CONSTITUTIONAL COURT OF SOUTH AFRICA

Venice Commission Questionnaire: The rule of law

I. The different concepts of the rule of law

1. What are the relevant sources of law (e.g. the Constitution, case-law, etc.) which establish the principle of the rule of law in the legal system of your country?

[1] The first source of the rule of law is the Constitution. Section 1(c) lists "supremacy of the constitution and the rule of law" among the founding values of the sovereign, democratic South African state.[1]

[2] The second source is case law. The Constitutional Court's rule of law jurisprudence reveals that the Court combines formal and substantive interpretations of the concept, with the emphasis on a formal interpretation. In *Fedsure Life Assurance Ltd*,[2] the Constitutional Court held that the rule of law in the form of

[1] Section 1 Constitution provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[2] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).

legality was implicit in the interim Constitution.[3] The text of that Constitution did not refer explicitly to the rule of law or legality.[4] Legality was interpreted to mean that "the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law".[5] This interpretation, requiring officials to act within the four corners of the law, was confirmed by the Court in *Pharmaceutical Manufacturers Association*[6] and *Affordable Medicines*.[7] A further facet of the rule of law as formal legality was highlighted in *Dawood*,[8] where the Court noted that the rule of law required laws to be stated in a clear and accessible manner.[9] This was subsequently confirmed in the *Affordable Medicines Trust* and *Kruger*.[10]

2. How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?

[3] The Constitutional Court has interpreted section 1(c) to contain a legality test. Legality first requires that a public functionary does not act beyond the scope of his or her powers (ultra vires).[11] Beyond simply acting within the law, it is moreover "a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary." So decisions "must be rationally related to the purpose for which the power was given".[12] Rationality review, while not a high

[3] Id at paras 58-9.

[4] Interim Constitution of the Republic of South Africa Act 200 of 1993.

[5] *Fedsure Life Assurance Ltd* above n 2 at para 58.

[6] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

[7] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).

[8] *Dawood, Shalabi and Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).

[9] Id at para 47.

[10] *Kruger v President of the Republic of South Africa* [2008] ZACC 17; 2009 (1) SA 417 (CC); 2009 (3) BCLR 268 (CC) at para 108.

[11] *Pharmaceutical Manufacturers Association* above n 6 at para 50.

[12] Id at para 85; see also *Prinsloo v van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 25 (the constitutional state must not "regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law").

substantive bar, does include a substantive component.[13] When an exercise of public power "is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved".[14] The Constitutional Court has struck down exercises of public power for failing rationality review.[15]

[4] The Chief Justice of South Africa, Justice Mogoeng, has emphasised the fundamental role of an independent judiciary in upholding the rule of law:

> "Even if all others were to be unable to give practical expression to the rule of law, human rights and the constitutional aspirations of the people in any democracy, that constitutional democracy would survive; provided a truly independent body of judges and magistrates, loyal to the oath of office or solemn affirmation, is in place and ready to administer justice to the aggrieved in terms of their oath of office or affirmation.
>
> And that is the oath or affirmation to be faithful to the Republic of South Africa, to uphold and protect the constitution and the human rights entrenched in it and to administer justice to all persons alike without fear, favour or prejudice, in accordance with the constitution and the law. Central to the affirmation or oath of office is the obligation to uphold the foundational values of our constitutional democracy, which include the rule of law, human dignity, equality, freedom, transparency and accountability.
>
> This is the legal philosophy and the vision necessary for the promotion of the rule of law."[16]

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[13] Alastair Price, "The Evolution of the Rule of Law," available at http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Price.pdf (the rationality test is a "substantive, justiciable standard"); Rosann Kruger, The South African Constitutional Court and the rule of law: the Masethla judgment, a cause for concern? available at http://www.ajol.info/index.php/pelj/article/view/63678 ("A review of the Constitutional Court's rule of law jurisprudence reveals that the Court combines formal and substantive interpretations of the concept, while still retaining the emphasis on a formal interpretation").

[14] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 51.

[15] See *Pharmaceutical Manufacturers Association* above n 6.

[16] Chief Justice Mogoeng Mogoeng, The Rule of Law in South Africa: Measuring Judicial Performance and Meeting Standards, 25 June 2013, available at http://constitutionallyspeaking.co.za/transcript-chief-justice-mogoeng-on-the-rule-of-law-in-south-africa/

[5] Additionally, the Constitution recognises customary law. This arguably may represent "a departure from a concept of rule of law and the rule of law based solely on the state," since the "rule of law can therefore be exercised through non-state legal norms as well, as long as they fulfil the qualitative standards that rule of law principles require of state law".[17]

3. Are there specific fields of law in which your Court ensures respect for the rule of law (e.g. criminal law, electoral law, etc.)?

[6] The rule of law finds frequent application in the realm of administrative action. In this context, the principle of legality serves as a constraint on the exercise of all public power. The essence of the principle of legality (inherent in the rule of law) applies to the guarantee of just administrative action.[18] This means, in the first place, that administrative organs may perform only actions that have been authorised by law;[19] and that they must heed any statutory requirements or preconditions attached to the exercise of a particular power.[20]

[7] The principle of legality also applies to the exercise of public power that does not constitute administrative action, such as executive acts and decisions.[21] It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least,

[17] The Legal Doctrines of the Rule of Law and the Legal State (Rechtstaat) (James R Silkenat et al eds 2014) at page 77.

[18] *Bel Porto School Governing Body v Premier of the Western Cape* [2002] ZACC 2; 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) at para 164.

[19] De Ville *Judicial Review of Administrative Action in South Africa* 2 ed (2005) 89-90. See *Pharmaceutical Manufacturers Association* above n 6 at para 50; *Fedsure Life Assurance Ltd* above n 2 at paras 56-58; *Affordable Medicines Trust* above n 7 at paras 49-50; and *Farjas* (*Pty*) *Ltd v Regional Land Claims Commissioner, KwaZulu-Natal* 1998 (5) BCLR 579 (LCC) at para 18.

[20] De Ville above id at 99; Hoexter *Administrative Law in South Africa* (2007) at 252-274.

[21] *Fedsure Life Assurance Ltd* above n 2 at para 56.

comply with this requirement.[22] In this way, legality as part of the rule of law serves an invaluable purpose. as a "safety net, catching exercises of public power that do not qualify as administrative action".[23]

[8] In criminal law, the principle of legality (*nullem crimen sine lege*) embodies five principles: (a) the *ius acceptum* principle, in accordance with which a court may convict an accused only if the act is recognised by the law as a crime; (b) the *ius praevium* principle, in accordance with which a court may convict an accused only if the act was already recognised as a crime at the time of its commission; (c) the *ius certum* principle, in accordance with which crimes may not be formulated vaguely; (d) the *ius strictum* principle, in accordance with which a court must interpret the definition of a crime narrowly; and (e) the application of these principles to sentencing.[24]

[9] Ensuring compliance with legality and the rule of law does not mean abandoning judicial deference. In *Minister of Environmental Affairs*[25] this is said:

> "Judicial deference was particularly appropriate where the subject-matter of an administrative action was very technical or of a kind in which a court had no particular proficiency."

[10] A combination of the principle of legality and judicial deference ensures that a court can, without usurping the powers or functions of a public official, determine whether the conduct is rational in accordance with the powers and duties conferred by statute.[26]

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[22] Hoexter, "The Principle of Legality in South African Administrative Law" [2004] MqLawJl 8; (2004) 4 Maquarie Law Journal 165.

[23] Id. Chaskalson CJ in *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 97 favourably quoted this formulation.

[24] Law of South Africa (The Principle of Legality) 2A2.1.

[25] *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA) at (at 409J–410A).

[26] *M & G Media Ltd v Public Protector* 2009 (12) BCLR 1221 (GNP) at para 101.

4. Is there case-law on the content of the principle of the rule of law? What are the core elements of this principle according to the case-law? Please provide relevant examples from case-law.

[11] Numerous cases refer to the content and core elements of the principle, notably as a limit on government power. In *New National Party*,[27] the majority considered that the primary constitutional constraint on Parliament is the "rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose".[28] Further, that case found that rationality fails where Parliament acts capriciously or arbitrarily.

[12] The Court indicated that this involves a two-part scrutiny:

> "The first part of the enquiry is whether a facial analysis of the provisions in issue, in relation to the Constitution, has been shown to lack rationality; the second is whether these provisions can be said to be arbitrary or capricious in the light of certain circumstances existing as at the date of the adoption of the statute."[29]

[13] Therefore, the rule of law requires the content of rationality and the elements of non-arbitrariness and non-capriciousness. The rationality inquiry takes into account both the provision in its constitutional context, and external factors that may show that the provision is irrational, even if it looks to be rational on the face of it.

[14] *Pharmaceutical Manufacturers*[30] confirmed that the "doctrine of legality" regulates all exercises of public power. The Court concluded that, "[w]hat the

[27] *New National Party v Government of the Republic of South Africa* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC). In this case, the New National Party challenged the constitutionality of legislation prescribing the documents which otherwise-qualified voters had to possess in order to register to vote.

[28] Id at 19.

[29] Id at 25.

[30] *Pharmaceutical Manufacturers Association* above n 6.

Constitution requires is that public power vested in the executive and other functionaries be exercised in an objectively rational manner."[31]

[15] *Affordable Medicines*[32] reiterates a similar notion to *New National Party*. It affirms the rationality required of government action. At the same time, it cautions restraint:

> "The rational basis test involves restraint on the part of the Court. It respects the respective roles of the courts and the legislature. In the exercise of its legislative powers, the legislature has the widest possible latitude within the limits of the Constitution."[33]

[16] This "widest possible latitude" confirms that the rule of law rationality test is a base-line assessment. A decision is *rational* if there is at least one suitable reason for it. It is *reasonable* if, following scrutiny of the various reasons for it, it falls with the range of acceptable decisions. The two types of review are therefore conceptually distinct, rather than falling along a spectrum.

5. Has the concept of the rule of law changed over time in case-law in your country? If so, please describe these changes referring to examples.

[17] Since the advent of constitutional supremacy, the rule of law has played an increasingly fundamental role in the regulation of state conduct within South Africa. Under the old legal order, the review powers of the courts in respect of discretionary executive conduct and administrative action were curtailed. In *Shidiack*, Innes ACJ expressed it as follows:

> "Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the Court will not interfere with the result. Not being

[31] Id at para 89.

[32] *Affordable Medicines Trust* above n 7.

[33] Id at para 86.

> a judicial functionary, no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own."
>
> . . .
>
> [I]nterference would be possible and right . . . [i]f for instance such an officer had acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute – in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong."[34]

[18] In *Pharmaceutical Manufacturers*, Chaskalson P explained that the rule of law under the Constitution requires that – in addition to the grounds of review identified by Innes ACJ (*mala fides*, ulterior purposes, failing to apply the mind) – decisions must be made rationally. That means that even decisions made in good faith, but irrational, may be susceptible to review.[35]

6. Does international law have an impact on the interpretation of the principle of the rule of law in your country?

[19] Yes. The Constitution provides that customary international law is law in South Africa, unless inconsistent with the supreme law or an Act of Parliament.[36] When interpreting legislation courts must prefer interpretations consistent with international law.[37] When interpreting the Bill of Rights, courts are required to take international law into account.[38] International law therefore has an effect on rule of law jurisprudence.

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[34] *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642 at 651-2.

[35] *Pharmaceutical Manufacturers Association* above n 6 at paras 85-90.

[36] Section 232 of the Constitution.

[37] Section 233 of the Constitution.

[38] Section 39(1) of the Constitution.

[20] In *S v Makwanyane*,[39] the Constitutional Court considered the constitutionality of the death penalty. In his judgment, Chaskalson P made extensive and creative use of international law. He resorted to international law in interpreting the Constitution. He considered circumstances and documents existing at the time the Constitution was adopted in interpreting the Constitution. Chaskalson P found authority in international law permitting the use of this evidence. He referred to the European Court of Human Rights and the United Nations Committee on Human Rights whose deliberations are informed by *traveaux preparatoires* as described by article 32 of the Vienna Convention on the Law of Treaties. Chaskalson P referred to other countries where the constitution is the supreme law such as Germany, Canada, the United States of America and India, where courts may have regard to circumstances prevailing during the drafting of the Constitution.[40]

[21] In *Glenister II*[41] Ngcobo CJ expressed a similar view:

> "Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law. . . . These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution."[42]

II. New challenges to the rule of law

7. Are there major threats to the rule of law at the national level or have there been such threats in your country (e.g. economic crises)?

[22] There are currently no immediate threats to the rule of law in South Africa.

[39] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

[40] Id at pars 12-17.

[41] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (*Glenister II*).

[42] Id at para 97.

[23] Court orders, including those against the State, are complied with. A judgment of the Constitutional Court in March 2016 ordered the President of the Republic to comply with a report by the Public Protector that found that he was liable for certain "non-security" features to the upgrade of his private home. The President has, in line with the Court's order, paid the money to the National Treasury.

8. Have international events and developments had a repercussion on the interpretation of the rule of law in your country (e.g. migration, terrorism)?

[24] No. The visit of the President of Sudan, Mr Omar al Bashir, occasioned litigation in which the High Court, later confirmed by the Supreme Court of Appeal (SCA), ordered his arrest under the Rome Statute. Government withdrew an application for leave to appeal against this decision in the Constitutional Court in October 2016 when it announced its intention to withdraw from the International Criminal Court.

9. Has your Court dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional / international courts (e.g. the African, Inter-American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related difficulties in implementing decisions of such courts / bodies? What is the essence of these difficulties? Please provide examples.

[25] The Constitutional Court is yet to directly consider a collision between national and international law. The Constitution seeks to avoid clashes of this nature. Section 233 of the Constitution requires that when interpreting legislation, every court must prefer any reasonable interpretation of legislation that is consistent with the rule of law. Similarly, section 39(1)(b) of the Constitution requires that when interpreting the Bill of Rights, a Court must consider international law.

[26] In *AZAPO,* the Constitutional Court found that "the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the State in terms of international law".[43] There is therefore a Constitutional obligation to harmonise national and international norms.

[27] Similarly, in *Glenister II* the Court found that there is "no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law."[44] The Court used this injunction to integrate an obligation to combat corruption into South African law.

[28] In socio-economic rights the Court has taken an interpretation to rights that is distinct from those in some international law instruments. In *Mazibuko*, the court rejected the idea, originally emergent in General Comment 3 (1990) of the United Nations Committee on Economic, Social and Cultural Rights, that a "minimum core" be outlined for the amount of water to which each person is entitled.[45] Instead, it adopted the approach that the state is obliged only to provide a "reasonable" quota.

[29] The Court has considered the enforcement of the judgment of the SADC Tribunal, a regional court, in *Fick*.[46] There, the Court found that it was necessary, in order to uphold the rule of law, that the common law on the execution of court orders be extended to allow for the execution of an order by the SADC tribunal. It thus found, through an interpretation of the common law in-line with international obligations, that property of the state of Zimbabwe could be seized to satisfy a judgment debt in terms of the Tribunal's ruling.

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[43] *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* [1996] ZACC 16; 1996 (4) SA 672 (CC); 1996 (8) BCLR 1015 (CC) at para 26.

[44] *Glenister II* above n 42 at para 202.

[45] *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC).

[46] *Government of the Republic of Zimbabwe v Fick* [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC).

III. The law and the state

10. What is the impact of the case-law of your Court on guaranteeing that state powers act within the constitutional limits of their authority?

[30] Decisions of the Court during 2016 illustrate how the Court's orders have ensured that executive and legislative action is curtailed within constitutional limits. As regards executive powers, in *McBride*, the Court declared legislative provisions that empowered the Minister of Police to suspend the head of the Independent Police Investigative Directorate (IPID) inconsistent with the Constitution for breaching the independence required of that office, and declared a suspension made under the provisions invalid.[47] In *Merafong*[48]and *Tasima*[49] the Court reaffirmed the principle that an organ of state that is dissatisfied with an administrative decision, or believes it to have been made in an unlawful manner, is not entitled to ignore it but must take the decision on review timeously. In the legislative branch, the Court held in *LAMOSA* that Parliament had failed to facilitate adequate public participation when enacting legislation dealing with the right to land restitution – a requirement imposed on it by section 72(1)(a) of the Constitution).[50] *DA v Speaker of the National Assembly* affirmed that all members of Parliament enjoy the privilege of freedom of speech and that provisions of legislation that empower their removal at the instance of the Member Presiding is unconstitutional.[51]

11. Do the decisions of your Court have binding force on other courts? Do other / ordinary courts follow / respect the case-law of your Court in all cases? Are there conflicts between your Court and other (supreme) courts?

[31] South African courts are guided by precedents. A court is bound by the decision of a court is higher than it. The Constitutional Court is the final court of

[47] *McBride v Minister of Police* [2016] ZACC 30; 2016 (11) BCLR 1398 (CC).

[48] *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35.

[49] *Department of Transport v Tasima (Pty) Limited* [2016] ZACC 39.

[50] *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC) (*LAMOSA*).

[51] *Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 8; 2016 (3) SA 487 (CC); 2016 (5) BCLR 577 (CC).

appeal for all constitutional issues or matters involving an arguable point of law of general public importance, and its decisions are binding on all other courts in South Africa. The SCA is, except in respect of certain labour and competition matters, the second highest appeal court in South Africa. It has jurisdiction to determine an appeal against any decision of the High Court. Precedents set by the Constitutional Court and SCA must be followed by the High Court and Magistrates' Courts. Similarly, precedents set by the High Court must be followed by the Magistrates' Courts within the respective areas of jurisdiction of the relevant High Court Division.

[32] In *Mekgoe v The State*[52] an application for leave to appeal to the SCA against the High Court's judgment delivered on 13 March 2014. The High Court held that it was *prima facie* of the view that it does not have jurisdiction to entertain the application and that special leave to appeal had to be obtained from the SCA. The High Court stated that "[it was] reminded of the obligation to observe the maxim *stare decisis*, the doctrine of precedents".[53]

[33] The Court quoted the Constitutional Court in *Camps Bay Ratepayers*,[54] which enjoined observance by courts of precedent. The Court said:

> "Considerations underlying the doctrine were formulated extensively by Hahlo & Kahn [Hahlo & Kahn *The South African Legal System and its Background* (Juta), Cape Town 1968) at 214-15]. What it boils down to, according to the authors, is: '(C)ertainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of *stare decisis*.' Observance of the doctrine has been insisted upon, both by this court and by the Supreme Court of Appeal. And I believe rightly so. The doctrine of precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. *Stare decisis* is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law

[52] [2015] ZAFSHC 60.

[53] Id at para 10.

[54] [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC).

> itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos."[55]

[34] There are no conflicts between this Court and the SCA or other Courts. When a matter has been brought to this Court on appeal from the SCA, this Court may overturn the SCA judgment. If the SCA is faced with the same legal issue in a different matter, the SCA is bound to follow the precedent set by this Court as the highest court of appeal.

[35] It is settled law that interpretive leeway and the constitutional injunction to develop the common law do not allow the courts to depart from the doctrine of *stare decisis*.

12. Has your Court developed / contributed to standards for law-making and for the application of law? (e.g. by developing concepts like to independence, impartiality, acting in accordance with the law, non bis in idem, nulla poena sine lege, etc.).

Independence

[36] The Constitutional Court has handed down many judgments exploring "independence. Some addressed the independence of corruption-fighting state institutions. In *Glenister II*, the Court distinguished between what it termed "judicial independence" and the independence of a corruption fighting unit.[56] In trying to balance the tension between independence and accountability, the Court held:

> "The question, therefore, is not whether the [state institution] is fully independent, but whether it enjoys and adequate level of structural and operational autonomy that is secured through institutional and legal mechanisms designed to ensure that it 'discharges its responsibilities effectively', as required by the Constitution."[57]

[55] Id at paras 28-30.

[56] *Glenister II* above n 42 at para 124.

[57] Id at para 125.

The Court also found that the concept independence requires not only actual or objective independence, but also a perception of independence:

> "This Court has indicated that 'the appearance or perception of independence plays an important role' in evaluating whether independence in fact exists. . . . [P]ublic confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence. . . . This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence."[58]

[37] Independence is said to apply not only to an institution, but individuals within an institution. Within the context of the judiciary, judges must have "decisional independence".[59] Thus, judges are to be protected "from undue external pressures from politicians, the public, and the media, to allow them to decide cases on the law and the facts before them."[60] The judiciary must be independent and impartial in exercising its authority. The Constitutional Court in *Mamabolo* explained:

> "In our constitutional order the judiciary is an independent pillar of state, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of state; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars."[61]

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[58] Id at para 207. See also *Helen Suzman Foundation v President of the Republic of South Africa* [2014] ZACC 32; 2015 (2) SA 1 (CC); 2015 (1) BCLR 1 (CC) and *McBride* above n 46.

[59] Cameron "Judicial independence – A substantive component" *Middle Temple & SA Conference: Judicial Independence* (2010) 24-29 at 24 para 4.

[60] Id at para 19.

[61] *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para. 16.

Acting in accordance with the law

[38] All persons and institutions are bound by the law. The Constitutional Court has made several pronouncements on this. The recent decision in *EFF* held that the President is bound by the law.[62] The President ought to have complied with remedial action taken against him by the Public Protector:

> "Our constitutional democracy can only be truly strengthened when: there is zero-tolerance for the culture of impunity; the prospects of good governance are duly enhanced by enforced accountability; the observance of the rule of law; and respect for every aspect of our Constitution as the supreme law of the Republic are real."[63]

[39] The Court has also engaged robustly within the sphere of administrative law, creating standards for rationality review[64] as well as giving substance to important administrative concepts that are geared towards ensuring compliance with the law (such as the approach to follow when dealing with collateral challenges)[65].

Nulla poena sine lege

[40] *Nulla poena sine lege* is entrenched as a fundamental right in the Constitution. Section 35(3)(l) provides that an accused person has the right "not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted". The Constitutional Court affirmed this in *Masiya*, where it extended the common law definition of rape to include anal penetration of a female by a male.[66] At the time of the offence, that amounted only to indecent assault. The Court did not apply this developed definition of rape to the

[62] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC).

[63] Id at para 54.

[64] See for example: *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 2000 (1) SA 1 (CC) (*SARFU*); *Albutt* above n 14; and *New Clicks* above n 23.

[65] See *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) and *Merafong City Local Municipality* above n 49.

[66] *Masiya v Director of Public Prosecutions Pretoria* 2007 (5) SA 30 (CC) at para 61.

accused. Doing so would subvert his rights under section 35(3)(l).[67] In *Veldman* the question was whether an accused, after having pleaded, could be sentenced in terms of an increased jurisdiction where the sentencing jurisdiction of a court had been increased after the plea.[68] The Court effectively extended the protection under section 35(3)(l), finding that—

> "[t]o retrospectively apply a new law, such as section 92(1)(a), during the course of the trial, and thereby to expose an accused person to a more severe sentence, undermines the rule of law and violates and accused person's right to a fair trial under section 35(3) of the Constitution."[69]

[41] The Court has thus increased the reach of *nulla poena sine lege*. Not only can an accused not be convicted of a crime that did not exist at the time the act or omission occurred, matters incidental to the offence cannot be applied retrospectively either (e.g. a subsequent increase in sentence).

13. Do you have case-law relating to respect for the rule of law by private actors exercising public functions?

Overview

[42] In South Africa, the exercise of all public power is subject legality, which is part of the rule of law.[70] In *SARFU*, the Constitutional Court confirmed a new approach to the regulation or control of public power, namely a functional approach (in contrast to an institutional approach).[71] This shifts the focus from *who* acts to *what* act is being performed. The attention is therefore not on the actor, but the action.

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[67] Id at para 57.

[68] *Veldman v Director of Public Prosecutions* 2006 (2) SACR 319 (CC).

[69] Id at para 37.

[70] Michelman FI "The rule of law, legality and the supremacy of the Constitution" in Woolman S & Bishop M *Constitutional law of South Africa (CLoSA)* vol 1 (2nd ed OS 2 2005) 11-1 – 11-44 at 11-3 explains that legality is part of the rule of law which is referred to in section 1(c) of the Constitution of the Republic of South Africa, 1996.

[71] *SARFU* above n 67 at para 141.

This has paved the way for acceptance that the rule of law applies to, and must be respected by, private actors performing public functions.[72]

The functional approach in case law

[43] Pursuant to the "functional approach", a court no longer looks merely to identifying institutions that usually exercise public functions to determine whether the actions are susceptible to judicial review and thus subject to the rule of law. Courts have developed a methodology of evaluating the action or function being performed to determine whether it amounted to a public function or the exercise of public power.

[44] In 2006, the Constitutional Court was asked to determine whether the Micro Finance Regulatory Council (ostensibly a private regulatory body which has effectively become responsible for regulating the micro-lending industry) exercised a public power or a public function by making (or purporting to make) legally-binding Rules to regulate the industry.[73] The Court emphasised that the regulatory function the Council performed was at least in part what would normally have been undertaken by the Minister of Trade and Industry. Through extensive delegation, the Minister transferred much of his authority and duties of regulation to the Council, indicating that the function was public in nature.[74]

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[72] This approach is textually supported by the wide formulation of section 239 of the Constitution which states:

> "organ of state means—
>
> (a) Any department of state or administration I n the national, provincial or local sphere of government; or
>
> (b) Any other functionary or institution—
>
> (i) Exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
>
> (ii) Exercising a public power or performing a public function in terms of any legislation,
>
> but does not include a court or judicial officer."

[73] *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) (*AAA* Investment) at paras 1-2.

[74] Id at para 43.

[45] The Court highlighted the extent of control the Minister retained over the functioning of the Council (determining its constitution and how it ought to function). The Minister effectively controlled the Council and had the authority to almost exclusively determine its functions. The Council was not a mere private entity.[75]

[46] If a public actor exercises a public function, it will be bound to the same standard set by the rule of law for organs of state. The rule of law (and the principle of legality) applies with equal force to public and private actors exercising a public power or function:

> "[T]he exercise of all public power in South Africa is constrained by the legality principle. It is therefore not necessary for the purpose of determining whether the legality principle applies to decide whether the power is governmental."[76]

[47] The Constitutional Court refined the functional approach in *Chirwa v Transnet*.[77] Langa CJ, in a minority judgment, acknowledged the challenges:

> "Determining whether a power or a function is 'public' is a notoriously difficult exercise. There is no simple definition or clear test to be applied."[78]

[48] He listed four factors, as a non-exhaustive list, that give an indication whether an action or power is public in nature:

> "(a) the relationship of coercion or power that the actor has in its capacity as a public institution;
> (b) the impact of the decision on the public;
> (c) the source of the power; and
> (d) whether there is a need for the decision to be exercised in the public interest."[79]

[75] Id at para 45.

[76] Id at para 39.

[77] [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC).

[78] Id at para 186.

[49] Whilst these factors will not always provide a clear-cut answer, and no single factor can on its own determine whether a function is public in nature, it offers a useful framework.

[50] Case law acknowledges that private actors who exercise public functions are subject to the rule of law in the same manner as public actors.[80]

14. Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight against corruption? Do you have case-law related to the accountability of public officials for their actions?

Constitutional Duties

[51] The Constitution places a duty on government to be accountable and transparent. The founding values of the Constitution, including the values of universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, are designed "to ensure accountability, responsiveness and openness".[81] Accountability is also asserted in the Constitution as an important principle in governance, ensuring that all spheres of government and organs of state provide effective, transparent, accountable and coherent government.[82] More specifically, one of the objects of local government is to provide democratic and accountable government for local communities.[83] In *Hlophe*[84] the SCA held that the fundamental value of accountability requires municipal officials to ensure that the Municipality complies with its obligations in terms of court orders.

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[79] Id at para 186.

[80] For further case law on the topic, see *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* 2010 (5) SA 457 (SCA); *ABSA Bank v Ukwanda* 2014 (1) SA 550 (GSJ).

[81] Section 1(d) of the Constitution.

[82] Section 41(1)(c) of the Constitution.

[83] Section 152(1)(a) of the Constitution.

[84] *City of Johannesburg Metropolitan Municipality v Hlophe* [2015] ZASCA 16; [2015] 2 All SA 251 (SCA).

[52] Section 195 of the Constitution recognises accountability as a democratic value and principle governing public administration:

> "(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> . . .
>
> (f) Public administration must be accountable."

This principle applies to administration in every sphere of government, organs of state and public enterprises.[85] National, provincial and municipal budgets and budgetary processes must also promote transparency and accountability.[86] The Constitutional Court has further held that the value of accountability is found within the scheme of the Bill of Rights.[87] To this end, the state or any person contending that a right should be limited in terms of the Constitution must account for the limitation by showing that the limitation is reasonable and justifiable in accordance with section 36 of the Constitution. Although public officials are in many instances protected from civil and criminal liability for actions that are committed in their official capacity, the Constitution remains the supreme law of the country.[88] Any conduct that is inconsistent with its provisions, will be declared unlawful and invalid, and set aside by the courts

Case-law related to the accountability of public officials

[53] Public officials are held to account in courts for both inaction and action. The Constitutional Court has held that a municipality is obliged to provide temporary accommodation for poor people evicted from the premises they were unlawfully occupying.[89]

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[85] Section 195(2) of the Constitution.

[86] Section 215 (1) of the Constitution.

[87] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 75.

[88] Section 2 of the Constitution.

[89] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC).

[54] The Constitution also provides that the Executive is accountable to Parliament. Parliament consists of the National Assembly and the National Council of Provinces. The Constitution places a duty on the National Assembly to provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it.[90] It also has the duty to ensure government by the people for the people under the Constitution. One way in which it is supposed to ensure this is by scrutinizing and overseeing executive action.[91]

[55] The principle that the executive is accountable to Parliament is also established in section 92(2) of the Constitution. This provides that "[m]embers of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions". This applies equally to provincial Members of the Executive Council who are accountable to the Legislature.[92] Section 93(2) similarly provides that deputy ministers are also accountable to Parliament "for the exercise of their powers and the performance of their functions."

[56] The Constitutional Court held that the National Assembly failed to fulfil its constitutional obligation to hold the President accountable for violating the provisions of the Executive Members' Ethics Act and the Executive Ethics Code, as found in a report by the Public Protector. Parliament is also vested with the national legislative authority in South Africa.[93] The Court has held the Legislature to account for not fulfilling its obligations to facilitate public participation in the law-making process.[94]

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[90] Section 55(2) of the Constitution.

[91] Section 42(3) of the Constitution.

[92] Section 133(2) of the Constitution.

[93] Section 44 of the Constitution.

[94] *LAMOSA* above n 51; *Matatiele Municipality v President of the Republic of South Africa* [2006] ZACC 12; 2007 (1) BCLR 47 (CC); and *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).

[57] There are also several mechanisms that are geared towards securing accountability over state officials, many of which are constitutionally mandated. For example, the Independent Police Investigative Directorate is an independent police complaints body established in terms of section 206(6) of the Constitution. It investigates alleged misconduct of or offences committed by members of the South African Police Service and municipal police services. It is an oversight body that functions independently of the police.

[58] The Judicial Service Commission (JSC) was established by section 178 of the Constitution for judicial accountability. Apart from interviewing applicants for appointment as judges, and advising government on matters relating to the Judiciary and the administration of justice, the JSC also deals with complaints against judges.

IV. The law and the individual

15. Is there individual access to your Court (direct / indirect) against general acts / individual acts? Please briefly explain the modalities / procedures.

Procedure

[59] Section 171 of the Constitution requires that all courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation. In addition, section 173 provides that the superior courts have inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice. The Rules of the Constitutional Court,[95] as required by the Constitution, allow a litigant to approach the Court:

a. To appeal against a judgment of the High Court or the SCA.[96] This is the more common procedure, where a matter has progressed through the hierarchy arriving at the Constitutional Court as the final arbiter.

[95] Promulgated under R1675 in Government Gazette 25726 of 31 October 2003. For certain interlocutory proceedings, the Constitutional Court applies the Rules of the High Court.

[96] Rule 19.

b. Direct access,[97] for the Court to sit as a court of first and last instance because of the exceptional circumstances. (The Court may also accept an urgent application where the circumstances justify a departure from the ordinary procedures.)[98]

c. Confirmation proceedings – if a High Court or the SCA has declared legislation constitutionally invalid, the order does not take effect until confirmed by the Constitutional Court.[99]

d. If the President refers a Bill before Parliament for review in terms of section 79 of the Constitution.[100]

[60] The exceptional circumstances for direct access were set out in *Electoral Commission v Mhlope*:[101]

> "Direct access may be granted only where the interests of justice permit. For this requirement to be met, exceptional circumstances must be demonstrated to the Court. In addition to the prospects of success, other factors in establishing exceptional circumstances include: the nature of the constitutional issues raised; the need for an urgent decision from the Court; whether the Court requires the views of lower courts, and, relatedly, if it is desirable for it to sit as a court of first and final instance; whether similar issues are pending before the Court; whether prejudice to the public good or good governance may occur; and whether the issue to be decided has a "grave bearing on the soundness of our constitutional democracy". This does not purport to be a closed list. And the relevance and relative weight of each factor will depend on the circumstances of each case."

[61] In some matters the Constitutional Court has exclusive jurisdiction.[102] Only it may:

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[97] Rule 18.

[98] Rule 12.

[99] Rule 16.

[100] Rule 14.

[101] *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC) at para 76.

[102] Section 167(4) of the Constitution.

a. decide disputes between organs of state in the national or provincial sphere concerning their constitutional status, powers or functions;
b. decide on the constitutionality of any parliamentary or provincial Bill;[103]
c. constitutionality challenges to legislation by members of the National Assembly or Provincial Legislature;[104]
d. decide on the constitutionality of any amendment to the Constitution;
e. decide that Parliament or the President has failed to fulfil a constitutional obligation; or
f. certify a provincial constitution in terms of section 144.

Standing (Locus Standi)

[62] Section 38 of the Bill of Rights[105] deals with the Enforcement of Rights:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) anyone acting in the public interest; and
> (e) an association acting in the interest of its members."

[63] The Court has endorsed a broad approach to standing:[106]

> "[I]t is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution

[103] Though only in terms of sections 79 or 121.

[104] sections 80 or 122 of the Constitution.

[105] Chapter Two of the Constitution.

[106] *Ferreira v Levin NO; Vryenhoek v Powell NO* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 9 (CC) at para 165.

> and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled."

[64] An own-interest litigant must show that a contested law or decision directly affects his or her rights or interests, or potential rights or interests.[107] Similarly, these requirements must be generously and broadly interpreted to accord with constitutional goals, though the interest may not be hypothetical or academic.[108]

[65] Apart from confirmations of statutory invalidity, and references of or challenges to legislation from legislatures, the Constitutional Court has the discretion whether to hear a matter. It determines its own docket. In considering direct access or an appeal, the prospects of success will be assessed, as well as the interests of justice.[109]

16. Has your Court developed case-law concerning access to ordinary / lower courts (e.g. preconditions, including, costs, representation by a lawyer, time limits)?

[66] Section 34 in the Bill of Rights of the Constitution addresses 'access to courts', providing the following:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[67] Section 170 applies to lower courts:

> "All courts other than those referred to in sections 167, 168 and 169 may decide any matter determined by an Act of Parliament, but a court of a status lower than the High

[107] Currie and De Waal *The Bill of Rights Handbook* 6 ed (Juta Cape Town 2013) at 80.

[108] Id. See also *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* [2012] ZACC 28; 2013 (3) BCLR 251 (CC) at paragraph 41.

[109] *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC) at paras 29-3.

> Court of South Africa may not enquire into or rule on the constitutionality of any legislation or any conduct of the President."

[68] The Magistrates Court Act 32 of 1944 and Rules regulate most of the lower courts.[110] In *University of Stellenbosch Legal Aid Clinic*[111] the Court held judicial oversight is a constitutionally indispensable before the Magistrates' Court may issue an emoluments attachment order.[112]

[69] The provisional sentence procedure[113] was the subject of a constitutional challenge in *Twee Jonge Gezellen.*[114] The Court upheld procedure though with fairness modifications.[115] The procedure would be constitutionally consistent if the common law were developed to give the court "a discretion to refuse provisional sentence only where the defendant can demonstrate: an inability to satisfy the judgment debt; an even balance of prospects of success in the main case on the papers; and a reasonable prospect that oral evidence may tip the balance of prospective success in his or her favour.[116]

[70] The Court also protects constitutional litigants acting against the state from adverse costs orders – even if they lose. *Biowatch* held:[117]

> "The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to

[110] Published under Government Notice R740 in *Government Gazette* 33487 of 23 August 2010.

[111] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* [2016] ZACC 32.

[112] Id at 130-3.

[113] Rule 8 of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the Supreme Court of South Africa Government Notice R48 of 12 January 1965.

[114] *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa* [2011] ZACC 2; 2011 (5) BCLR 505 (CC) ; 2011 (3) SA 1 (CC).

[115] Id at para 43.

[116] Id at para 60.

[117] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

> pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and the circumstances of the case".[118]

[71] By corollary, constitutional litigants who succeed against the state must have their costs.[119]

17. Has your Court developed case-law on other individual rights related to the rule of law?

[72] The Bill of Rights delineates specifically the rights enjoyed by people in South Africa. The Court has not developed standalone constitutional rights not specifically mentioned in the Constitution or arising from the rule of law. And O'Regan and Sachs JJ, in their minority, judgment in *S v Jordan*[120] eschewed any reliance of a right not expressly included in the Constitution.[121] Notwithstanding this, some jurisprudence has highlighted the interconnectedness between the rule of law and fundamental rights.

[73] In *Modderklip*[122] the Constitutional Court discussed the interplay between the rule of law and the right of access to courts, and the implications for the state:[123]

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[118] Id at para 21 quoting Ngcobo J's remarks in the matter of *Affordable Medicines Trust* above n 7 at para 139.

[119] *Tebeila Institute of Leadership, Education, Governance and Training v Limpopo College of Nursing* [2015] ZACC 4; 2015 (4) BCLR 396 (CC).

[120] *S v Jordan* [2002] ZACC 22; 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC).

[121] Id at para 53. The "right" the Court was requested to consider was that of autonomy.

[122] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA, Amici Curiae)* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) (*Modderklip*).

[123] Section 34 provides that—

> "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

> "The first aspect that flows from the rule of law is the obligation of the State to provide the necessary mechanisms for citizens to resolve disputes that arise between them. This obligation has its corollary in the right or entitlement of every person to have access to courts or other independent forums provided by the State for the settlement of such disputes."[124]

[74] The rule of law has also influenced jurisprudence relating to the right to just administrative action in section 33 of the Constitution.[125] The question in *Joseph*[126] was whether residents of an inner city building who had no immediate contractual relationship with the municipality were entitled to procedural fairness before municipality cut the electricity.[127] The Court found a right in public law: people residing in the municipality's area are entitled to receive the services including electricity; something not entrenched in the Constitution – and to fair process when it is terminated.[128]

[75] And in *New National Party*[129] Yacoob J held for the majority that—

> "[c]ourts do not review provisions of Acts of Parliament on the grounds that they are unreasonable. They will do so only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose. In such circumstances,

[124] *Modderklip* above n 116 at para 39.

[125] Section 33 provides:

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

[126] *Joseph v City of Johannesburg* [2009] ZACC 30; 2010 (4) SA 55 (CC); 2010 (3) BCLR 212 (CC).

[127] The residents had a contractual relationship with the landlord who in turn had a contractual relationship with the municipality.

[128] The Court applied the Promotion of Administrative Justice Act 3 of 2000.

[129] *New National Party* above n 27.

review is competent because the legislation is arbitrary. Arbitrariness is inconsistent with the rule of law which is a core value of the Constitution."[130]

[76] This is closely connected to section 9(1) of the Constitution which provides that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law". In *Prinsloo*,[131] the Court held that this aspect of equality is "to ensure that the state is bound to function in a rational manner"[132] and that when any differentiation between two people or groups of people cannot be "regulate[d] in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose".[133]

[77] Finally, although they are not "rights", the Constitution does impose various obligations on certain organs of state that must be complied with "diligently and without delay".[134] The corollaries to these obligations are not necessarily rights, but there is some expectation that they will be carried through. A good example is the obligation imposed on Parliament to "facilitate public involvement in [its] legislative and other processes".[135] In *Doctors for Life*,[136] Ngcobo J postulated that the rule of law requires this obligation to be fulfilled.[137]

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[130] Id at para 24.

[131] *Prinsloo* above n 12.

[132] Id at para 25.

[133] Id

[134] In terms of section 237 of the Constitution.

[135] The obligations are imposed on the National Assembly and National Council of Provinces (the two constituent house of Parliament) separately. Section 59(1) provides that—

"[t]he National Assembly must—

(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees."

Section 72(1) provides that—

"[t]he National Council of Provinces must—

(a) facilitate public involvement in the legislative and other processes of the Council and its committees."

[136] *Doctors for Life International* above n 97.

[137] Id at para 70.

18. Is the rule of law used as a general concept in the absence of specific fundamental rights or guarantees in the text of the Constitution in your country?

[78] As previously indicated the principle of legality, an incident of the rule of law,[138] requires all exercises of public power to be based on a minimum threshold of rationality[139] and to be rationally connected to the purpose for which given.[140] In some instances this may require procedural fairness before a decision is made – such as a hearing.[141] All state conduct is justiciable, so failing to comply with this requirement will make the decision susceptible to review.

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[138] *Fedsure Life Assurance Ltd* above n 2 at para 56.

[139] *Pharmaceutical Manufacturers Association* above n 6 at para 90.

[140] *Affordable Medicines Trust* above n 7 at para 75.

[141] *Albutt* above n 14 at para 72.