established.

Rosenfeld (2005:365) in support of the right answer theory states that in difficult cases the logic and solidity of the right answer is similar to the right answer to a complex mathematical problem. In both cases, human shortcomings or mistakes do not detract from the validity of the one right answer and leave aside ontological queries regarding the connection between law and morality. The right answer thesis by Dworkin seems preferable to positivist discretion, assuming that certain requirements are met. Chief among them is the consent or established legitimacy of the principles used during the resolution of hard cases and application of the relevant principles actually leads to a single right answer, rather than a plurality of right answers. If the first of these requirements is not met, then it would be simply unreasonable to return to the principles in question.

The objective of Dworkin's theory ought to be applauded. Rosenfeld (2005:369) asserts that the principle approach embraced by Dworkin is certainly intended to combat the idea that judicial decision-making needs to be arbitrary in some way. Dworkin claims that judicial decision-making adheres diligently to the principle of integrity, but due to the intricacy of modern legal systems, the applicable principles cannot necessarily be extended to the legal texts submitted for jurisdictional interpretation. What is at stake is the consistency and coherence of the law achieved by ascribing hermeneutic principles to legal texts. Hence, compliance to the principle of integrity must guide judges or Hercules towards a proper understanding consistent with such harmony and coherence. Therefore, the question of whether or not the presumption of fairness places major interpretative constraints on judges is an important factor for the success of Dworkin's hermeneutical undertaking.

Because of its progressive nature, Dworkin's point of view can be perceived as a common ground between legal realism, natural law, and positivism, with an emphasis on the degree to which the laws control the set of rules and their applicability to facts. By doing so, it shook up the prevalent philosophy of positivism. By introducing political ethics as the centrepiece for the collection of principles, it helped bring law and morality together.

Van Doren also commends Dworkin for his realism to include political morality in his decision-making process. In particular, the jurisprudential schools and positivism are grappling with the problem of subjectivity and finding ideas that can be externally supported. These contributions, explains van Doren, are significant and commendable, but the emphasis on the existence in institutional history of pre-existing rights that yield one right answer does not reflect the legal environment or the universe.

Considering the fact that the courts in South African have a duty to give reasons – the aim being to corroborate their decisions – Dworkin's theory in this regard dovetails with the South African legal systems. It is now an undeniable fact that South Africa's past was characterised by inequality and injustices, which had to be changed in order to have country that all could be proud of. In line with this vision, the main objective of the Constitution is to transform South Africa from what it was into a country that inculcates both confidence and trust in the South African citizenry. Dworkin's approach is relevant to South Africa on the basis that it is the vehicle through which the ideals that are enshrined in the Constitution are realised. To the extent that the Constitution of South Africa is not a conservative or preservative one, but a

transformative constitution, Dworkin's theory is progressively constructive in this regard. I think that the enunciation that Dworkin makes in relation to rule, principle, and policy provides a toolset for South African judges in the context of individual rights that have to be adjudicated upon.

I observe that the South African Constitution places high premium on human rights as a mechanism of healing past wounds, and leading South Africa to a healthier future. In the light of the fact that the Constitution demands that the rights contained in it must be fulfilled, protected, promoted, and respected, this requirement dictated by the Constitution is satisfied when the judge makes a decision with reliance on Dworkin. Based on Dworkin's theory, in hard cases, judges must demonstrate the role played by the moral and political theory in the construction and application of rights due to the notion that judicial decisions should be generated by principle not policy. Dworkin's approach that principle greatly justifies a political decision by proving that the decision recognises or guarantees some individual or group right is more relevant to South African transformative constitutionalism, at the centre of which is the Constitution functioning as a tool to develop individual rights.

I view Dworkin's work as relevant for South African judges for their decision making, particularly as a method to help them transform South Africa gradually, and as a method to accommodate the separation of powers. This is due to the fact that the courts cannot implement practically their own judgements but have to rely on the other arms of government, namely, the legislature and the executive for compliance with the courts' transformational orders. The principle-centred approach advocated by Dworkin in decision making by judges is the most practical method in the realisation of constitutionalism, fundamental rights, and liberties, not only in South Africa, but also in other democracies where a culture of human rights and constitutionalism is friable, because Dworkin plausibly identifies the weakness of judicial discretion to justify his principle-oriented approach.

Next, I discuss the facts of each of the three cases that were selected for the current project. In doing so, I endeavour to demonstrate how the Constitutional Court is inconsistent in the adjudication of rights giving rise to uncertainty of whether their main consideration is the morals of society or the legal rule.

CHAPTER 4

JORDAN CASE

The three appellants in the Jordan case, namely, Ellen Jordan, Louisa Johanna Francina Broodryk, and Christine Louise Jacobs, approached the Court citing the State as the First Respondent, and Sex Workers Education and Advocacy Taskforce, Reproductive Health Research Unit, Centre for Applied Legal Studies, Commission for Gender Equality, and Pieter Crous, Menelaos Gemeliaris, and Andrew Lionel Phillips as First, Second, Third, Fourth, Fifth, and Sixth Amicus Curiae, respectively.

The facts in the case are that the appellants in their capacity as the owner of a brothel, employee, and sex worker were tried at the Court of First Instance – the Magistrates' Court – for the crime of violating the 1956 Sexual Offenses Act. After their conviction, they decided to approach the High Court for appeal with the thrust of their appeal being that the specific sections of the Act relied upon to convict them, were unconstitutional. The ruling of the court was that the section of the Act that criminalises carnal intercourse for reward (the prostitution provision) was indeed unconstitutional, but refused the appeal in respect of the sections of the Act that make it a crime to keep or manage a brothel (the brothel provision).

The appellants were not happy about the dismissal of their appeal and remained unsatisfied. So they took their case to the Constitutional Court with the assertion that the so-called "brothel provisions" ought to be ruled as violating the Constitution. They requested the Constitutional Court to make the High Court portion of the appeal that had invalidated the prostitution provision an order of the Constitutional Court. The state strongly opposed both – the brothel provision and the invalidation of the prostitution provision. The Constitutional Court also permitted several amici curiae to present arguments calling for all provisions to be invalidated.[1]

The main issue that was argued requiring the Constitutional Court to make a determination was whether section 20(1) (aA) of the Sexual Offences Act discriminates unjustly against women, as unfair discrimination violates the constitutional right to equality. The state's main contention was for the status quo to be maintained. In that, on a proper construction of the provisions of

[1] Viewed https://prostitution.procon.org/sourcefiles [Accessed 20 April 2020]

the Act that were being attacked by the appellants in the matter, there is no discrimination motivated by the argument that the section affects not only the prostitute as a service provider but the customer as well. In effect, the state convinced the Court that the section was not discriminatory.

The full citation of the case is *Jordan and Others vs The State and others Case* CCT 31/2001. The arguments were presented in the Constitutional Court on 5 and 6 March 2002. The judgment was handed down a few months later on 9 October 2002 by Ngcobo J, stating in the introductory remarks that he read the joint judgment of Judge O'Regan and Judge Sachs before he gave his judgment. Supremely important is the fact that he also agreed that the constitutional challenges focused on human integrity, privacy, and economic activity, and that the individual must fail as these challenges did not make out a case of violation of constitutional rights. It is noteworthy that the reasons that persuaded him in his conclusion that the argument with the basis on the right to economic activity and the right to privacy had to be dismissed, differed in both scope and emphasis from those enunciated in the judgment of Judge O'Regan and Judge Sachs. While Judge Ngcobo also accepted that sections 2, 3(b) and (c) of the Sexual Crimes Act needed to be discarded, he did not agree with the fact that section 20(1)(aA) of the Act discriminates disproportionately against women, and is thus inconsistent with the provisional Constitution.

Furthermore, the judge expressly remarked that the primary objective of the ban is to outlaw commercial sex. Prostitutes are involved in the commercial sex business. The main aim of deterring commercial sex can only be realised if and when there is law in place that addresses the conduct of the merchant through criminal sanctions. The difference between the dealer and the consumer is a prevalent one. Section 20(aA) thus ought to be considered against the fact that a person who pays for sex is guilty of criminal behaviour with the liability of the same punishment as the prostitute (2002:6).

According to the judge, the legislature did not have the intent to discriminate because the law makes it a crime and punishes it as such when all decide to partake in unlawful conduct. The Sexual Offenses Act and section 20(aA) are part of a system of law. All who participate – the man who pays for sex and the woman who accepts payment – are similarly criminally culpable and therefore subject to the same punishment (2002:8).

The judge held the view that in the event of any prejudice, such prejudice could hardly be regarded as unfair on the ground that with the Sexual Offences Act, it is hoped that it serves a very significant and valid constitutional reason to ban commercial sex with the only important change in the conduct being that the prostitute sells sex whereas the patron purchases it. In essence, gender is by no means a differentiating factor. Invariably, to effectively curb commercial sex, that main focus should be on supply. However, insisted the Judge, the criminalisation is gender neutral as it condemns the prostitute, regardless of gender, and both are equal in guilt and punishment.

Discrimination resulting from dealing with the customer and the prostitute under different provisions of the law cannot be deemed unfair. It is an attitude in society that should not in any way be taken as the result of the law. Often, the public sees the recipient of reward as being more to blame than the client, as the stigma that accompanies prostitution happens on the basis of the conduct that the prostitute engages in, and not on the basis of their gender. Ultimately, stigma is attached to both males and females alike. Judge Ngcobo also agreed with Judge O'Regan and Judge Sachs in the finding that by deciding to be involved in commercial sex work, the sex worker willingly and deliberately accepted the risk of lowering their status in the eyes of the society (2002:9).

The Court also acknowledged the challenge about the right to economic activity, ruling that, at best for the appellants, sections 26(1) and (2) of the interim Constitution needs to be read in accordance with a view to assigning significance to all restrictions on economic activity and on earning a living outside the limits of subsection (2) as in violation of section 26. All that subsection (2) needs is that a reasonable relation should be formed between the law and the legislative intent authorised under subsection (2). The right to economic activity is not absolute, as the limitation clause does kick in to answer a question of law to enunciate the circumstances under which it becomes limited. That is confirmation that the objective in a democratic and open society founded on freedom and equality is justifiable once it has been established, that the aim of the ban is approved by subsection (2) (2002:12).

The state was strongly opposed, declaring that the intent of the legislative changes and law was meant to facilitate the preservation or enhancement of the standard of life and human welfare, which is confirmed and governed by section 26. The state further argued that sex work cannot be dissociated from other unlawful conduct or crimes such as violence, drug abuse, and child

trafficking. It is for these reasons that the Sexual Offences Act was put in place by the legislature. It remains the responsibility and duty of the legislature to fight and address social ills with the result that, where it is reasonable, to use criminal sanctions, and in so doing, to act in a manner that is in line with the Constitution of the country. It was the state's submission that once the legislature has done so, the state maintained that courts did not have a choice but to give effect to that legislative decision and in the process avoid the temptation to entertain the debate of trying to get an answer to the question of whether the decision made by the legislature is good or bad compared to others not chosen.

The Court held that fighting and addressing the social ills that accompany commercial sex, leaves the legislature with a mechanism of prohibition, regulation, and abstention. To tackle such problems, the government resorted to criminalising commercial sex and brothel-keeping, which is regulated by subsection (2). The main objective according to the Court is to eradicate the detrimental impacts of sex work and brothel-keeping with measures intended to improve and protect the quality of life. The judge also distanced the Court from passing judgment on the effectiveness or otherwise of the choice that has been made by the legislature (2002:13, par 26). He went on to caution that the Court's responsibility was not to put aside laws merely because the Court considers them inadequate. After all, there are alternative and effective forms of handling the problem. Consequently, it follows that prostitution and the keeping of brothels will not be covered by section 26 of the Constitution, which notes that the petition based on section 26 must also fail (2002:13, par 26).

The Court also had to make a decision concerning the right to privacy, an argument that was also part of the submission on behalf of the appellants. In that the criminalisation of sex work violates the right to privacy, but the judge expressed his grave doubts as to whether the prohibition contained in section 20(1) (aA) infringes the right to privacy (2002:13, par 27). According to the judge, Jordan's case was different from the *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice*, because the offense was the focus of the constitutional opposition which violated the right of homosexuals not to be prejudiced and their right to dignity. This has infringed the "sphere of private intimacy and sovereignty that enables us to establish and maintain social relationships without external group intervention" and therefore has influenced the identity of homosexual persons at the core of this private area of intimacy (2002:13, par 27).

The court adopted a position in the Jordan case that sought to make the point clear that commercial exploitation of sex never involves "an infringement of dignity nor unfair discrimination" (2002:14, par 28). Asserting that if the "privacy rights are involved, that right resides at the periphery but not at its core". Ngcobo J saw that as being at the root of the argument by the prostitutes, that they are not permitted to offer their sexual services (2002:14, par 29). The judge pointed out that prostitutes are free to engage in sex, use their bodies in any manner imaginable, and participate in any trade, as long as it does not include prostitution and violating a law that is lawfully established. What is restricted is the prostitute's commercial interests. However, the restriction is not absolute as prostitutes "can follow their commercial interests but not in a manner relating to commercialization of sex" (2002:14, par 29). Pursuant to the legitimate state interest (2002:14, par 29) in outlawing prostitution and brothel keeping, cognisant of the extent of the restriction on the right of the commercial sex workers to earn a living, the judge ruled that "if there is an infringement of the right to privacy, the infringement is justified" and the appeal of the right to privacy "must be dismissed" (2002:14, par 29). He dismissed the appeal against the High Court's decision regarding brothels, and on the basis of his view that "Section 20(aA) did not infringe the privacy, freedom and security and the right to economic activity", he dismissed the appeal and refused to acknowledge the invalidity order in respect of section 20(aA) 20(1) (aA) (2002:15, par 31).

PRINCE CASE

The full citation of this case is *Gareth Prince v The President of the Law Society of the Cape of Good Hope and others Case* CCT 36/200. The matter was argued in court on 17 May 2001, but the verdict was delivered by the Court the following year on 25 January 2002. The appellant in the matter was Gareth Prince ("Gareth"). He wanted to be admitted as an attorney and be authorised to enrol as an attorney on the basis that, as far as he was concerned, he had fulfilled all the admission requirements to the law profession as an attorney. One of the admission requirements in terms of section 2A(a)(ii) of the Attorneys Act was a period of community service, which Gareth did not do. In his application for registration of his community service contract with the Law Society of the Cape of Good Hope (Law Society), Gareth submitted to the second respondent, as mandated by section 5(2) of the Attorneys Act, that he still had two prior convictions of possession of marijuana (also known as cannabis) but also stated that he wished to continue to use cannabis. Furthermore, in an application he stated that cannabis use was heavily influenced by the Rastafari religious belief to which he subscribes (2002:2).

Gareth's application was not successful with the Law Society. The Law Society refused to register his contract of community service on the basis that a person who, despite possessing two prior convictions for cannabis possession, declared his desire to keep breaking the law. In the Society's view, this was not a fit and suitable individual to be licensed as an attorney, and therefore could not be allowed to practice as such. While retaining the firm position that as long as the ban on the usage of cannabis existed in statute books, the appellant would continue to violate the law – a behaviour that would inevitably bring disrepute on the profession of attorneys (2002:2).

The stance of the South African legal system at the time was that cannabis possession or consumption was forbidden under very few exceptions, which, however, did not extend to the case of the appellant. Worthy of note is that the appellant had been unsuccessful in challenging the constitutionality of the prohibition both in the High Court, as the first court he approached with the challenge, and the Appeal Court in Bloemfontein, which he approached with the appeal against the dismissal of his application in the High Court in the Western Cape. Most notably, at the outset of the High Court's litigation procedure, the petitioner questioned the constitutionality of the Law Society's judgment by arguing that the Law Society had breached his fundamental right to freedom of worship, to equality, to follow the career of its choosing, and not to be discriminated against arbitrarily.

The main contention in his appeal was to get an order of the Court declaring that the ban on the use of cannabis possession if inspired by religion is not illegal because the Constitution guarantees freedom of religion (2002:3). The relief he sought was for the Court to examine and disregard the Law Society's verdict decision that was disallowing him to register his community service contract. He also wanted the Court, as part of the order, to order the Law Society to register his contract with effect from 15 February 1997 (2002:4). It is the fact that was taken as accepted by the appellant in Court proceedings that criminalisation of possession of cannabis was for a legitimate reason in the interest of society. Consequently, it was the decision that the Constitutional Court had to make in terms of answering the question of whether cannabis should be legalised or not. Gareth, as the appellant, maintained that the moratorium was unfair as it stretched very far, even bringing within its scope usage required by the Rastafari religion, thereby making it a pure constitutional complaint.

The appellant made a decision when taking his matter to the Constitutional Court to widen the scope of his argument of the constitutional challenge and included an attack of section 4(b) of the Drugs and Drugs Trafficking Act 140 of 1992 (the Drugs Act) and section 22A(10) of the Medicines and Related Substances Control Act 101 of 1965 (the Medicines Act) with the result that when the matter reached the Constitutional Court, it became essential to include the involvement of the Minister of Justice, the Minister of Health, and the Attorney-General (2002:4).

It was the Court's view in favour of the members of Rastafari religion that while Rastafari doesn't quite belong to official associations, it is affiliated with several duly constituted groups or communities. The Rastafari National Council was established as an umbrella structure to co-ordinate operations and take care of Rastafari interests, including aspects of behaviour. Notwithstanding the fact that their places of worship are quite informal, local followers would meet for worship at church gatherings overseen by priests, assistant priests, or elders. According to the evidence submitted to the court, there were approximately seven priests in the country at the time (2002:9).

The Court maintained that Rastafari have a moral code which all adherents have to obey, such as the Nazarene Code, and its faith embraces fundamental principles, such as harmony, compassion, honesty, equality, justice, and freedom. Furthermore, it is a religion that accepts the Bible as an inspiring and sacred source, with logic and meditation comprising the key aspects of the religion. Meditation is in this context a person's contemplative activity, while reasoning is a collective act as a form of communion. A significant component of these practices is the use of cannabis at their religious meetings, and secretly at the home of the follower (2002:10).

The Court further observed that there was nothing before the Court to suggest real dispute that the use of cannabis lies at the heart of the Rastafarians. The Court carefully considered the evidence of Professor Yawney, whose evidence was to the effect that to the Rastafari, cannabis is a sacred herb given by God for the cure of the people, and that Rastafari describe their spiritual experience as 'knowing God', 'gaining divine wisdom', and 'seeing the truth'. In line with their religious doctrine, according to his evidence, they sought to gain access to encouragement from Jah Rastafari – who is the Living God, according to them (2002:10).

The Court noted that the agreed fact between the parties was in relation to Gareth, as an appellant, being a staunch member of the Rastafari religion. By accepting the vow of Nazarene as the mark of conversion, he showed his allegiance with the faith by donning dreadlocks and following the religion's dietary commands. He also conducted religious rituals in compliance with Rastafari doctrines. Furthermore, he observed the religious meetings, such as gatherings like Nyabinghi, which is equivalent to a traditional church service. He used cannabis at these ceremonies by either burning it as an incense or eating it at home alone (2002:11).

The legal position regarding cannabis is that it is listed in Part III of Schedule 2 of the Drugs Act as an "undesirable dependence-producing substance", and its possession or usage is banned by section 4(b) of the Drugs Act. The main aim of the Drugs Act is to prohibit the usage of 'dependency-inducing' products and to differentiate between dangerous and harmful items, including cannabis, which is categorised as an undesirable item causing dependency. It should be remembered that possession for medical purposes is exempt under section 4(b) and is subject to the requirements of the Medicines Act. Section 22A(10) of the Medicines Act interpreted in compliance with Schedule 8 of that Act also forbids the usage or consumption of cannabis, except for purposes of study or analysis.

The court confirmed in its ruling that the substances mentioned in Schedule 8 of the Medicines Act are significantly the same as the ones listed in Part III of Schedule 2 of the Drugs Act. In this regard, the court maintained that the ban in section 22A (10) of the Medicines Act corresponds with the Drugs Act where both are geared at prohibiting the use of harmful dependence-producing drugs. Both pieces of legislation solely target cannabis because it could lead to psychological dependence when consumed frequently and in huge amounts. Medical evidence was presented in Court to show that cannabis is a hallucinogen (2002:11).

It was the appellant's main argument that the provisions of the Act he was challenging were illegal and that they were not able to offer an exception for usage and possession by Rastafari's for bona fide religious purposes. The Court's opinion was that the appellant argued that the ban is constitutionally wrong, since it does not allow cannabis religious use. In other terms, the regulations questioned were overbroad (2002:15).

There was acceptance in Court by both Attorney-General and the Minister of Health that the ban limited the appellant's (and that of fellow Rastafari's) constitutional rights to freedom of

religion, but that the prohibition was valid in the light of Article 36 of the Constitution and critical to the war on drugs, as it was also required by international law obligations (2002:16). The Attorney-General and the Minister of Health also stated that a religious exception requiring Rastafari to use cannabis for theological purposes may be challenging to enforce. Their facts and argument focused on cannabis smoking and the logistical problems that might occur in carrying out such religious exemption (2002:16).

The Constitutional Court looked at the approach that the appellant adopted in the matter and held that just like the High Court, the appellant had approached the Constitutional Court on the basis that the prohibition embodied in the disputed clauses represented a compelling purpose of the government and that there was no indication, either in the papers or in the appellant's case, that the goal sought by the prohibition was not commendable. The court held the view that the adjudication in this matter revolved around the question of whether an exception for the Rastafari religious usage of cannabis should be permitted, or if the scope of the ban should be restricted, so as not to negatively impact on the Rastafari's religious use of cannabis without jeopardising the criminalisation objective. It was the Court's reasoning that the objective of the inquiry was basically to test the legitimacy of the disputed statutes by deciding if legislature might have accomplished its goal without limiting the constitutional rights to the degree that it did (2002:21).

There was indeed acceptance by the Court that if the appellant was guaranteed freedom of religion that it was vital to first ascertain how the ban restricted the appellant's fundamental freedom of religion (2002:21). This right to freedom of religion is found in section 15(1) of the Constitution, and stipulates that: "Everyone has the right to freedom of conscience, religion, thought, belief and opinion". Additionally, section 31(1)(a) stipulates: "Individuals belonging to a political, ethnic or linguistic group cannot be refused the freedom to celebrate their faith, exercise their religion and use their language along with other members of that group".

DE CASE

The full citation of the case is *DE v RH* [2015] ZACC 18. The matter was first argued in the North Gauteng High Court in Pretoria. After the ruling in the North Gauteng High Court, there was an appeal to the Appeal Court in Bloemfontein. The matter was brought before the Constitutional Court because, on appeal, the Bloemfontein Court of Appeal decided that the

time was right to rethink the criminal liability argument arising from adultery to determine if it could still be part of the South African legal system (2015:3). The party that initiated the North Gauteng High Court lawsuit was a claimant against the respondent who based his criminal claim on the loss of consortium and contumelia as a result of the extramarital relationship that his wife allegedly had with the respondent in this case. Therefore, the North Gauteng High Court had ruled in favour of the claimant (2015:3).

That an adulterous relationship took place between the applicant's ex-wife, Ms H, and Mr RH., was never disputed during the court proceedings. However, the applicant and his ex-wife had stopped staying together as husband and wife on 23 March 2010, which was the time the applicant's wife made the decision to leave the matrimonial home (2015:4). After the applicant's ex-wife left her marital home, she began legal proceedings in June 2010 with the intention of securing a divorce order from the Court to end her marriage to the applicant. The Court ruled in her favour and granted a divorce order in September 2010. The applicant's view was that his marriage with his ex-wife would not have broken down if the respondent did not have an adulterous relationship with his ex-wife. He blamed the respondent for his marital problems that culminated in the decree of divorce. Though disputed by his ex-wife in court, the applicant's averment was that his marriage was a happy one up until his ex-wife started an intimate relationship with the respondent. Ms H argued in court that her marriage relationship had begun disintegrating at least two years prior to her approaching the court for a decree of divorce. She also expressed that she already wanted to meet with a marriage counsellor. Thus, the severity of the marital problems had already motivated her to seek marriage counseling. There was recognition on her side that she and the respondent began a sexual relationship only after she had decided to leave the marital home (2015:4).

It is a question that the Court of Appeal in Bloemfontein decided to raise *mero motu* (of its own accord) during the appeal proceedings, whether the delictual claim arising out of adultery should continue being part of South African law and allowed both parties to make written submissions on this issue (2015:4). In a majority decision, the Supreme Court of Appeal ruled that taking into account the circumstances surrounding the case, the claimant could have a civil claim for *contumelia* concerning the law as it appeared. The judgment also took into consideration the historical context of the criminal allegation resulting from an extramarital relationship with the third party, revisiting the comparators of international law, shifting cultural expectations and the negative emotional and financial costs of such an action. After

this review, the Court noted that the delictual action based on adultery was already archaic and could no longer be maintained based on the current mores of our culture, and that the time had come for its abolition. This ruling against the claimant led him to take a decision to seek relief from the Constitutional Court (2015:4).

The Constitutional Court ruled that the judgment would be issued on the basis of papers submitted by the parties without providing oral evidence and argument. However, the claimant vehemently submitted the question of whether the adultery-based criminal allegation should continue to thrive as an argumentative point of law of wider public importance. The application was also founded on constitutional issues (2015:4). The Constitutional Court recognised that the constitutional principles and freedoms found in the Constitution now infuse public policy. It is worthy of note that the claimant based his case on three primary fundamental foundations in his papers. He first criticised the Court of Appeal in Bloemfontein, in that it had been powerless, as far as he was concerned, to amend the common law to conform with the country's Constitution. His second attack was that the Court of Appeal had failed to consider the applicant's right to privacy by finding that the adulterous offense was obsolete because, in his opinion, the case sought to preserve the integrity of the non-adulterous spouse. The third aspect of his case was that the Court of Appeal had refused to acknowledge the basic importance of marriage and the family recognised in section 15(3) of the Constitution, which he argued would be covered by interfering with the nature of a criminal allegation under section 8 of the Constitution (2015:5).

As a result of the applicant's argument, the Constitutional Court was persuaded that it had jurisdiction to hear the matter on the strength that an argumentative matter of law of broad public concern had been presented and was constitutional in principle. The Constitutional Court decided that the appropriate approach in the matter was to carefully look at the historical background of the development of the delictual claim arising out of the adulterous relationship and found that indeed the claim was recognised by the Appellate Division. The Constitutional Court also found that the existence of the delictual claim was not immune from criticism. In that its existence was heavily entrenched in patriarchy, with only the male having the freedom to make a lawsuit against a third person who had committed adultery with his wife (2015:6). In effect, continued the court with its criticism, wives were treated as chattels, which explained why the argument was against the third party, and not the spouse who was a co-wrongdoer. Nevertheless, as time passed, judges in South Africa started to question the unfair existence of

the claim, making contentions founded on Christian principles of loyalty that extend to both married couples and wives (2015:7).

It was imperative for the Constitutional Court to answer the attack by the applicant in relation to the failure of the Court of Appeal to establish the common law in order to be in line with the Constitution ruling that without a doubt it is up to the courts to establish common law. This is an authority that the courts have already had and that the right must be exercised in compliance with section 39(2) of the Constitution, establishing common law in such a manner as to maintain the spirit, purpose, and purposes of the Bill of Rights. This involves establishing the common law according to existing public policy. The Constitutional Court echoed this with respect to the judicial role: "Judges ought to and should adjust the common law to suit the rapidly shifting, social, and economic structure of the nation and judges shouldn't be fast to enforce laws whose social pillars have long expired" (2015:8).

There was an acknowledgment by the Constitutional Court (2015:8) that there are substantial limitations on the capacity of the courts to amend the law. In a constitutional democracy, parliament is responsible for changing the law, not the judiciary. In addition, the judiciary ought to be limited to progressive changes essential to maintain the "common law with the complex and changing structure of the society". The court noted that public policy has now been ingrained in the Constitution and the principles underlying it since the dawn of constitutional democracy. What public policy is, the Constitutional Court (2015:8) maintained, "must now be decided by reference to the principles underlying constitutional democracy as articulated by the Bill of Rights provisions".

The Constitutional Court addressed the issue of the *actio iniuriarum* (injury to personality) presented by the claimant in his papers. It noted that the Appellate Division had indicated that the court had to adopt the criteria of rationality, an objective test requiring the behaviour complained of to be tested against the prevailing norms of society, namely, current community principles and reasoning, to assess how such actions may be listed as unjust (2015:9). It could not be ignored, continued the Constitutional Court, that the Court of Appeal in the subject had taken time to examine the prevailing societal moral values in order to evaluate the significance of this criminal charge, and also saw a need to assess its continued existence in the sense of constitutional principles. It was on the basis of the shifting and indeed loosening perceptions towards adultery that public policy was more important and, therefore, wrongful (2015:9).

The Constitutional Court recognised that South African courts had already challenged the presence of the litigious claim several years before the applicant's case was brought before the Constitutional Court, and that scholars concluded that the argument was obsolete, and ought to be scrapped (2015:11). Furthermore, in the legal landscape, it was not without importance that regulations on divorce had long been revised to make it simpler for couples who did not wish to be tied by a marriage that was not working to seek divorce. Before the amendments, divorce used to be granted on specific circumstances, such as malicious desertion, incurable insanity, adultery, and violent crimes. This was modified by section 3 of the Divorce Act, which simplifies the dissolution of marriage on the grounds that it was irretrievably broken (2015:11).

It was the court's ruling that it could be of immense benefit to seek clarification from foreign law on the argument. However, considering variances in context, this needed to be undertaken with caution, because if a situation has both legal and moral implications, it would be wise to assess how similar legal problems occurred in other jurisdictions (2015:13). In making this decision, the court indicated that it had to consider the circumstances in which such problems occurred and their commonalities within the South African context. Of importance is the rationale used to substantiate the conclusions drawn in each of the international jurisdictions considered, and whether that justification was appropriate in the light of the Constitution's normative structure and social background (2015:13).

Taking into account the foreign law, for the Constitutional Court, it seemed that even with other jurisdictions, the overall trend towards the possibility of repealing a civil claim despite the much faster paced international disposal of an adultery offense and the massive uptake of reforms, was heading in one direction (2015:13). The Court held that the preservation of the argument by certain governments was not exactly a sign that such states could still not eradicate it even if they were asked to do so, as it might well have been the case that in some cases the question of abolishment had never arisen for judicial purposes. Accepting the Supreme Court's position in this respect, the Constitutional Court demonstrated that if the Supreme Court of Appeal had not raised the issue of its own accord, the country could still have been classified as a country that clung to the argument (2015:17).

Before the Constitutional Court upheld the Court's decision, it concluded that the criminal allegation was intrusive and infringed the right to privacy, as this very case was reflective in that respect. The Court of Appeal dealt with the violent, humiliating, and degrading discussion

dragged before the High Court by the ex-wife of the applicant, Ms H, as she was forced to suffer the anguish of microscoping her personal life and being questioned in an offensive and degrading manner (2015:14). The court raised concerns that the third party will have to reveal specifics of his or her romantic contact, like sexual intercourse with the unfaithful spouse, which is at the core of the sensitive essence of a romantic partnership, in order to justify a prosecution allegation focused on adultery

CHAPTER 5

The contrasting judgements in the three cases – Jordan, Prince, and DE – inevitably give rise to the question of whether or not the Constitutional Court does a good job of applying the engaged rights to the facts of particular cases. Of course, how we answer this question requires us first to ascertain what the job of (Constitutional Court) judges are. To this end, I have argued (in Chapters 2 and 3) that a Dworkinian approach is best suited to the context of a democratic South Africa. So let us examine how the decisions in the three cases fare according to this approach.

The decision in the case of Jordan seems to have been based solely on policy and not on principle, since the former supports a political decision by demonstrating that the decision promotes or preserves the common goal of the society itself. In the Jordan case, the view that the decision is on the basis of policy and not principle is inherent in the claim that Ngcobo J made in the matter when he remarked:

> Much of the argument in this case, and of evidence placed before this Court, was directed to the question whether the interests of society would be better served by legalising prostitution than by prohibiting it. In a democracy those are decisions that must be taken by the legislature and the government of the day and not the Courts. Courts are concerned with legality, and in dealing with this matter I have had regard to the constitutionality of the legislation and not its desirability. Nothing in this judgement should be understood as expressing any opinion on that issue.

The judge's claim demonstrates unpreparedness and unwillingness on the part of the Court in the case to pose a very similar question the Constitutional Court posed in the DE case in relation to the desirability to maintain a civil claim of adultery in a society where morals are not static but changing. The strict adherence to the Sexual Offences Act of 1956 in the case of Jordan that had to be decided in 2002, exhibits the Court's stance of policy, justifying a political decision that promotes or safeguards some shared objective of the society.

The decision of the Constitutional Court in this matter did not cater for argument of principle. Dworkin argues that the principle claim supports a political decision by demonstrating that the decision protects or preserves some person or group of people's rights, which are better understood as trumps over some historical rationale for political decisions that set a goal for

the whole society. The issue in the Jordan case was whether prostitution was bad for society versus the right to an individual's economic activity.

In the Prince case, the Constitutional Court did not base its decision on an argument of principle but on policy, since this case revolved around certain provisions of the Act which required an appeal to the Constitutional Court to rule the ban of the use or possession of cannabis unlawful by reason inspired by the Rastafari religion. In the course of the case, the appellant established the rights that the ban violated, namely, the right to freedom of worship, to privacy, to follow the career of his choice, and not to be discriminated against unfairly. In the form of a policy that promotes or safeguards any collective community aim, the Court noted that there were significant concerns regarding costs, the prioritisation of social needs, and the theoretical underpinnings that militated against the awarding of such a waiver. The giving of a limited exemption substantially interfered with the state's capacity to enforce its laws.

The DE case clearly shows a seismic shift by the Constitutional Court from policy to principle argument, as the judgment took into account the changing moods of our society before concluding that the adultery-based criminal action has become obsolete, and can no longer be maintained, and that the time has come for its abolition (2015:15). The manifestation of the shift lies in the fact that the principle arguments legitimise a political decision by demonstrating that the ruling respects or guarantees some person or group of people's rights. In addition, arguments of principle appeal to rights in aid of a decision whereas policy arguments are arguments that appeal to the collective objectives of a decision. Indeed, in the DE case, the Constitutional Court took into account, amongst others, rights to dignity and privacy of the partner who is presumed to have entered into an extra-marital relationship, as well as the rights to dignity and privacy of the third party who is alleged to have had an intimate relationship, with the inescapable conclusion that a civil claim of adultery does not have any place in the current South African constitutional legal system.

What the cases selected for this project illustrate is that despite the many decades that have passed since the advent of the so-called Hart–Dworkin debate, the matter is not settled – at least in the case of decisions made by Constitutional Court judges in South Africa. That is, some cases appear to be decided on arguments of principle while others are justified according to policy. The analysis of the three cases that were chosen for the research project evidences that inconsistencies in the adjudication of rights plays itself out because of Constitutional Court

failure to grasp the fact that the South African Constitution is not a preservative but a transformative Constitution. In rejecting the claim for the right to religion in the Prince case and the right to economic activity in the Jordan case, the Constitutional Court had placed reliance on the Drugs and Drugs Trafficking Act 140 of 1992 and Sexual Offences Act 17 of 1956, pieces of legislation that were in place many years before the promulgation of the Constitution. The adherence to pieces of legislation sharply contrasts the type of constitution that South Africa as a Republic has in the new dispensation. A closer look at the DE case demonstrates the abandonment of legal positivism in favour of Dworkin's 'rights thesis' to justify a decision by demonstrating that the action protects or preserves the rights of a certain person or group of people. In particular, the DE case demonstrated that it is the responsibility of the courts to establish common law whenever necessary, and that public policy is now filled with constitutional values and standards. More recently, in regard to cannabis, the court considered the Drugs and Drugs Trafficking Act in the Dagga case but relied on the right to privacy to rule in favour of Prince, which is evidence enough that rights are trumps as envisaged by Dworkin. With reference to the Jordan case, however, as Meyerson (2014:144) argues, the Constitutional Court does not always honour the idea of rights as trumps.

While there is much to be said for sticking to the rules, this conservative or formalist approach to law may appear to be inconsistent with transformative constitutionalism. I contend that the Court's procedure in the DE case and in the Dagga case – to move away from arguments of policy to arguments of principle – is a constructively progressive move, as it caters for abstract rights, and is a move that is in line with the constitutional ideal to promote the transformative objective of the Constitution. This method is also advocated on the grounds that it fits with the understanding that, while the main force for changing the law rests with the parliament, the courts are sometimes obliged to establish common law in a gradual manner. The conditions are determined, firstly, by section 39(2) of the Constitution, which mandates the courts the obligation to establish common law in order to uphold the meaning, intent, and purpose of the Bill of Rights, and secondly, by agreeing that the courts can and ought to adjust the common law to represent the changing moral, social, and economic fabric of society, the legal laws should never be propagated, which have lost their social substratum.

Because the role of the legal system, in addition to promoting justice, is to provide certainty, switching between adherence to policy and adherence to principle is problematic as it culminates in inconsistencies in the adjudication of rights. To prevent these contradictions, I

propose that decisions need to be explained in the context of South Africa by claims of theory and not policy arguments.

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