LCP 408-02

Chapter Seven

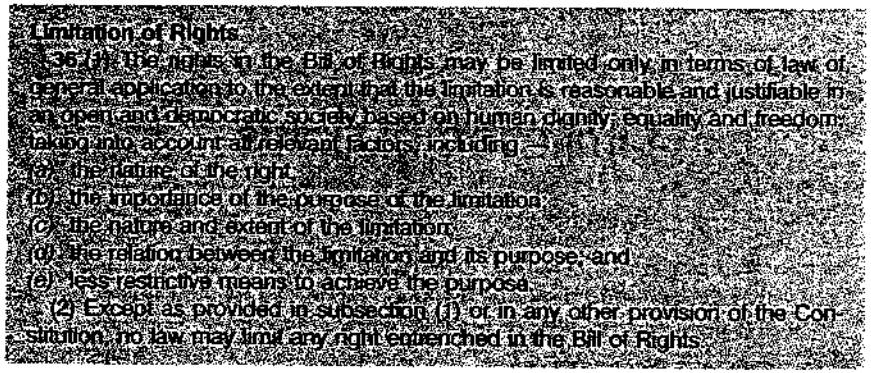
Limitation of rights

7.1 THE GENERAL LIMITATION SECTION

(a) Introduction: the nature of a general limitation provision

Constitutional rights and freedoms are not absolute. They have boundaries set by the rights of others and by important social concerns such as public order, safety, health and democratic values. In the South African Constitution, a general limitation section — s 36 — sets out specific criteria for the justification of restrictions of the rights in the Bill of Rights.[1]

[1] The section applies only to the limitation of the rights in the Bill of Rights. Provisions elsewhere in the Constitution that directly or indirectly grant rights cannot be limited by reference to s 36: *Van Rooyen v S (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) para 35 (judicial independence not subject to limitation).



Limitation of Rights

36.(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

'Limitation' is a synonym for 'infringement' or, perhaps, 'justifiable infringement'. A law that limits a right infringes the right. However, the infringement will not be unconstitutional if it takes place for a reason that is accepted as a justification for infringing rights in an open and democratic society based on human dignity, equality and freedom. In other words, not all infringements of fundamental rights are unconstitutional. Where an infringement can be justified in accordance with the criteria in s 36 it will be constitutionally valid.

It must be emphasised that the existence of a general limitation section does not mean that the rights in the Bill of Rights can be limited for any reason. It is not simply a question of determining whether the benefits of a limitation to others or to the public interest will outweigh the cost to the right-holder. If rights can be overridden simply on the basis that the general welfare will be served by the restriction then there is little purpose in the constitutional entrenchment of rights.[2] The reasons for limiting a right need to be exceptionally strong. The South African Constitution permits the limitation of rights by law but requires the limitation to be justifiable. This means that the limitation must serve a purpose that most people would regard as compellingly important.[3] But, however important the purpose of the limitation, restrictions on rights will not be justifiable unless there is good reason for thinking that the restriction would achieve the purpose it is designed to achieve, and that there is no other 'realistically available' way in which the purpose can be achieved without restricting rights.[4]

[2] Ronald Dworkin *Taking Rights Seriously* (1970) chap 7. The point of rights, according to Dworkin, is to protect individuals against certain decisions that a majority might want to make, even when that majority acts in what it takes to be the general interest. Dworkin's influential metaphor explaining this effect of rights is that rights are 'trumps'. Individual rights trump or outweigh collective goals. No matter how important a collective goal it cannot be pursued in a manner that violates individual rights. The limitation section in the South African Bill of Rights tells us that, while rights will usually trump collective goals, there are occasions when rights must give way to overridingly important social concerns.

[3] Denise Meyerson *Rights Limited* (1997) 36–43.

[4] *S v Manamela* 2000 (3) SA 1 (CC) para 32.

(b) The two-stage approach

The Constitution provides for the limitation of fundamental rights by way of a general limitation section. It is 'general' because it applies to all the rights in the Bill of Rights and provides that all the rights may be limited according to the same set of criteria.[5] In this regard, the Constitution differs from many other bills of rights and international rights instruments. For example, the United States Constitution does not have a limitation clause at all.[6] The German Bill of Rights, on the other hand, does not have a general limitation clause but attaches specific limitation provisions to many of the fundamental rights.[7] A similar structure is found in many of the international human rights instruments.[8] The principal model for the South African Bill of Rights is the Canadian Charter of Rights and Freedoms which contains a list of rights and a general limitation clause governing the limitation of those rights.[9]

One consequence of the inclusion of a general limitation section in the Bill of Rights is that the process of considering the limitation of rights must be

[5] It is, however, difficult to apply the general limitation clause to rights with internal demarcations or qualifications that repeat the phrasing of s 36 or that make use of similar criteria. For example, s 33(1) which provides, inter alia, a right to lawful and reasonable administrative action will be violated by unlawful or unreasonable administrative action. It is hard to think of a way of justifying such administrative action as a 'reasonable' limitation of the right, or of arguing that it is 'in terms of law of general application'. There are similar problems with the application of s 36 to the equality clause (see 9.2*(c)* in Chapter 9 below), to the occupational freedom right in s 22 (see Chapter 22 below) and to the property right (see 25.3*(g)* in Chapter 25 below). In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services* 2002 (4) SA 768 (CC), the Constitutional Court acknowledged the difficulties of applying the limitation clause to a violation of s 25(1) but found it unnecessary to decide the question whether the property right could ever be justifiably limited. The positive aspects of the socio-economic rights in ss 26 and 27 (rights to reasonable measures to achieve progressive realisation of the listed goals) are also inappropriate for limitations analysis. See *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) which tested legislation restricting a social welfare benefit to citizens against the criterion of 'reasonableness' in s 27(2) and not against the limitation section. Repeating the move it employed in *First National Bank*, the court acknowledged the difficulty of applying s 36 to the socio-economic rights but expressed no definitive opinion on the issue (paras 83–4). See, further, 26.6 in Chapter 26 below. On demarcations of rights, see 7.4 further below.

[6] Limitations are established by means of interpretation of the right by the courts. For example, the First Amendment to the US Constitution provides simply that 'Congress shall make no law . . . abridging the freedom of speech'. This does not mean that the right is absolute. Over the years, the US courts have held that the government can justifiably pass laws prohibiting obscene speech, defamation, fighting words, words creating a clear and present danger to public order and misleading or false advertising. See S Woolman 'Limitations' in M Chaskalson et al (eds) *Constitutional Law of South Africa* (1996, 3 rev 1998) para 12.1*(c)*(iii).

[7] For example, art 2(1) of the German Basic Law: 'Everyone shall have the right to the free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral code'.

[8] Such as the International Covenant on Civil and Political Rights, 1966 and the European Convention on Human Rights. For example, art 18(3) of the Covenant permits limitation of the freedom to manifest one's religion or beliefs if the limitations are 'prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.

[9] The limitation clause is s 1, which provides that 'the rights and freedoms set out in . . . [the Charter] are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. The influence of the Canadian model on the drafting and interpretation of the South African limitation section is surveyed by Woolman (note 6 above) 12–6–12–9.

distinguished from that of interpretation of the rights.[10] As was pointed out in Chapter 2 above, in direct Bill of Rights litigation, once the preliminary issues have been cleared out of the way, the court asks two questions. The first is whether a right in the Bill of Rights has been infringed by law or conduct of the respondent. The second (which necessarily depends on a positive answer to the first question) is whether the infringement can be justified as a permissible limitation of the right.[11] This is the two-stage analysis of identifying an infringement of rights and evaluation of the justifications for the infringement.

We also saw in Chapter 2 that the first stage of the analysis is principally a matter of interpretation of the provisions of the law and of the Bill of Rights. The court must determine the scope of the rights by a process of interpretation and must ascertain whether the right has been infringed by the challenged law or conduct. The arguments required and any evidence that is needed will have to be brought by the applicant. If the court finds that a right has been infringed, the respondent (usually the state, but sometimes the person relying on the validity of the legislation) may then seek to demonstrate that the infringement of the right is nevertheless permissible in terms of the criteria for a legitimate limitation of rights laid down in s 36.[12] Even if the respondent makes no attempt to discharge its 'burden of justification',[13] the court must nevertheless consider the possibility that a limitation of rights is justifiable. This was the approach of the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice*.[14] Despite the fact that the respondent Minister indicated that he would abide by the decision of the Constitutional Court and did not attempt to defend the laws that were in question, the court mero motu and at considerable length considered whether a limitation argument could be made in favour of the laws.[15]

[10] It also permits a 'generous' interpretation to be given to the rights at the first stage of analysis. See, further, 6.3*(c)* in Chapter 6 above. As Halton Cheadle explains it, the courts 'should engage in rights analysis [ie, the first stage] on the understanding that there is no need to shape the contours of the right in order to accommodate pressing social interests', 'Limitation of Rights' in H Cheadle et al *South African Constitutional Law: The Bill of Rights* (2002) 698–9.

[11] In *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) the Constitutional Court showed that it was willing to depart from the two-stage approach to rights and their limitation in order to avoid having to decide the question whether a right has been infringed. The court declined to decide whether a law prohibiting corporal punishment in schools was a violation of the right of freedom of religion and the right to practice a religion in community with others. Instead, it went directly to the limitation clause. It held that, on the assumption for purposes of argument that the religion rights had been infringed, the infringement would be a permissible limitation of the rights.

It must be said that this is an extremely artificial way of deciding a case. The balancing exercise required by the limitation clause cannot be accurately carried out with only a 'hypothetical' violation of rights on one side of the scale. Moreover, when the case is decided on the basis of an assumption rather than a holding that a right has been limited, the entire discussion of the justifiability of the limitation becomes a hypothetical exercise with no precedential value.

The *Christian Education* move makes a reappearance in the majority decision in *Jordan v S* 2002 (6) SA 642 (CC) paras 28–9.

[12] *S v Makwanyane* 1995 (3) SA 391 (CC) para 102.

[13] *Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 491 (CC) para 19. In *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2004 (5) BCLR 445 (CC) para 34 the court described it as an 'onus of a special type'.

[14] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

[15] Ibid paras 33–57. See also *Phillips v Director of Public Prosecutions, Witwatersrand Local Division* 2003 (3) SA 345 (CC) para 20 (absence of evidence and argument from the state in favour of justification does not exempt the court from the obligation to conduct a justification analysis).

In more recent cases, the Constitutional Court has indicated that only a cursory form of limitation analysis needs to be undertaken in cases where the respondent puts up a half-hearted or inadequate case for justification[16] or where the respondent clearly shares the view of the applicant that the law in question is unconstitutional.[17] In such cases, it seems, it is unlikely that there will be much to be said in favour of the law's justifiability and a court does not need to devote much energy to the issue.[18]

There is an additional important difference between the first stage of considering the interpretation of a right and the second stage of considering the justifiability of a limitation of that right. The question whether an infringement of a right is a legitimate limitation of that right frequently involves a far more factual enquiry than the question of interpretation. Appropriate evidence must often be led to justify a limitation of a right in accordance with the criteria laid down in s 36. A court cannot determine in the abstract whether the limitation of a right is 'reasonable' or 'justifiable in an open and democratic society based on human dignity, equality and freedom'. This determination often requires evidence (such as sociological or statistical data) about the impact that the legislative restriction has on society.[19] Where justification rests on factual and/or policy considerations the respondent must put such material before the court. Failure to do so may lead to a finding that the limitation is not justifiable.[20] In this regard rule 31 of

[16] See *S v Steyn* 2001 (1) SA 1146 (CC) paras 32–36.

[17] See *S v Niemand* 2002 (1) SA 21 (CC) para 26 and *Moise* (note 13 above) paras 20–21.

[18] Indeed, in *Satchwell v President of Republic of South Africa* 2002 (6) SA 1 (CC) para 26 the court devoted no energy at all to the issue and simply accepted (in a single sentence) the respondents' concession that the law in question was unjustifiable. The concession is probably explained by the fact that the law had been found to be unfair discrimination. There is, as we argue in 9.2*(c)* in Chapter 9 below, not much point in trying to justify unfair discrimination. Much the same explanation can be offered for the sketchy treatment of the limitation issue in *J v Director-General: Department of Home Affairs* 2003 (5) SA 621 (CC) para 15.

[19] Sometimes the purpose of a limitation and the relationship between the limitation and its purpose will be self-evident. In such cases, according to Cameron J in *S v Meaker* 1998 (8) BCLR 1038 (W), there is no need for a mountain of statistics and reports to support a limitation argument. A 'common sense analysis' of the purpose and need for legislation and of the 'social or economic milieu' giving rise to the legislation would suffice (1047A–G). This approach allowed the court to uphold a reverse onus presumption in road traffic legislation as a justifiable limitation of the right to be presumed innocent, on the strength of an affidavit from the acting director of the Johannesburg Traffic Management Service, testifying to the 'practical importance and necessity' of the presumption.

[20] *Moise* (note 13 above) para 19: 'If the government wishes to defend the particular enactment, it then has the opportunity – indeed an obligation – to do so. The obligation includes not only the submission of legal argument but placing before court the requisite factual material and policy considerations. Therefore, although the burden of justification under section 36 is no ordinary onus, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment'. See also *Phillips v Director of Public Prosecutions* 2003 (3) SA 345 (CC) para 20.

Prince v President, Cape Law Society 2002 (2) SA 794 (CC) was, according to the minority judgment of Ngcobo J, an example of such a case. The court had to decide whether a failure to provide an exemption for religious use of prohibited drugs was a justifiable limitation of the right to freedom of religion. This required evidence that 'all religious uses of cannabis by Rastafari and in any circumstance pose a risk of harm regardless of how it is used and that a religious exemption cannot be granted without undermining the objective of the statutes. Such facts were necessary in this case because of, first, the constitutional requirement that in limiting the constitutional rights regard must be had to less restrictive means that are available to achieve the purpose of the limitation; and second, the constitutional commitment to tolerance which calls for the accommodation of different religious faiths if this can be done without frustrating the objectives of the government' (para 57).

In *NICRO* (note 13 above), the court noted that there are some cases 'where the concerns to which the [limiting] legislation is addressed are subjective and not capable of proof as objective facts. A legislative

the Constitutional Court's 2003 Rules[21] makes provision for the introduction of factual material which is relevant to the determination of the issues before the court provided that the facts are common cause or otherwise incontrovertible; or are of an official, scientific, technical or statistical nature and capable of easy verification.[22]

7.2 Criteria justifying the limitation of rights

A law may legitimately limit a right in the Bill of Rights if it is *(a)* a law of general application that is *(b)* reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Each of these requirements is dealt with in detail below.

(a) Law of general application

(i) *Authorised by law*

Only a 'law of general application' can validly limit a right in the Bill of Rights. This is the minimum requirement for the limitation of a right. A limitation must be authorised by a law, and the law must be of general application.

The 'law of general application' requirement is the expression of a basic principle of liberal political philosophy and of constitutional law known as the rule of law. There are two components to this principle. The first is that the power of the government derives from the law. The government must have lawful authority for its actions, otherwise it will not be a lawful government but will be despotism or tyranny. The practical effect of this component is illustrated by *August v Electoral Commission*,[23] in which the Constitutional Court considered the validity of the Independent Electoral Commission's failure to take steps to allow prisoners to register and vote in the 1999 general election. The Commission's inaction had the effect of denying prisoners their right to vote and, because

choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data When policy is in issue it may not be possible to prove that a policy directed to a particular concern will be effective' (para 35) Parties relying on justification arguments that are not based on facts 'should place sufficient information before the court as to the policy that is being furthered, the reasons for that policy, and why it is considered reasonable in pursuit of that policy to limit a constitutional right'. Failure to do so may be fatal to the justification claim However, the court held, there may 'be cases where despite the absence of such information on the record, a court is nonetheless able to uphold a claim of justification based on common sense and judicial knowledge' (para 36) But *NICRO* was itself not such a case In the absence of clear evidence of the policy objectives sought to be achieved by the disenfranchisement of convicted prisoners, the justification argument had to fail (paras 65–7)

[21] GN R1675 of 31 October 2003

[22] For example, in *S v Makwanyane* (note 12 above) the State, in support of its argument that the death penalty was a justifiable limitation of rights, submitted statistical evidence relating to the incidence of violent crime in South Africa and the increase in such crimes since the 1992 moratorium on the carrying out of the death penalty By contrast, in *NICRO* (note 13 above) the argument that the disenfranchisement of convicted prisoners was justified by the additional costs of registering prisoners and providing mobile voting facilities in prisons failed This was because the argument was advanced simply by assertion and was not backed up by any 'information as to the logistical problems or estimates of the costs involved' (para 49)

[23] *August v Electoral Commission* 1999 (3) SA 1 (CC)

it was not authorised by any law,[24] there was no possibility of justifying the infringement of rights in terms of s 36.[25]

What forms of law qualify as 'law of general application'? Though the Constitutional Court has not dealt with this question directly it has given a wide interpretation to the meaning of 'law' elsewhere in the Bill of Rights. On the strength of this interpretation it seems that all forms of legislation (delegated and original) qualify as 'law',[26] as does the common law (both the private law and the public law rules of the common law such as criminal law) and customary law.[27] A mere policy or practice (even of an organ of state) cannot qualify as 'law'.[28] While in most instances the limitation of rights is performed by the legislature, the courts also have the power to develop limitations by virtue of their power to develop the common law.[29]

(ii) *General application*

The second component of the rule of law relates to the character or quality of the law that authorises a particular action. The law must be general in its application. At the level of form, this means that the law must be sufficiently clear, accessible and precise that those who are affected by it can ascertain the extent of their rights and obligations.[30] On a substantive level it means that, at a minimum, the law must apply impersonally, it must apply equally to all and it must not be arbitrary in its application.[31] The 'law of general application' requirement

[24] The Electoral Act 73 of 1998 did not deny prisoners the right to vote, but simply prescribed that eligible voters had to register on the common voters' roll administered by the Commission in order to vote For budgetary and administrative reasons, the Commission deliberately failed to take any steps that would have allowed prisoners to register or vote

[25] *August* (note 23 above) para 23

[26] In *Larbi-Odam v MEC for Education (North-West Province)* 1998 (1) SA 745 (CC) para 27 the Constitutional Court held that subordinate legislation applying to all educators in South Africa was a law of general application

[27] *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) paras 44 and 136 Compare the dissenting judgment of Mokgoro J in *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 96

[28] *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 41 (policy of an organ of state that HIV-positive persons not qualified for employment as airline cabin attendants not a law of general application)

[29] Section 8(3)(b) specifically authorises the courts, in cases involving the direct horizontal application of the Bill of Rights to common law, to 'develop rules of the common law to limit [rights], provided that the limitation is in accordance with s 36' See Cheadle (note 10 above) 696 Rights can also be limited in cases of the indirect application of the Bill of Rights For example, in *S v Mamabolo* 2001 (3) SA 409 (CC) a reading-down was employed to save the common-law offence of scandalising the court in the form of contempt ex facie curiae from constitutional invalidity The interpretation arrived by the court nevertheless entailed the limitation of the right to freedom of expression The limitation was however held to be justifiable, principally because the court's narrow interpretation of the ambit of the offence (committed only in a few cases where the utterance in question was likely to damage the administration of justice) resulted in a minimal interference with the right in the interests of protecting the legitimacy of the judicial process (para 48)

[30] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 47 The requirement of accessibility additionally requires laws to be prospective in their operation

[31] AV Dicey *An Introduction to the Study of the Law of the Constitution* (10 ed 1959), chapter IV As Jackson J of the US Supreme Court put it in *Railway Express Agency v New York* 336 US 106 (1949) at 111-13, '[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected '

in s 36 therefore prevents laws that have personal, unequal or arbitrary application from qualifying as legitimate limitations of rights. Ackermann J has explained why there can be no room for such laws in a constitutional state:

> In reaction to our past, the concept and values of the constitutional state, of the 'regstaat', and the constitutional right to equality before the law are deeply foundational to the creation of the 'new order' referred to in the preamble [to the interim Constitution] We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution. Arbitrariness must also, by its very nature, lead to unequal treatment of persons Arbitrary action, or decision-making, is incapable of providing rational explanation as to why similarly placed persons are treated in a substantially different way. Without such a rational justifying mechanism, unequal treatment must follow.[32]

The second aspect of the rule of law and the 'law of general application' requirement — the idea that a rule must apply impersonally and not to particular people or groups[33] and that it must not be unequal or arbitrary in its application — has been considered by the Constitutional Court in two cases. In *S v Makwanyane*, it was argued that s 277 of the Criminal Procedure Act 51 of 1977, in terms of which a person could be sentenced to death, did not constitute a law of general application since it did not apply uniformly in the whole of South Africa. The death sentence had been abolished by decree of the military government in the Ciskei bantustan in 1990. This meant that a person could not be sentenced to death in this part of South Africa. The court rejected the argument with little hesitation on the basis that

> [s]uch a construction would defeat the apparent purpose of s 229 [IC], which is to allow different legal orders to exist side by side until a process of rationalisation has been carried out, and would inappropriately expose a substantial part if not the entire body of our statutory law to challenges under s 8 of the Constitution It follows that disparities between the legal orders in different parts of the country, consequent upon the provisions of s 229 of the Constitution, cannot for that reason alone be said to constitute a breach of the equal protection provisions of s 8, or render the laws such that they are not of general application.[34]

[32] *S v Makwanyane* (note 12 above) para 156

[33] Equal application does not mean that a law must apply to everyone, but simply that it applies to everyone that it regulates in the same way So, for example, the fact that the Code of Conduct for Broadcasting Services under consideration in *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) applied only to broadcasters and not to the public at large did not matter It applied equally to all broadcasters and therefore qualified as a law of general application

[34] *S v Makwanyane* (note 12 above) para 32 It would be equally absurd to suggest that, for example, a law of the Gauteng legislature cannot qualify as 'law of general application' simply because it does not apply uniformly throughout the Republic The structure of government established in the Constitution envisages provincial and local government legislation that is limited in its area of application

In *President of the Republic of South Africa v Hugo*[35] the Constitutional Court considered the validity of a Presidential Act that ordered the release from prison of all mothers who had children under the age of twelve. The Presidential Act was authorised by s 82(1)*(k)* of the Interim Constitution which permits the President 'to pardon or reprieve offenders'. The majority of the court held that the Presidential Act did not violate the right to equality and non-discrimination and therefore did not consider the issue of limitation. Mokgoro J dissented, holding that the Presidential Act did constitute unfair discrimination. This raised the question whether the infringement could qualify as a justifiable limitation of the right. A Presidential Act differs from other forms of delegated legislation in that it is not authorised by a specific grant of legislative power in an Act of Parliament or Provincial law. Rather the President's power is a discretionary executive power specifically granted by the Constitution.[36] Moreover, a Presidential Act, unlike delegated legislation, is not published in the *Government Gazette*. Can it therefore qualify as 'law of general application' and therefore as a legitimate limitation on a fundamental right?

Mokgoro J looked to the interpretation given by the European Court of Human Rights and the Canadian Supreme Court to the analogous phrase 'prescribed by law'.[37] The ECHR has held that at least two requirements flow from the expression 'prescribed by law'. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable citizens to regulate their conduct. Citizens must be able — if need be with appropriate legal advice — to foresee, to a degree that is reasonable in the circumstances, the consequences of a given action.[38] As for the Canadian law, the Supreme Court has consistently held that rules that emanate from statute, delegated legislation and the common law are 'prescribed by law'. More controversial however is the question whether norms that emanate from directives or

[35] Note 27 above

[36] The equivalent section in the 1996 Constitution is s 84 which grants the President 'the powers necessary to perform the functions of Head of State and head of the national executive' These powers specifically include the power of 'pardoning or reprieving offenders' (s 84(2)*(j)*) The powers conferred by s 84 are known in English constitutional law as 'prerogative powers', the common-law powers and functions possessed by the Crown (ie, the head of state) and distinguished from those powers that are granted to the Crown by legislation

[37] The European Convention on Human Rights provides that valid limitations of rights must be 'prescribed by law' The word 'law' in this phrase has been held to include statute law, unwritten law, subordinate legislation and royal decrees *Klass v Federal Republic of Germany* (1979) 2 EHRR 214 Similarly, the rights in the Canadian Charter of Rights and Freedom are subject to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society' This is a requirement that rights and freedoms are diminished only by 'formal and ascertainable executive and legislative norms as opposed to arbitrary acts of private individuals and government officials' G Beaudoin & EP Mendes (eds) *The Canadian Charter of Rights and Freedoms* 3ed (1996) 3-8

[38] *Sunday Times v United Kingdom* (1979) 2 EHRR 245 In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (6) BCLR 726 (W) the High Court considered an argument that the common law offence of commission of an 'unnatural sexual act between men' was too vague and imprecise to constitute a law of general application On a consideration of the authorities the court appeared to accept that vagueness would disqualify a law from being a law of general application but held that the prohibition of an unnatural sexual act was not too vague to be understood

guidelines issued by government departments or agencies, but that are not officially published delegated legislation, can be said to be 'prescribed by law'.[39]

According to Mokgoro J, underlying both the 'prescribed by law' and the 'law of general application' requirements is the principle of the rule of law. Rules affecting fundamental rights should be accessible, precise and of general application. People should be able to know of the law, and should be able to conform their conduct to the law. Laws should apply generally, and should not target specific individuals.[40] The Presidential Act, according to Mokgoro J, complied with all these requirements.[41] As for the argument that the Presidential Act was not 'law' because it was not conventional delegated legislation, Mokgoro J held that the Presidential Act was sufficiently similar to delegated legislation to be considered law. The only difference between the Presidential Act, and standard delegated legislation was the absence of an enabling statute. That difference did not justify considering the Presidential Act not to be law. Delegated legislation obtains its legitimacy from its parent statute which must be passed by a democratic process in the legislature. Similarly, a direct exercise of power granted by the Constitution derives its legitimacy from the Constitution, which was the product of a democratic drafting process.[42] In conclusion, Mokgoro J held as follows:

> the 'law of general application' requirement is merely a precondition to the applicability of s 33(1)[IC] If a limitation is in substance ill-advised, that will be caught by the rigours of the limitation test itself To conclude, the Presidential Act is an exercise of constitutional power in the form of general, publicly accessible rules which affect the rights of individuals In my view, that is sufficient to fall within 'law of general application' for the purposes of s 33(1) [43]

To summarise, Mokgoro J takes the following approach to the 'law of general application' requirement:

(1) 'Law' for purposes of the requirement includes rules of legislation, delegated legislation and common law, and exercises of executive rule-making authorised by the Constitution.[44] As for executive rule-making, it is not necessary that such rules are formally published in the *Gazette*. The range of rules qualifying as law should not be too narrow.
(2) To qualify as a 'law of general application' a rule from one of these sources must be accessible, precise and of general application. People should be able to know of the law, and should be able to conform their conduct to the law. Laws should apply generally, and should not target specific individuals.

This interpretation does not make the 'law of general application' requirement a particularly exacting one. Almost any reasonably intelligible rule, emanating

[39] See *Committee for the Commonwealth of Canada v Canada* (1991) 77 DLR (4th) 385
[40] *Hugo* (note 27 above) para 102
[41] This was in spite of the fact that the Presidential Act was not published in the *Government Gazette* According to Mokgoro J 'formal publication requirements are not dispositive for the purposes of [the law of general application requirement]'
[42] *Hugo* (note 27 above) para 103
[43] Ibid para 104
[44] Mokgoro J's judgment does not address the controversial issue of whether the internal orders or directives of state agencies constitute law

from a source that is authorised to issue such a rule, will qualify. There is not even a requirement that the rule must be promulgated or published. The only substantive qualification is that the rule must be 'general' in that it must not single out specific individuals for favourable or harsh treatment.

By contrast, Kriegler J held that the Presidential Act was not law of general application. His reasons for doing so are tersely stated:

> My colleague Mokgoro J has concluded that although the Act is in conflict with s 8, it is a 'law of general application' within the meaning of s 33(1) and is saved by its provisions. I cannot agree with the second of those propositions and the third therefore does not arise The exercise by the President of the powers afforded by s 82(1)*(k)* — even in the general manner he chose in this instance — does not make 'law', nor can it be said to be 'of general application' The exercise of such power is non-recurrent and specific, intended to benefit particular persons or classes of persons, to do so once only, and is given effect by an executive order directed to specific state officials I respectfully suggest that one cannot by a process of linguistic interpretation fit such an executive/presidential/administrative decision and order into the purview of s 33(1) That savings clause is not there for the preservation of executive acts of government but to allow certain rules of law to be saved.[45]

According to Kriegler J the Presidential Act was not law because it was an 'executive order directed to specific state officials'. Moreover, it was not general in its application in that it applied only to a specific case. To use Mokgoro J's phrase, the Act targeted specific individuals.

It seems that there is little disagreement between Kriegler J and Mokgoro J on the criteria for 'law of general application'. Rather, they disagree about whether the Presidential Act conformed to those criteria.[46] For Kriegler J, the Act was simply an executive act of the government, an order made by the President and directed to the government officials who would carry it out. The order did not have the character of legislation and, moreover, is quite specific in its application and not general. This means, according to Kriegler J, that the Presidential Act could not serve as a legitimate restriction of the right to equality. However good the reasons may be for the Presidential Act, it is not law of general application and cannot therefore limit a fundamental right.

[45] *Hugo* (note 27 above) para 76
[46] An important difference between the two judgments is that Kriegler J does answer the question whether directives or guidelines issued by government departments or agencies but which are not officially published delegated legislation are laws of general application Such rules would not have the character of law They would be executive acts or orders addressed to governmental officials According to Kriegler J, the limitation clause 'is not there for the preservation of executive acts of government but to allow certain rules of law to be saved' (ibid, para 76) The implications of Kriegler J's approach to this issue are illustrated by the facts of *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) The applicant alleged that his right not to be refused emergency medical treatment in s 27(3) of the Constitution had been infringed by a state hospital The hospital acted in terms of policy guidelines drawn up by the provincial Department of Health which restricted dialysis treatment to patients with curable kidney disorders and denied it to those with incurable disorders who were not eligible for a kidney transplant The Constitutional Court found that the hospital's conduct was not an infringement of the applicant's rights But had it found the opposite, the question whether the guidelines were a law of general application would have had to be confronted On Kriegler J's approach, the guidelines would probably have failed to qualify as law of general application They lack the character of law, are addressed to hospital officials only and regulate internal procedures in state hospitals

Both the judgment of Mokgoro J and Kriegler J are dissenting judgments and are not the authoritative view of the Constitutional Court on the interpretation of the 'law of general application' requirement. The majority of the Court, expressed no view on the issue. It is submitted that while Kriegler J's view of the nature and effect of the Presidential Act is preferable to that of Mokgoro J, neither interpretation of the 'law of general application' requirement is exhaustive. Besides a requirement that the rule has the character of law, that it derives from a source with lawful authority to issue the rule, and a formal requirement that the law is clear, accessible and precise, the rule must also apply generally in the sense of not being unequal or arbitrary in its application. Equal application means that the rule must not apply solely to an individual case, or must not restrict the rights only of a particular individual or group of individuals.[47] The rule must provide for parity of treatment: like cases must be treated alike.

A good illustration of both the equality and non-arbitrariness requirements is provided by *De Lille v Speaker of the National Assembly*.[48] The case concerned a punitive suspension of a Member of Parliament by an ad hoc committee of the National Assembly. The High Court held that the suspension was a violation of the rights to freedom of expression, just administrative action and access to courts. The violation was not justifiable under the limitation clause because it was not authorised by law of general application. The rules and standing orders of Parliament did not permit an ad hoc Committee to suspend a member, nor was there any statutory or constitutional authority for the Committee's actions. Instead, the suspension was based on Parliamentary privilege, in particular the privilege to punish a member for contempt of Parliament. But, according to Hlophe J, Parliamentary privilege does not qualify as law of general application:

> It is not codified or capable of ascertainment Nor is it based on a clear system of precedent. There is no guarantee of parity of treatment It is essentially ad hoc jurisprudence which applies unequally to different parties [49]

[47] An example of a law that fails to comply with this requirement can be found in *Matinkinca v Council of State, Republic of Ciskei* 1994 (4) SA 472 (Ck) To prevent the prosecution of certain individuals on charges arising from the Bisho massacre of 7 September 1992, the Ciskei Council of State enacted the Special Indemnity Decree 7 of 1993 The Decree provided inter alia that 'no criminal proceedings shall be instituted or brought in any court against any person in respect of any act as herein defined done on 7 September 1992 at or near the city of Bisho' The Decree was found to be an interference with fundamental rights in that it made protection and enforcement of rights that may have been violated by the events of the day unenforceable The question of limitation then arose Was the decree 'of general application' as required by the limitation provision of the Ciskei Constitution? According to the court, the decree was 'clearly only aimed at the incidents on 7 September 1992 and is not of general application in Ciskei Furthermore, it is only the rights of persons detrimentally affected by an act of the security services or demonstrators on 7 September 1992 that are affected, and not the rights of the citizens of Ciskei at large' (497B–E) It was therefore held that the Decree was not of general application and therefore could not qualify as a legitimate limitation of fundamental rights Another example is the military decree which was the subject of *Attorney-General of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd* 1997 (8) BCLR 1122 (Lesotho CA). The decree purported to revoke five specified mining leases Its purpose was to prevent the holders of the leases from using them as a basis for an interdict stopping further work on the construction of the Lesotho Highlands Water Project

[48] *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C)

[49] Ibid para 37.

(iii) *Administrative action*

While delegated legislation qualifies as a 'law' for purposes of the law of general application requirement, administrative action taken under the authority of law (ie, administrative conduct) does not in itself qualify as law of general application.[50] However, the requirement that limitations of rights are authorised by law does not mean that the legislature must perform every limitation itself. It is possible for a law to authorise an administrator to exercise a discretionary power which has the effect of limiting rights. However, an empowering law will lack the quality of general application if it simply grants an administrator a wide and unconstrained discretion to limit rights. Legislation conferring discretionary powers on administrative officials to limit rights must place guidelines on the proper exercise of the discretion.

This is illustrated by *Dawood v Minister of Home Affairs*[51] in which the Constitutional Court considered the validity of s 25(9)(b) of the Aliens Control Act 96 of 1991. Section 25(9)(b) allowed spouses, dependent children and destitute, aged or infirm family members of people lawfully and permanently resident in South Africa to remain in South Africa pending the outcome of their application for an immigration permit. All other applicants had to leave the country. The effect of s 25(9) read with s 26(3) and (6) of the Act was that foreign spouses could continue to reside in South Africa while their applications for immigration permits were being considered only if they were in possession of valid temporary residence permits. Given that such applications were not automatically granted but had to be considered on their merits, these provisions necessarily authorised immigration officials and the Director General to refuse to issue or extend such temporary permits. The effect of a refusal was that a South African married to a foreigner was forced to choose between going abroad with his or her partner while the application was considered, or remaining in South Africa alone. The court pointed out that many couples would not have the option of being abroad together, because of poverty or other circumstances, and would be separated during the period that the application was under consideration.[52] The right to cohabit, a key aspect of the marriage relationship and protected by the constitutional right to dignity, was therefore limited by the statutory provisions that empowered immigration officials to refuse to grant or extend a temporary permit.

Could the limitation be justified? The answer was no. The statutory provisions, delegating as they did an unconstrained discretionary power allowing the limitation of rights, failed to qualify as a law of general application:

> It is an important principle of the rule of law that rules be stated in a clear and accessible manner It is because of this principle that section 36 requires that limitations of rights may

[50] *Premier of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools Eastern Transvaal* 1999 (2) SA 91 (CC) para 41 (a government decision to change a policy without first consulting affected individuals not a law of general application, no lawful authority for infringement of right to procedurally fair administrative action), *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) para 82

[51] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC)

[52] Ibid para 39

be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. In the absence of any clear statement to that effect in the legislation, it would not be obvious to a potential applicant that the exercise of the discretion conferred upon the immigration officials and the DG by sections 26(3) and (6) is constrained by the provisions of the Bill of Rights, and in particular, what factors are relevant to the decision to refuse to grant or extend a temporary permit. If rights are to be infringed without redress, the very purposes of the Constitution are defeated.[53]

While it was conceivable that a legislative provision could have been framed justifiably allowing the limitation of the right in certain circumstances, this was not done in the Act. Legislation cannot simply leave it to an administrative official to determine when it will be constitutionally justifiable to limit the right.[54]

(b) Reasonableness and justifiability in an open and democratic society based on human dignity, equality and freedom

Put at its simplest, this part of the limitation test requires a law that restricts a fundamental right to do so for reasons that are acceptable to an open and democratic society based on human dignity, equality and freedom. In addition, the law must be reasonable in the sense that it should not invade rights any further than it needs to in order to achieve its purpose. To satisfy the limitation test then, it must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits it is designed to achieve (the purposes of the law).

(i) *Proportionality*

The Constitutional Court adopted the following approach to the application of the general limitation clause in the interim Constitution in *S v Makwanyane*:

> The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1)[IC]. The fact that different rights have different implications for democracy, and in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of s 33(1)[IC], and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators'.[55]

[53] Ibid para 47

[54] There is a similar holding in *Janse van Rensburg v Minister of Trade and Industry* 2001 (1) SA 29 (CC) para 25 (legislation may grant a Minister powers that infringe the right to procedurally fair administrative action, but must place constraints on their use)

This paragraph in *Makwanyane* has become a standard reference when the Constitutional Court considers the legitimacy of limitation.[56] It was summarised as follows in *S v Bhulwana*:[57]

> In sum, therefore, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.[58]

Although the passage in *Makwanyane* is a description of the analysis to be undertaken under s 33of the interim Constitution, it applies with equal force to the interpretation of s 36 of the 1996 Constitution. Section 36 contains a set of 'relevant factors' to be taken into account by a court when considering the reasonableness and justifiability of a limitation. These correspond exactly to the factors identified as making up the proportionality enquiry in *Makwanyane*:

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

There are a few additional aspects of the *Makwanyane* passage that are worth emphasising. Chaskalson P recognises that a general limitation clause does not translate into a standard limitation test. This means that the limitation test itself, and not merely the application of the test, depends on the circumstances. In other words, the criteria of reasonableness and justifiability do not always mean the same thing; their specific implications depend on a variety of considerations. What are these considerations? Chaskalson P refers to the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and whether the desired ends could reasonably be achieved through other means less damaging to the right in question. Finally, Chaskalson P acknowledges that courts should defer to the legislature when policy choices are at stake.

[55] *S v Makwanyane* (note 12 above) para 104, quoting *Reference re ss 193 and 195 of the Criminal Code of Manitoba* (1990) 48 CRR 1 at 62 (Lamer J).

[56] See for example *S v Mbatha* 1996 (2) SA 464 (CC) para 14

[57] *S v Bhulwana* 1996 (1) SA 388 (CC)

[58] Ibid para 18

In the following five sub-sections of this chapter, the five factors specified by s 36 as relevant to the limitations enquiry are analysed in turn. To illustrate the practical application of the factors in a concrete case, a summary of the treatment of each factor in *S v Makwanyane* is provided. It must be emphasised that the five 'relevant factors' are not an exhaustive catalogue of what must be considered in the limitation enquiry, nor are they a checklist of requirements. They are simply indications as to whether a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Once a court has examined each of the factors it must then weigh up what the factors have revealed about the purpose, effects and importance of the infringing legislation on the one hand and the nature and effect of the infringement caused by the legislation on the other.[59]

(ii) *Section 36(1)*(a)*: the nature of the right*

The proportionality enquiry required by s 36 involves weighing up the harm done by a law — the infringement of a fundamental right — against the benefits that the law seeks to achieve — the reasons for the law, or the purpose of the law. Some rights weigh more heavily than others. It will therefore be more difficult to justify the infringement of such rights than other, less weighty rights. A court must assess what the importance of a particular right is in the overall constitutional scheme. A right that is of particular importance to the constitution's ambition to create an open and democratic society based on human dignity, freedom and equality will carry a great deal of weight in the exercise of balancing rights against justifications for their infringement.

Example: S v Makwanyane

S v Makwanyane was concerned with the constitutionality of the death penalty. The Court held that the death penalty infringed the rights to life, to human dignity and to freedom from cruel, inhuman or degrading punishment. This meant that for the death penalty to be constitutional it would have to qualify as a reasonable and justifiable limitation of these three rights.[60] The purposes of the death penalty, the benefits it was designed to achieve would have to be balanced against the harm it did — the violation of the three rights. The first consideration in this balancing exercise was the determination of the weight of the three rights, their importance in an open and democratic society based on freedom and equality.

According to the Constitutional Court the 'rights to life and dignity are the most important of all human rights, and the source of all other personal rights in . . . [the Bill of Rights]. By committing ourselves to a society

[59] *S v Makwanyane* (note 12 above) para 104; *S v Manamela* 2000 (3) SA 1 (CC) para 32.

[60] The infringements had to be justifiable in terms of the limitation clause of the interim Constitution, s 33. There are three differences between this clause and s 36. First, limitations had to be justifiable in 'an open and democratic society based on freedom and equality'. Secondly, limitations could not 'negate the essential content of the right' (this meant that though a right could be limited it could not be taken away altogether). Thirdly, certain rights in the Bill of Rights received additional protection against limitation by a requirement that any infringement of these rights had to be necessary in addition to being reasonable and justifiable.

founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals.'[61] This meant that very compelling reasons would have to be found to justify the limitation of such important rights.[62] As for the freedom from cruel, inhuman or degrading punishment, this right is a component of the overall protection of human dignity and the associated protection of physical integrity. Given the importance of human dignity in the constitutional scheme, its cruel punishment component carries no less weight.

(iii) *The importance of the purpose of the limitation*

At a minimum, reasonableness requires the limitation of a right to serve some purpose. Justifiability requires that purpose to be one that is worthwhile and important in a constitutional democracy. A limitation of rights that serves a purpose that does not contribute to an open and democratic society based on human dignity, equality and freedom cannot therefore be justifiable.

Example: S v Makwanyane

The Constitutional Court held that the death penalty violated three very important rights: the rights to life, human dignity and freedom from cruel punishment. To justify the infringement of these rights the state had to show that the death penalty served purposes that an open and democratic society based on freedom and equality would consider worthwhile and important. According to the state, the death penalty served three purposes that could not be adequately served by other forms of punishment. First, it served as a deterrent to violent crime: the prospect of such a severe punishment would deter someone who, for example, was contemplating committing a murder. Secondly, it served to prevent the recurrence of violent crime: an executed

[61] *S v Makwanyane* (note 12 above) para 144 (Chaskalson P). See also O'Regan J at paras 326–7: 'The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society. . . . The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.'

[62] Even though the rights to life and human dignity carry a great deal of weight in the Bill of Rights this is not to say that they could never be limited. The law recognises, for example, that the right to life can be justifiably limited in the case of self-defence. But, given the importance of the right, killing in self-defence is only justified in cases of necessity, ie as a matter of last resort where no other less severe alternative exists for the victim. See *Ex parte Minister of Safety and Security, in re S v Walters* 2002 (4) SA 613 (CC) (principles bearing on the use of lethal force to arrest fleeing suspect). As for the right to dignity, the Constitutional Court noted in *S v Makwanyane* (note 12 above) para 142–3 that 'Dignity is inevitably impaired by imprisonment or any other punishment, and the undoubted power of the State to impose punishment as part of the criminal justice system necessarily involves the power to encroach upon a prisoner's dignity'. To be justifiable, such encroachments must however be kept to a minimum: 'A prisoner is not stripped naked, bound, gagged and chained to his or her cell.'

murderer will not murder again. Thirdly, the death penalty served as fitting retribution for violent crimes. Are these purposes important to an open and democratic society based on freedom and equality? Certainly the deterrence of violent crime is an important purpose which can be used to justify the limitation of rights: 'The need for a strong deterrent to violent crime is an end the validity of which is not open to question. The State is clearly entitled, indeed obliged, to take action to protect human life against violation by others.'[63] The same obviously goes for the purpose of preventing the recurrence of violent crime. But the third purpose of the death penalty, retribution, was not considered to be a purpose fitting the type of society that the Constitution wished South Africa to be. The Constitution envisaged a society based on values of reconciliation and ubuntu and not vengeance and retaliation: 'retribution smacks too much of vengeance to be accepted, either on its own or in combination with other aims, as a worthy purpose of punishment in the enlightened society to which we South Africans have now committed ourselves'.[64]

A limiting measure must serve a purpose that all reasonable citizens would agree to be compellingly important. For this reason, the purpose of protecting the personal morality of a sector of society will not qualify as a justification for the limitation of rights.[65] Which purposes do qualify as sufficiently important? A rapid survey of the Constitutional Court jurisprudence indicates that the court has considered the following as legitimate purposes in the context of limitations analysis:

(1) Protecting the administration of justice at its broadest.[66] For example, the court has condoned as legitimate purposes for the limitation of rights the prevention of the intimidation of witnesses, the disclosure of state secrets or the identity of informers;[67] the screening out of appeals that had no merit or hope of success;[68] the recovery of assets of a company for the benefit of its creditors;[69] the protection of the interests of creditors of an insolvent estate;[70] the protection of the state's interests and avoidance of logistical difficulties when the state is sued in civil actions;[71] the enforcement of court orders; [72] ensuring the attendance of accused persons in court.[73]

[63] *S v Makwanyane* (note 27 above) para 117 (Chaskalson P).
[64] Ibid para 185 (Didcott J).
[65] *National Coalition for Gay and Lesbian Equality v Minister of Justice* (note 14 above) para 37.
[66] *S v Singo* 2002 (4) SA 858 (CC) para 33: 'essential that courts be equipped with the power to deal effectively with any conduct that threatens the smooth running of the administration of justice'.
[67] *Shabalala v Attorney-General (Transvaal)* 1996 (1) SA 725 (CC) para 52.
[68] *S v Ntuli* 1996 (1) SA 1207 SA 984 (CC) para 24.
[69] *Ferreira v Levin NO* 1996 (1) SA 984 (CC) para 126.
[70] *Brink v Kitshoff* 1996 (4) SA 197 (CC) para 47; *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 102.
[71] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) paras 16–17.
[72] *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) para 12.
[73] *S v Singo* (note 66 above) para 33.

(2) The prevention, detection, investigation and prosecution of crime generally;[74] specifically the prohibition of the abuse of illegal drugs, particularly those that can cause severe damage to the user or that are addictive.[75]
(3) Reduction of unemployment among South African citizens.[76]
(4) Inspection and regulation of the multiple health undertakings in modern society which impact on the welfare and general well-being of the community.[77]
(5) Protection of the rights of others.[78]
(6) Compliance with constitutional obligations.[79]
(7) Promoting healing of the divisions of the past and the building of a united society.[80]
(8) Complying with South Africa's international obligations.[81]
(9) Preventing people from gaining entry to the country illegally.[82]

(iv) *The nature and extent of the limitation*

This factor requires the court to assess the way in which the limitation affects the right concerned. Is the limitation a serious or relatively minor infringement of the right? This assessment is a necessary part of the proportionality enquiry because proportionality means that the infringement of rights should not be more extensive than is warranted by the purpose that the limitation seeks to

[74] *S v Mbatha* (note 56 above) para 16, *S v Manamela* (note 59 above) para 27, *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) para 53.
[75] *S v Bhulwana* 1996 (1) SA 388 (CC) para 20; *Prince* (note 20 above) para 52.
[76] *Larbi-Odam* (note 26 above) para 30.
[77] *Mistry v Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC).
[78] See, for example, *Beinash v Ernst & Young* 1999 (2) SA 116 (CC) in which the Constitutional Court upheld the provisions of the Vexatious Proceedings Act 3 of 1956 which allow a court to declare someone a vexatious litigant, thereby preventing them from instituting proceedings in any court without the leave of that court. Although a limitation of a vexatious litigant's right of access to court in s 34, the Act had the important purpose of protecting the right of access to court of other litigants with meritorious disputes. See also *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA); *Walters* (note 62 above) para 39 (limitation of right to life, dignity and physical integrity of fleeing suspect justifiable to protect police officers and members of the public from immediate harm or to arrest person reasonably suspected of having committed a crime involving the infliction or threatened infliction of serious bodily harm); *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 (1) SA 406 (CC) (limitation of freedom of expression and privacy by prohibition of possession and distribution of child pornography justified to protect rights of children).
[79] For example, s 200(1) of the Constitution provides that the South African National Defence Force 'must be structured and managed as a disciplined military force'. Legislation prohibiting military personnel from forming and joining trade unions in the interests of maintaining discipline would have the legitimate purpose of complying with this obligation: *South African National Defence Force Union v Minister of Defence* 1999 (4) SA 469 (CC). The Constitutional Court held that the prohibition in s 126B(1) of the Defence Act 44 of 1957 nevertheless failed the limitation test because there was no evident relationship between the limitation (a blanket ban on forming and joining any type of trade union) and its purpose (promoting the discipline and efficiency of the Defence Force). See also *Christian Education* (note 11 above) para 40 (state under constitutional duty to diminish public and private violence in society and protect particularly children from maltreatment, abuse or degradation); *Islamic Unity Convention* (note 33 above) para 45 (constitutional duty to regulate broadcasting justifies restrictions on free speech).
[80] *Islamic Unity Convention* (note 33 above) para 45.
[81] *Prince* (note 20 above) paras 52 and 72 (international obligations requiring suppression of drug trafficking sufficiently important to justify measures impacting on use of dagga for religious purposes).
[82] *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) para 37.

achieve. A law that limits rights should not use a sledgehammer to crack a nut.[83] To determine whether the limitation does more damage to rights than is reasonable for achieving its purpose first requires an assessment of how extensive the infringement is.[84]

Example: S v Makwanyane

The State argued that the death penalty served the purposes of deterrence and prevention of recurrence of violent crime and was fitting retribution for such crimes. The Court considered the first two purposes to be worthwhile but not the third. The proportionality enquiry then required the Constitutional Court to assess whether there was proportionality between the harm done by the death penalty (the infringement of the rights to life, human dignity and freedom from cruel punishment) and the purposes it sought to achieve (deterrence and prevention). If the harm is disproportionate to the benefits, the limitation is not justifiable. To assess proportionality the Court must first assess the degree of harm: how seriously does the death penalty impact on the rights identified?

The Court found that the death penalty had grave and irreparable effects on the rights concerned. The inroads that it made on the rights to life, dignity and freedom from cruel punishment could not be more severe. In the words of a US Supreme Court judgment cited by the Constitutional Court: 'The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.'[85]

(v) *The relation between the limitation and its purpose*

To serve as a legitimate limitation of a right, a law that infringes the right must be reasonable and justifiable. This means, put at its simplest, that there must be a

[83] *S v Manamela* (note 59 above) para 34

[84] It is the effect of the limitation on *rights* and not the effect of the limitation on a particular rightholder that is of concern to this part of the analysis This is illustrated by *S v Meaker* (note 19 above) in which the state argued that the consequences of the application of a reverse onus presumption in traffic legislation were trivial, usually entailing payment of a fine for a speeding or parking violation According to Cameron J, this was irrelevant to the assessment of the 'nature and extent' of the limitation required by s 36(c). It was the 'nature and extent' of the infringement of the presumption of innocence that had to be assessed Notwithstanding the relatively minor penalties following a conviction obtained with the aid of the presumption the limitation was extensive 'It trenches directly on the vehicle owner's rights whenever the vehicle is involved in the commission of an offence on a public road' (1054E–G) Similarly, in the *Islamic Unity Convention* case (note 33 above) para 49 the court dismissed a contention that the impact of a limitation of free speech in a broadcasting code of conduct was minimal because broadcasters were free to 'opt out' of the code by adopting their own code of regulation The code had the effect of limiting rights in an objective sense and the fact that a particular broadcaster could chose to opt out of being bound by the code was immaterial

[85] *Furman v Georgia* 408 US 238 (1972) 306 (Stewart J) Cited in *S v Makwanyane* (note 12 above) para 236 (Langa J)

good reason for the infringement. It also means that there must be proportionality between the harm done by the infringement and the beneficial purpose that the law is meant to achieve. Logically, this requires there to be a causal connection between the law and its purpose: the law must tend to serve the purpose that it is designed to serve. If the law does not serve the purpose it is designed to serve at all it cannot be a reasonable limitation of the right. If the law only marginally contributes to achieving its purpose it cannot be an adequate justification for an infringement of fundamental rights.

Example. S v Makwanyane

According to the State the death penalty was designed to serve the purposes of deterrence and prevention of violent crime. Both purposes were considered by the Court to be legitimate justifications for the infringement of the rights to life, dignity and freedom from cruel punishment. (Retribution, the third purpose relied on by the State, was not considered a suitable justification.) Assessing the reasonableness of the limitation then required the Court to determine whether there was a rational connection between the ends of deterrence and prevention and the means chosen to achieve these ends. In other words, did the death penalty (the means) serve to deter and prevent the recurrence of violent crime (the ends)? If so, to what extent did it do so?

Certainly, the death penalty effectively ensures that criminals will never again commit the violent crimes for which they were executed. There is therefore undoubtedly a rational connection between means and ends (or the limitation and its purpose) in this case. The same cannot be said for the purpose of deterrence however. Determining whether an infringement of rights is justifiable is a factual enquiry. Therefore if the state wished to show that the death penalty deters violent crime it would have to adduce evidence in support of this contention. According to the Constitutional Court, there was no satisfactory evidence establishing a connection between the death penalty and a reduction in the incidence of violent crime. According to Didcott J: 'The protagonists of capital punishment bear the burden of satisfying us that it is permissible under s 33(1). To the extent that their case depends upon the uniquely deterrent effect attributed to it, they must therefore convince us that it indeed serves such a purpose. Nothing less is expected from them in any event when human lives are at stake, lives which may not continue to be destroyed on the mere possibility that some good will come of it. In that task they have failed and, as far as one can see, could never have succeeded.'[86]

(vi) *Less restrictive means to achieve the purpose*

To be legitimate, a limitation of a fundamental right must achieve benefits that are in proportion to the costs of the limitation. The limitation will not be proportionate if other means could be employed to achieve the same ends that will

[86] *S v Makwanyane* (note 12 above) para 184

either not restrict rights at all, or will not restrict them to the same extent. If a less restrictive (but equally effective) alternative method exists to achieve the purpose of the limitation, then that less restrictive method must be preferred. Note that in assessing the effectiveness of alternative methods a margin of discretion is given to the state: 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators'.

Example: S v Makwanyane

The purposes of the death penalty are deterrence and prevention of violent crime. But in the course of achieving these ends, the death penalty imposes considerable costs: grave and irreparable violations of the rights to life, dignity and freedom from cruel punishment. Where other methods of achieving these purposes exist that do not impose the same costs, it becomes difficult to claim that the method chosen is reasonable and justifiable. According to the Constitutional Court the goal of deterrence of violent crime could be as well served by a sentence of imprisonment for a long period or for life. Such a punishment would also be an infringement of rights but would not be nearly as extensive an infringement as the death penalty. In the absence of any evidence that the death penalty serves the purpose of deterrence more effectively than a sentence of imprisonment, it is the latter, less restrictive method of achieving the purpose that must be preferred. The same goes for the purpose of prevention of recurrence. Life imprisonment will serve this purpose. Given the drastic effects of the death penalty, if a far less restrictive means of achieving the same purpose is available it should be preferred.[87]

Although the proportionality analysis must notionally be conducted with reference to all the factors, it is factor (e) on which most limitation arguments will stand or fall. A law which invades rights more than is necessary to achieve its purpose is evidently disproportionate or, to use the term routinely employed in the jurisprudence, 'overbroad'. Legislation must be, to use some of the other metaphors used by the courts, 'narrowly tailored' and not 'cast the net too widely'. A few examples of overbreadth will serve to make the point:

- To achieve the purpose of controlling the harmful side-effects of liquor consumption there is no need to prohibit anyone 'who is not clothed or not properly clothed' from performing in 'entertainment of any nature' on premises where liquor is served. The prohibition nets not only striptease bars but also bona fide artistic entertainment such as theatre performances and is therefore an unnecessary limitation of the freedom of expression.[88]
- To achieve the purpose of controlling the market in dangerous drugs is a blanket prohibition on possession of dagga necessary? The prohibition infringes the freedom of religion of Rastafarians and would have been overbroad if an exception for religious use (along the lines of that for medical use) had been practically feasible.[89]
- To achieve the purpose of a disciplined and non-partisan Defence Force it is not necessary to prohibit all Defence Force personnel from performing any 'act of public protest'. The prohibition is so wide that it prevents legitimate acts of free speech that have nothing to do with the discipline of the force: 'Members of the Defence Force are prevented, whether they are in uniform or not, or whether they are on duty or not, from taking any action at all to support or oppose almost any purpose or object'.[90]

[87] Ibid paras 123, 128 (Chaskalson P)
[88] *Phillips* (note 20 above)

(c) The s 36(1) enquiry in a nutshell

Once it is established that a law of general application infringes a right protected by the Bill of Rights the State or the person relying on the law may argue that the infringement constitutes a legitimate limitation of the right. Rights are not absolute. They may be infringed, but only when the infringement is for a compellingly good reason. A compellingly good reason is that the infringement serves a purpose that is considered legitimate by all reasonable citizens in a constitutional democracy that values human dignity, equality and freedom above all other considerations.[91] The infringement must however not impose costs that are disproportionate to the benefits that it obtains. This will be the case where a law infringes rights that are of great importance in the constitutional scheme in the name of achieving benefits that are of comparatively less importance. It will also be the case where the law does unnecessary damage to fundamental rights, damage which could be avoided or minimised by using other means to achieve the same purpose.

7.3 Limitation of rights by other provisions of the Constitution

Section 36(2) states that only laws conforming to the test for valid limitations in s 36(1) can legitimately restrict rights. However, the subsection adds that rights can be justifiably limited in terms of 'any other provision of the Constitution'.

The predecessor of s 36(2) — s 33(2) of the interim Constitution — was the basis for the Constitutional Court's decision in *Azanian Peoples Organisation*

[89] *Prince* (note 20 above) The majority of the Constitutional Court thought an exception was not feasible since it would be difficult to police and would undermine the general prohibition See para 141 According to the minority (para 83), 'The constitutional defect in the two statutes is that they are overbroad They are not carefully tailored to constitute a minimal intrusion upon the right to freedom of religion and they are disproportionate to their purpose They are constitutionally bad because they do not allow for the religious use of cannabis that is not necessarily harmful and that can be controlled effectively '

[90] *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) para 11

[91] According to Denise Meyerson 'the reasons supplied by the state for limiting a constitutionally protected right have to be such as to elicit the agreement of all reasonable citizens who matter equally it may not appeal to a justification whose normative force depends on an intractably disputed point of view or way of reasoning' Meyerson (note 3 above) 17 There is some support for this conclusion in the Constitutional Court's approach to justifications of restrictions on homosexuality in *National Coalition* (note 14 above) paras 37–8 The court's rejection of moral or religious-based justifications for the restrictions is arguably motivated by the intractably disputed or controversial nature of those justifications

(AZAPO) v President of the Republic of South Africa.[92] The case concerned the Promotion of National Unity and Reconciliation Act 34 of 1995, which allowed amnesty to be granted to perpetrators of gross violations of human rights committed with a political objective. Section 20(7) of the Act provides that a person granted amnesty shall not be criminally or civilly liable in respect of the acts for which they have received amnesty. The applicants attacked s 20(7) as inconsistent with the right of access to court.[93] The Constitutional Court acknowledged that there would be considerable force in the argument that the section violated the access right,[94] except for the existence of s 33(2) and the postamble of the interim Constitution ('National Unity and Reconciliation') which specifically deals with amnesty. The postamble specifically authorised a law conferring amnesty on a wrongdoer in respect of acts, omissions and offences associated with political objectives and committed between 1960 and 1993. This permitted the National Unity Act to limit the right of access to court.

In general however, the courts will be reluctant to assume that provisions in the Constitution are contradictory and will, if possible, construe apparently conflicting provisions in such a way as to harmonise them with one another. In *S v Rens*[95] for example, the applicant argued that the requirement in s 316 of the Criminal Procedure Act that leave to appeal must be obtained was in conflict with s 25(3)*(h)* of the interim Constitution which provided a 'right to have recourse by way of appeal or review to a higher court than the court of first instance'. It was argued by the state that s 102(11) of the interim Constitution specifically authorised the imposition of leave to appeal requirements and that this disposed of the applicant's argument in terms of s 25(3)*(h)*.[96] Madala J held that s 102(11) could be interpreted to refer merely to appeals in constitutional matters and not to appeals in ordinary criminal cases. In addition, since s 102(11) was permissive and not mandatory, it should not be interpreted as authorising procedures that were limitations on the right to appeal entrenched in the Bill of Rights.[97]

7.4 Demarcations of rights and special limitation clauses

Most of the rights in the Bill of Rights are textually unqualified. For example, s 11 provides simply that 'everyone has the right to life'. The scope of the right is unqualified and the only limitations that are placed on the right are those imposed by the general limitation section — s 36. A few rights however are qualified by language that specifically demarcates their scope. Such qualifications can be termed demarcations of that right.[98] Their purpose is definitional: defining the

[92] *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC)

[93] Section 22 of the interim Constitution.

[94] *AZAPO* (note 92 above) para 10

[95] *S v Rens* 1996 (1) SA 1218 (CC)

[96] Section 102(11) of the interim Constitution dealt with the jurisdiction of the courts and provided that legislation and rules of court 'may provide that leave of the court from which the appeal is brought, or to which the appeal is noted, shall be required as a condition for such appeal'

[97] *S v Rens* (note 95 above) paras 16–17

[98] They are sometimes also called 'internal modifiers' See AJ van der Walt *The Constitutional Property Clause* (1997) 73–4

scope of the right more precisely than is the case with the textually unqualified rights.[99] The Bill of Rights contains numerous demarcations. For example, s 17 protects the right to assemble as long as the assembly takes place 'peacefully and unarmed'. Section 16(1) states that everyone has the right to freedom of expression but s 16(2) provides, amongst other things, that the right does not extend to 'advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'. Section 31(2) provides that the rights of cultural, religious or linguistic communities cannot be exercised in a manner inconsistent with any provision of the Bill of Rights.[100] In terms of s 32, access to information held by private individuals is possible only in so far as such information is required for the exercise or protection of a person's rights.

Demarcations have received very little judicial attention. How do demarcations fit into the two-stage approach to rights and limitation analysis that has been outlined above? In most instances the demarcations will come into play when the nature and scope of the right in question is determined. Demarcations circumscribe the right or place certain conditions on its availability. The right to assemble is, for example, protected on the condition that the assembly is peaceful and unarmed. The condition demarcates the right and in terms of the two-stage analysis, it is a first-stage matter to determine whether the applicant's conduct falls within the demarcated scope of the right. In other words, an applicant alleging that their right to assembly has been violated will have to show that the assembly in question was peaceful and unarmed.

Other textual qualifications of rights create special criteria for the limitation of certain rights by the legislature. These are more properly called special limitations. Engaging in any form of limitation analysis, whether in terms of the criteria laid down in s 36 or in terms of the special criteria attached to some of the rights, assumes that an infringement of a right has been established. This means that reliance on a special limitation clause is a second-stage matter. At the first stage the person relying on the right has to show that an infringement has taken place. Once shown, at the second stage the state or the person relying on the validity of the legislation must show that the limitation of the right is justified either by reference to a special limitation clause or the general criteria of s 36.

Although this has not been recognised by the courts, it seems that there were six special limitation clauses in the interim Constitution and a multitude of demarcations. Sections 8(3), 14(3), 26(2), 28(2) and (3) and 33(5) of the interim Constitution looked more like special limitation clauses than demarcations. The 1996 Constitution has far fewer special limitation clauses. These are s 15(3) (allowing legislation dealing with marriages and personal and family law sys-

[99] *Islamic Unity Convention* (note 33 above) para 32 (purpose of s 16(2) is definitional, acknowledging that some forms of expression do not qualify for constitutional protection)

[100] In *Christian Education* (note 11 above) para 26 the Court held that 'these explicit qualifications' of the s 31 rights have a double purpose 'The first is to prevent protected associational rights of members of communities from being used to "privatise" constitutionally offensive group practices and thereby immunise them from external legislative regulation or judicial control This would be particularly important in relation to practices previously associated with the abuse of the notion of pluralism to achieve exclusivity, privilege and domination The second relates to oppressive features of internal relationships primarily within the communities concerned '

tems), the second sentence of s 22 (allowing regulation of the practice of a trade, profession or law), s 23(5) and (6) (allowing labour relations legislation to regulate collective bargaining), s 29(4) (allowing state subsidies for independent schools).[101] Section 33(3)*(c)* which requires the legislation giving effect to the rights to just administrative action to 'promote an efficient administration' is also arguably a special limitation provision.[102] These are special limitations rather than demarcations because they do not relate to the applicant's activity and whether it falls within the scope of activity protected by a right in the Bill of Rights. Rather it relates to the state's conduct and to the means employed and objectives pursued by the state to protect, promote and fulfil the rights in the Bill of Rights.[103] Thus, the burden of showing whether law or conduct is justified by a special limitation provision is on the party seeking to uphold the law or conduct and not on the applicant.

The limitation section must further be distinguished from the derogation or suspension section of the Bill of Rights: s 37. The latter applies only in times of public emergency and allows for the temporary suspension of some of the Chapter 2 rights in certain circumstances. A limitation clause, on the other hand, is continuously applicable. Even when a state of emergency is declared, s 36 will continue to apply for the limitation of those rights that have not been temporarily suspended.[104]

[101] The provision dealing with affirmative action (s 9(2)) is no longer a special limitation as it was in the interim Constitution It is now positively framed so as to make clear that an affirmative action programme does not constitute a limitation of the right to equality, but is a component part of the right itself See, further, 9 5 in Chapter 9 below

[102] The arguments for and against treating s 33(3)(c) as a special limitation clause are outlined in I Currie & J Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) 31

[103] Woolman (note 6 above) para 12 2*(b)*

[104] On the suspension of rights during states of emergency, see, generally, Chapter 33 below

Chapter Eight

Remedies