



## Review

### Understanding the “Spirit, Purport and Objects” of South Africa’s Bill of Rights

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#### Abstract

Section 39(2) of the Constitution of the Republic of South Africa, 1996 directs that when any legislation is interpreted, the result must be a construction that promotes ‘the spirit, purport and objects of the Bill of Rights’. The Constitution omits defining the contours of this phrase. Its precise meaning has also not been the subject of a comprehensive exposition by South African courts. Thus, uncertainty exists as to the exact import of this imprecise, somewhat vague phrase. What is clear is that the Constitution differentiates between the ‘spirit’, the ‘purport’ and the ‘objects’ of the Bill of Rights. Therefore, they must bear different meanings for its purposes. The absence of a definition that demarcates the scope and ambit of these constitutional imperatives increases the difficulty in applying them, particularly also because they may mean different things to different people. To ensure legal certainty, a tenet of the rule of law, it is important to develop a common understanding of the ‘spirit’, purport and objects of the Bill of Rights’ and of that which must be fostered or advanced (‘promoted’). However, as this article will demonstrate with reference to judicial precedent and relevant legal cum constitutional principles, they do not lend themselves to easy interpretation. This probably also explains the absence of a fixed definition thereof in SA’s constitutional architecture and jurisprudence. Hence, this article does not seek to, nor will it, carve out a finite definition of the constituent elements at the epicentre of the interpretive directive in section 39(2) of the Constitution.

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#### Introduction

Under s 39(2) of the Constitution of the Republic of South Africa, 1996 (Constitution), “[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights” (Bill) [1]. The texture, tone and sweep of this directive indicate that the duty therein is couched imperatively (“must promote”). It applies to the interpretation of all legislation. In other words, s 39(2) requires fiscal and non-fiscal statutes to be interpreted in a manner that is sensitive to human and peoples’ rights. By virtue of s 2 read with s 237 of the Constitution, statutory interpretation inconsistent with s 39(2), is invalid [2]. A problem encountered in practice is that the Constitution does not define the constituent elements at the epicentre of the directive, namely, “the spirit, purport and objects of the Bill of Rights”. Its meaning has hitherto also not been the subject of a comprehensive exposition by a court in South Africa (SA). To fulfil the peremptory duty imposed by s 39(2), it is necessary that interpreters of statutes understand the phrase in question and the import of its constituent elements.

This article aims to analyse the aforementioned phrase in s 39(2) and postulate a meaning for each element within its constitutional context. The discussion is divided as follows: Part 1 discusses the principles applicable to interpreting s 39(2); Parts 2 and 3 deals with (i) Historical background and objects of the Constitution, (ii) Role of the Bill in shaping SA’s democracy, (iii) Constitutional supremacy, (iv) The transformational spirit and purport of the Bill, and (v) The values underpinning an open and democratic society based on human dignity, equality and freedom. These aspects are discussed because they demonstrate the Bill’s underlying objectives, fundamental values, principles, ethos and democratic cultures, all of which, it is submitted, serve to inform the substance of the spirit, purport and objects of the Bill of Rights [3].

#### Synopsis of Fundamental Principles of Interpretation

Interpretation is a matter of law, not fact [4]. It is not an exact science or mechanical process in which meanings are determined with clinical or arithmetical precision of join-the-dots or paint-by-numbers [5]. Interpretation is a craft entailing giving practical meaning to a law text by applying juridical logic and integrated, sound reasoning, and relying on the aids, maxims and canons of interpretation crystallized in judicial precedent [6]. Interpretation also does not occur in stages; it is a “unitary exercise” [7]. An interpretation of the spirit, purport and objects of the Bill of Rights involves an interpretation of a provision in the Bill, namely, s 9(2). Thus, s 39(1) thereof is triggered [8]. Section 39(1) introduced a new interpretive methodology onto the legal landscape of SA that is different from that which applied during its apartheid era when Parliament reigned supreme and an executive minded judiciary was geared to interpreting provisions by giving effect to parliamentary intent. The new interpretive methodology embraced by s 39 is unrelated to whatever intention those responsible for the words may have had at the time they selected them [9]. Section 39 does not identify authorial intention as relevant to any form of interpretation, whether in relation to a statute or the Bill. Indeed,

interpretation of any provision in the Constitution does not entail giving effect to its framers' intention [10].

By virtue of constitutional supremacy, discussed below at para 3 1 4, the Constitution lies at the centre of the law pertaining to interpretation of all legal instruments. The Constitution contains an objective, normative legal framework [11]. It is underpinned by a set of higher, fundamental values of an open and democratic society based on human dignity, equality and freedom. The Constitution envisages an original method of interpretation that will uncover the values immanent in a law text [12]. The values, discussed below at para 3 1 7, are guiding principles and stimuli of constitutional and statutory interpretation [13]. A value-based construction is referred to as teleological interpretation. This modality fosters the development of a normative constitutional jurisprudence and promotes the fullest protection of constitutional guarantees [14,15]. The enquiry into constitutional values is, thus, deeply imbricated in the judicial process [16].

Constitutional texts and values are integrally linked - they work hand in hand to provide the protections promised by the Constitution [17]. Therefore, a value-laden interpretation of a law text is not a licence to ignore the language of a law text in favour of a generalised resort to constitutional values [18]. The result of textual disrespect is not interpretation but divination [19]. Owing to the separation of powers, a key constitutional principle, interpreters may not cross the Rubicon and engage in legislating [20]. They must interpret in a manner that is consonant with s 39 of the Constitution [21]. The text of the Bill remains constant until it is formally amended in the manner prescribed by the Constitution in s 74. This is a hallmark of democracy. Thus, whilst the provisions of s 39(2) are open to interpretation, no words may be read into its text that are not expressly written therein, nor may words written therein be ignored or overlooked [22].

As indicated above, textual respect is an important interpretive principle. Thus, every reading of s 39(2) must remain faithful to its actual wording [23]. Interpretation may also not involve a distortion of language used but rather give words their plain, ordinary, natural, dictionary meaning [24]. This is the meaning that they bear in common parlance or ordinary colloquial speech [25]. This is referred to as grammatical (or textual) interpretation. However, grammar, sentence structure (syntax) and dictionary meanings are "merely principal (initial) tools rather than determinative tyrants" [26]. When interpreting words in s 39(2), a balance must be struck between its language and its context [27]. Interpretation does not entail excessive peering at a text "without sufficient attention to the contextual scene" [28]. This is referred to as contextual (or systematic) interpretation.

The Constitution is an organic, living instrument whose texts are not precise mathematical formulas. Their significance and meanings are to be gathered not simply by taking the words and a dictionary but by considering their origin and the line of their growth [29]. The Constitution effected a shift from strictly textual to contextual interpretation. In law, context is everything [30]. Words are meaningless if read in the abstract or in isolation, or divorced from context [31]. A word "take[s] its colour, like a chameleon, from its setting and surrounds", even though its meaning may be clear and unambiguous [32,33]. Contextualist interpretation is not limited to the language of the text "as throwing light of a dictionary kind on the part to be interpreted" [34].

Contextualist interpretation of s 39(2) entails ascribing meaning to its words according to, *inter alia*, legal traditions and the linguistic

usages thereof [35]. This requires consideration of the relevant and admissible context of its text. That context is influenced by various factors. These include (i) The actual words used in s 39(2) and its interplay with other provisions in the Constitution "which may reveal the purpose of the interpreted section" [36], (ii) "The consequences in relation to justice and convenience of adopting one view rather than another" [37], and (iii) Extraneous indicia [38]. The latter includes evolving standards and the normative framework of the Constitution, the aims of an open and democratic society, the relevant social, economic, historical and institutional factors, the mischief aimed at, and the state of the law existing at the time of the interpretation [39-42]. These factors are dealt with below because they assist in shedding light on the meaning of the phrase in s 39(2) forming the subject of this article.

When interpreting the relevant text in s 39(2), effect must be given to a meaning thereof that is reconcilable with the Constitution's underlying aims. This is referred to as purposive interpretation, a process that gives effect to a meaning that best advances the fulfilment of the Constitution's broader aims and underlying objectives (discussed below at para 3 1 2) [43]. Effect must not be given to a meaning that would stultify the operation of the Constitution or the attainment of its aims [44]. Purpose "plays an important role in establishing a context that clarifies the scope and intended effect of a law" [45]. Purpose is, however, distinguishable from mischief [46]. Constitutional provisions are to be interpreted broadly, liberally and purposively so that the Constitution can "play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation" [47]. To construe s 39(2) widely requires consideration of, *inter alia*, the standards, values, spirit, ethos and tenor of the Constitution: [48] they must transcend and suffuse the interpretive process [49]. Purposive interpretation, thus, enables the phrase forming the subject of this article to be construed in accordance with its transformative potential.

## Historical background of the Constitution and Bill of Rights

As stated above, contextualist interpretation of a constitutional text in s 39(2) requires that consideration be given to SA's legal and institutional history. This is a useful starting point. South Africa is a *Rechtsstaat* that, in relative terms, is a fledgling democracy born on Freedom Day, 27 April 1994 [50]. Democracy was preceded by apartheid, a repressive political order declared to be a crime against humanity [51]. Apartheid was geared to social engineering through a brutal, violent onslaught on human rights that created a system of 'racial oligarchy' and privilege for a White minority, and disadvantage for the Black majority [52,53]. The apartheid regime lacked a human rights culture. Apartheid laws stripped Blacks of their humanity, deprived them of freedom in all its manifestations, and their dignity 'was routinely and cruelly denied' [54,55]. Apartheid institutionalised manifestly unjust discrimination [56]. Its fault lines - a deeply divided, vastly unequal citizenship with segregated property, political and socio-economic rights - 'generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge' [57]. The edifice of apartheid is a 'fundamental "mischief" to be remedied' through the Constitution, a 'promissory note' of a better future for all. This is a relevant consideration in contextualist interpretation [58,59].

Apartheid created class cleavages between the economically marginalised Black communities, and the rest of society. Apartheid left

a deeply polarised society in its wake that continues to suffer from deep disparities in wealth, as well as various social and economic ills (such as unemployment, inadequate social security, and a lack of access to quality basic and further education). Under apartheid, many Blacks lived in undignified, deplorable conditions. They aspired to a life with dignity, equality and freedom. These are human rights that are part of the core moral code common to all democratic societies. Human rights are inviolable, inalienable, universal claims necessary to grant every human being a decent life [60]. It is against this historical background that SA's *sui generis* interim (1993) and final (1996) Constitutions were penned.

### Objectives of the Constitution

The Constitution of the Republic of South Africa, 1993 ushered in a new system of governance. It transformed SA from rule by parliament to a representative democracy [61]. Its architects crafted universally accepted principles that laid the foundation upon which the text of the final Constitution is built [62]. On 4 February 1997, the final (1996) Constitution superseded the interim (1993) Constitution. These instruments pioneered change in all facets of life including, social, economic, political, cultural and legal. Equality pervades and defines the ethos and spirit on which the Constitution is premised [63]. The constitutional architecture is both 'backward- and forward-looking' [64]. Whilst it seeks to redress the injustices of apartheid that divided society in SA into disparate classes, it also seeks to nurture SA into becoming a just and equal society for future generations. Thus, the spirit of transformation pervades the constitutional project. This project entails a lengthy process of transition from a diverse society based on inequality, division, injustice and exclusion from the democratic process to one respecting the dignity of all, placing a premium on human rights and freedoms, and embracing a representative, participatory process of governance [65]. The reconfiguration of SA fashioned along these lines is enunciated in the Constitution's Preamble as an objective to 'build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations'.

The final Constitution is not a narrow ideological formulation but a solid premise upon which a broad-based system of restorative and corrective social justice is to be built [66]. It is a codification of a common set of norms, objective values and democratic principles that are the true strands from which the fabric of a new socio-political-legal order is woven. Since the Constitution's underlying aims are not set out in any particular provision, they are to be distilled from that instrument read as a whole. The Constitution's aims and objectives are reflected by *inter alia*: (i) The Preamble's expression of mutual interests and common aspirations or convictions towards transformation (discussed below at para 3 1 5); (ii) The re-definition of a common, objective, normative value system, including the subjection of government (s 41) and public administration (s 195(1)) to a set of democratic values and principles (discussed below at para 3 1 7); (iii) The displacement of parliamentary sovereignty by constitutional supremacy (discussed below at para 3 1 4); (iv) The recognition of a common South African citizenship in s 3(1); (v) The entrenchment of a Bill of Rights that rejects injustice, establishes a culture of human rights and freedoms, and advances universal rights ensconced therein by imposing, in s 7(2), duties on the State to 'respect, protect, promote and fulfil the rights' (discussed below at para 3 1 3); (v) The creation of an independent judiciary in s 165(2) whose make-up is designed to reflect the diversity among SA's people (ss 174(1), (2)); and (vi) The establishment of a culture of democracy in s 234. These aims give

shape and substance to the Bill, advances SA's 'democratic hygiene', and serve as catalysts for transformation in all its various facets [67].

The Constitution is part of SA's substantive law. Its provisions are binding and enforceable on all natural and juristic persons, arms of government, organs of state, public enterprises and public institutions. The Constitution changed the context of all legal reasoning and decision-making in SA [68]. It commands a transformed mindset and establishes the 'never again' principle: never again will the right of ordinary people to freedom be permitted to be taken away [69]. Thus, under the Constitution, it will not be business as usual. The Preamble thereof records the commitment of South Africans to the fulfilment of the Constitution's lofty goals of achieving unity in diversity, national security, peace, social and economic justice, equality, a non-racial and non-sexist society, an improved quality of life for all citizens and freeing the potential of each person [70]. Thus, the ethos of the 1993 and 1996 Constitutions is aptly described as a - 'historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex' [71].

### Role of the Bill of Rights in shaping democracy in SA

The Bill of Rights in Chapter 2 of the Constitution is the embodiment of basic human rights for citizens and non-citizens alike [72]. Section 7(1) proclaims the Bill to be 'a cornerstone of democracy in South Africa'. Although the Bill borrows from foreign constitutions, it has a distinctly South African flavour [73]. It entrenches a suite of independently delineated fundamental rights deserving of protection, 'reflecting historical experience pointing to the need to be on guard in areas of special potential vulnerability and abuse' [74]. The Bill is inseparable from, and inextricably linked to, the rest of the Constitution with which it shares a common heritage: they are products of the same chequered history under apartheid (discussed above at 3 1 1). That history shaped the character and transformative mission of the Bill and its content [75]. Thus, the Bill cannot be read in isolation. Its content must be viewed as integrated within its existential context in the Constitution. In the light of their shared historical origins, the spirit, purport and objects of the Bill is integrally linked with, and influenced by, that of the rest of the Constitution.

The Bill buttresses constitutional protection by entrenching onto the legal landscape of SA a catalogue of guaranteed social, political, economic, civil and other human rights and freedoms encapsulated in s 9 to s 35. In so doing, the Bill constitutionalises certain universal rights recognised at international law [76]. While some are 'new' rights in SA, others are 'old' rights which were denied to certain persons under apartheid [77]. The 'objects' of the Bill are to be found in the fundamental rights it guarantees and the values that underlie them [78]. The Bill also lays the ground rules for the lawful exercise of legislative and executive action affecting entrenched fundamental rights. To this end, the Bill articulates a minimum threshold that cannot be trespassed. The Bill creates an unparalleled paradigm facilitating the realisation of the Constitution's objectives of social engineering and transformation discussed below. The Constitution and the Bill share a common conviction for remedial action aimed at redressing the legacies of past repression, political and social exclusion, inequality and dispossession [79]. This is typified by, for example, s 25(5) that reads: 'The state must take reasonable legislative and other measures, within

its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.' For purposes of s 39(2), when interpreting any legislation in a manner that promotes the Bill's 'objects', the aforementioned objectives must be considered to the extent that they, or any of them, are legally relevant. A meaning must then be chosen which best promotes any such goal. This is part of purposive interpretation discussed above.

The Bill also seeks to ensure compliance with Art 28 of the Universal Declaration of Human Rights [80]. In this regard, s 7(2) is instructive. It reads: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.' As a concept, 'state' does not have a universal meaning. Its ambit must be determined within its 'context' [81]. In *Glenister v President of the Republic of South Africa* the Court held that s 7(2) creates a duty 'beyond a mere negative obligation not to act in a manner that would infringe or restrict a right [82]. Rather, it entails positive duties on the State to take deliberate, reasonable measures to give effect to all of the fundamental rights in the Bill of Rights.' This requires financial resources. The Constitution leaves it to the State to choose the means by which it will comply with its duties [83]. Taxation is the chosen means to raise finance for governmental expenditure and human rights purposes. To 'respect' entails a negative duty to refrain from interfering with constitutional rights; to 'protect' entails a positive duty to, first, take appropriate steps to ensure that there is no unwarranted interference with the enjoyment of any constitutional right and, secondly, to provide an effective remedy against an intrusion on any such right. The State is, thus, also a guardian of rights. This is a basic tenet of a constitutional State [84]. To 'promote' consists of a positive duty to advance the rights in the Bill by, for example, bringing them to a beneficiary's attention. A fundamental right is meaningful on a practical level if its beneficiary is cognisant of the right's existence and import. Such knowledge advances access to justice. To 'fulfil' imposes a positive duty to proactively develop and implement measures that will fully realise human rights. Examples are legislation enacted in accordance with a constitutional imperative (such as, Promotion of Access to Information Act and Promotion of Administrative Justice Act) [85,86].

### Supremacy of the Constitution and Bill of Rights

During apartheid, law was used to enforce repression, coercion and discrimination. Under the Constitution, law is used to enforce respect for, and the protection, promotion and fulfilment of, rights. To bolster its efficacy, the Constitution proclaims its supremacy in s 2 quoted above. All law and conduct must conform to the Constitution's strictures and prescripts. Thus, rule by the Constitution replaced Parliamentary sovereignty [87]. Parliament 'can no longer claim supreme power' [88]. It will be subservient to, and qualified by, the Constitution. This instrument, which is short on specifics and long on generalisations, outlines procedural safeguards and substantive requirements which all laws must satisfy [89]. Non-compliance renders a law, and the process of its enactment, susceptible to nullification on review [90]. This is part of the principle of legality, an incident of the rule of law, a founding value in s 1 [91]. Invalidity does not operate automatically. It only follows a declaration by a court competent to grant such order [92]. In terms of s 172(1)(a), any such declaration is made only to the extent of an inconsistency with the Constitution.

Although s 1(c) records constitutional supremacy as a founding value, it is not confined to being a mere value. Supremacy is expressed as an indisputable, inviolable rule 'for the construction of a

determinate, hierarchical relation among legal norms emanating from various, recognized sources of law' [93]. The unambiguous language of s 2, namely, the Constitution 'is the supreme law' and law or conduct inconsistent with it 'is invalid', proclaims constitutional supremacy as an incontrovertible fact and fundamental principle [94]. Therefore, the Constitution is a *lex fundamentalis* (that is, an overarching, overriding 'law', superseding any other, including statutory law, common law, customary law, by-laws, regulations and rules, regardless of whether such law is of pre-constitutional vintage or enacted after the dawn of democracy).

Although the Constitution is a societal construct, it is not in the nature of a social contract, pact or other non-binding charter of norms and standards. Its enforceability and dominance on the socio-politico-legal landscape is engrained in its text. For example, s 8(3)(b) permits a court to develop rules of the common law to limit the operation of a fundamental right, provided the limitation is consistent with s 36 that is designed to combat the malpractice of State action unduly interfering with basic rights. The institution, status and role of traditional leaders under customary law are also recognised, but subject to the Constitution (s 211(1)). Customary international law is adopted as 'law in the Republic unless it is inconsistent with the Constitution' (s 232). The Constitution obliges members of the legislature (ss 48, 107), executive (ss 95, 135) and judiciary (Schedule 2 para 6) to swear or affirm faithfulness to the Constitution. Constitutional supremacy is augmented by s 165(5) that reads: 'An order or decision issued by a court binds all persons to whom and organs of state to which it applies.' The provisions referred to here exemplify constitutional pre-eminence which is also reflected by the societal values imposed by the Constitution against which all laws and conduct are tested for validity.

The pervasiveness of the Constitution is succinctly summed up in the *dictum* that 'all law, including the common law, derives its force from the Constitution and is subject to constitutional control' [95]. Constitutional supremacy includes supremacy of the Bill whose dominance is recorded in s 8(1): 'The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.' Thus, no law is beyond its radar. Its spirit, purport and objects infuse all laws. The pre-eminence of the Bill is also evident from s 39(3) recognising 'the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill'. (my emphasis).

### Transformational spirit and purport of the Constitution and Bill of Rights

The Constitution and the Bill facilitate the building of a 'new', transformed SA on the ruins of the 'old' apartheid SA. They are touchstones creating a programmatic scheme for their primary mission, namely, fulfilling social, political, legal, cultural, economic and institutional transformation by 'redressing the historical imbalance caused by past unfair discrimination' [96]. Thus, constitutional provisions are transformative in nature and effect [97]. The spirit of transition and transformation characterises the entire constitutional enterprise [98]. The word 'transformation', 'transformative', 'transformatory' or other variation thereof does not appear in the Constitution. However, its transformative character, mission, effect and orientation are unmistakable [99]. This is traceable in the following declaration of

intent in the Preamble: 'We therefore ... adopt this Constitution as the supreme law of the Republic so as to - Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.'

Constitutional transformation does not have one, all-embracing meaning. It may also mean different things to different people. Transformation is not simply a declaration or other once-off event. It is a process of renewal, redevelopment, reconstruction, reconciliation and transition that will occur in the fullness of time over many decades. In this sense, transformation is an evolutionary process carried out in accordance with constitutional principles [100]. Transformative constitutionalism is a value lying at the heart of the Constitution, an instrument whose intrinsic worth lies in it being meaningful in the lives of its beneficiaries [101]. The Constitution and the Bill are roadmaps and compasses providing moral, ethical, economic, legal, social and political direction that navigate South Africans en route to a common national destiny [102]. Inequality is an apartheid legacy scarring and eroding the dignity of those afflicted thereby [103]. It is the bane of their existence. Achieving substantive, not formal, equality is at the epicentre of transformation in SA. It preoccupies constitutional thinking [104]. Hence, s 9(2) envisages the empowerment of Blacks disadvantaged under apartheid [105]. It reads: 'Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.'

### Interpreting 'an open and democratic society'

As stated above, when determining, under s 39(2), the meaning of 'the spirit, purport and objects of the Bill of Rights', s 39(1)(a) commands that the values underlying an open and democratic society must be promoted. This reinforces a dominant constitutional theme, namely, that the Constitution is a bridge between a past based on injustice and oppression, and a future premised on equality, pursuit of social justice and peace, and the recognition of human rights and freedoms. For interpretational purposes, the relevant values are those associated with the broad, normative concept of 'an open and democratic society based on human dignity, equality and freedom'. This concept requires analysis, particularly because it recurs within the Bill. In terms of s 36(1), limitations of fundamental rights are valid only if they are 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

Constitutionally, SA is an open and democratic society premised on a trifecta of core values, namely, human dignity, equality and freedom. The precise meaning of 'open and democratic society' is unclear. It is undefined in the Constitution and case law probably because of the inherent difficulty in composing a comprehensive definition. The 'notion of an open and democratic society is ... not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply and the final measure we use for testing the legitimacy of impugned norms and conduct' [106]. The society referred to is an abstract or ideal (Utopian) one and premised on active solidarity in

which the basic needs of those living in it are catered for (such as, access to food, water, health care, social security and education) [107]. In so doing, the quality of life may be improved for all, including the poor, social outcasts and vulnerable persons [108]. Loosely explained, an 'open society' is an inclusive, diverse, pluralistic society whose members are tolerant, progressive minded, and accommodating of all, regardless of ethnic and social origin, sexual orientation, religious persuasion, culture, race, belief, gender, age, nationality or status [109]. As for 'democratic society', a useful guide of its meaning emanates from *Speiser v Randall*, [110] namely, 'a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all'. This meaning resonates with the Preamble that, as shown above, records the aim 'to ... [l]ay the foundations for a ... society in which government is based on the will of the people and every citizen is equally protected by law'.

Based on the foregoing, the Constitution and the Bill ushered in a reborn society in which there is a 'radical movement away from the previous state of the law' [111]. The ethos of SA's society is 'democratic, universalistic, caring and aspirationally egalitarian' [112]. This is the antithesis of the closed, undemocratic, apartheid society that was racist, repressive, insular, authoritarian and wholly lacking of a human rights culture, ethos and spirit. Therefore, the Constitution displaced a culture of apartheid, authority and racism with a culture of democracy, human rights, openness and justification. This informs, in part, 'the spirit, purport and objects of the Bill of Rights'.

### Values of a democratic society based on human dignity, equality and freedom

Values are etched in the structure and design of SA's democratic order. In accordance with the aim to break away decisively from a 'past based on conflict, untold suffering and injustice' and create a democratic, rights friendly society infused with justice and human rights, the Constitution establishes a unitary State subscribing to values, norms and principles that, being universal among open and democratic societies, place a premium on respect for and protection, promotion and fulfilment of human rights and freedoms [113]. The Constitution has a cascading effect. Section 8(1) quoted above superimposes values in the vertical application of the Bill in relationships between State and non-State actors. Section 8(2) does likewise for its horizontal application in private relationships between non-State actors *inter se* [114]. The Constitution in, for example, ss 195(1) and (3) distinguishes 'values' from 'principles'. This dichotomy is important. Neither term is constitutionally defined. Constitutional values are general norms formulated rather broadly [115]. Venter contends, persuasively, that 'values' do not connote something of 'material worth' but rather an abstract concept indicating a certain 'standard or a measure of good' which 'set requirements for the appropriate or desired interpretation, application and operationalisation of the constitution and everything dependent thereupon' [116]. Thus, if a law or conduct fails to conform to the standards of a constitutional value, then it would mean that it conforms to standards of a lower, different, conflicting or extra-constitutional measure, thereby leading to unconstitutionality. In other words, constitutional values are the barometers or yardsticks against which law and conduct are tested for constitutional congruence. On the other hand, constitutional principles are, as Venter explains, those founded in, and which give expression to, a specific constitutional value. For example, the principle that law must

be applied fairly and equitably is premised on the values of justice and equality.

The Constitution is underpinned by, and a repository of, interrelated, interdependent and indivisible values to which every person, official, organ of state, public enterprise, sphere of government and institution must subscribe and adhere. The values 'are strong, explicit and clearly intended to be considered part of the very texture of the constitutional project' [117]. Section 1 lists the founding values, [118] namely, human dignity, [119] achievement of equality, [120] and the advancement of human rights and freedoms (s 1(a)); non-racialism and non-sexism (s 1(b)); constitutional supremacy and rule of law (s 1(c)); universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government in a unitary State, to ensure accountability, [121] responsiveness and openness (s 1(d)) [122]. Other values of a mature society may be extrapolated by implication from the Constitution's text, tone and structure [123]. These include national unity, respect, justice, fairness, equity, democratic and co-operative governance, liberalism, diversity, inclusiveness, impartiality, judicial and institutional independence, constitutionalism, democracy, *ubuntu*, transformation, separation of powers, and social justice. These values are not a *numerus clausus* of *grundnorms* [124].

The constitutional values are not Holy cows (or sacred). They also do not give rise to duties. This because values are not discrete or enforceable rights, except to the extent that a value is elevated to the status of a fundamental right (such as, human dignity and equality) [125]. Constitutional values are the building blocks of democracy. Values of the kind enumerated above are hallmarks of an open and democratic society contemplated by s 39(1)(a) [126]. Values are broad concepts that include further dimensions reflecting the norms incorporated therein (such as, peace, public safety and order, national security, social security, public health, environmental protection, control over the exercise of power, effective protection of rights, privacy, and access to information) [127]. These and other norms of an open and democratic society inform and give substance to constitutional provisions (such as, 'the spirit, purport and objects of the Bill of Rights'). This is so because, first, values form the genesis of the entrenched fundamental rights. In other words, they animate every right, thereby giving them a constitutional shape and form that establish the right's sphere of protected activity [128]. Secondly, the values are authoritative guides that direct how State action must be exercised and the degree to which such action may curtail fundamental rights. Therefore, constitutional values are the substantive legal basis for evaluating whether a limitation of a right is reasonable and justifiable under s 36(1). In this way, the values operate as aids in defence of human rights [129].

Human dignity, equality and freedom are prominent values in the Constitution [130]. They form the substratum of SA's open and democratic society. Owing to grave human rights abuses during the apartheid era, this triad of values reflects, and facilitates the attainment of, the transformation aims of the Constitution discussed above [131]. Since human dignity, equality and freedom are referred to in various constitutional provisions (such as, ss 1, 7(1), 36(1) and 39(1)(a)), they inform every aspect of legal reasoning and decision-making. The values in this trilogy are not mutually exclusive of each other. Each value enhances and reinforces the others [132]. For purposes of constitutional interpretation under s 39(1)(a), the values of human dignity,

equality and freedom are to be promoted as well as any other that is consonant with, or sourced from, this trifecta of constitutional values which have been labelled as 'meta-values', [133] 'foundational', [134] 'dominant', [135] and 'conjoined, reciprocal and covalent' [136]. The tag used to label this trilogy is irrelevant when their legal status is under consideration. The recurring reference to them in the Constitution does not mean that they, or any among them, are elevated to a position of primacy above any other value.

The Constitution does not delineate a formal ranking of constitutional values. Like constitutional rights, each value is equal in weighting, status and prominence. Any hierarchical ranking by courts would be susceptible to undue influence by a judicial officer's own personal preferences and ideological bent. Hence, an abstract ranking ought to be avoided. The equal status of constitutional values gives each a comparative equal ranking for interpretational and other constitutional purposes. Therefore, no value will be superior over another so that, as a general rule, none would have to yield to another [137]. However, if, in a particular instance, competing values are at play, then legal effect ought to be given to the value(s) whose protection is, in the specific circumstance, the one(s) which 'most closely illuminates the constitutional scheme to which we have committed ourselves' [138].

Public policy and society's *boni mores* ('good morals') are rooted in the Constitution and infused with its values [139]. To be valid, public policy and society's morals must pass muster [140]. They cannot be repugnant to the Constitution. The community's convictions take on constitutional contours. They are 'underpinned and informed by the norms and values' embraced by the Constitution [141]. Society's *mores* evolve as social dynamics, values or conceptions change [142]. However, despite 'tectonic shifts in the attitudes and *mores* of society', the Constitution's text may only alter through a formal amendment that complies with the prescribed procedural requirements [143]. The Constitution is a living instrument 'capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers' [144]. *Tempora mutantur et nos mutamur in illis* ('times change and we change with them'). The flexibility and adaptability in the application of the Constitution is a pillar of its strength and durability. However, without an amendment to its text, the values therein do not change. But since the values are norms open to interpretation, their content is not static and may be developed incrementally by reference to 'new' or enlightened values that underlie an open and democratic society. This reflects their flexibility and dynamism [145]. Also, it adds weight to their usefulness as tools of interpretation. As stated above, the Constitution provides for the development of the common law and customary law in accordance with 'the spirit, purport and objects of the Bill of Rights'. Since values develop in the way indicated here, these laws can adapt in order to keep abreast with, and reflect, the changing social, moral and economic fabric of society in SA [146].

## Conclusion

The foregoing discussion shows that whilst apartheid SA followed a culture of coercion, discrimination, secrecy and autocratic rule, the central features of the new legal order are constitutionalism, democracy, a justiciable Bill of Rights, an independent judiciary and state institutions, and accountable and transparent public administration. These features stem from the interim and final Constitutions transforming SA by *inter alia* (i) Replacing parliamentary autocracy with constitutional democracy, (ii) Substituting minority rule with

majoritarianism, and (iii) Establishing a culture of rights, openness, constitutionality, democracy and justification. Accordingly, SA has a unitary system of law that is shaped by a supreme humanitarian oriented Constitution that aims to transform SA into an inclusive, egalitarian, tolerant, pluralistic society whose members uphold and foster values that are congruent with an open and democratic society based on the core values of human dignity, equality and freedom.

This article shows further that, by virtue of s 39(1)(a) read with (2) of the Constitution, constitutional values orientate interpreters to understand the purpose of a constitutional provision in a manner that, on the one hand, underscores respect for the Constitution's transformational objectives and, on the other, promotes, protects or fulfils the fundamental rights in the Bill. Section 39(2) is not the *fons et origo* of the modalities applicable to statutory interpretation nor the development of common law or customary law. Section 39(2) merely indicates an outcome that, as a minimum, an interpretive exercise or legal development must satisfy in order to pass constitutional muster. That outcome is the promotion of 'the spirit, purport and objects of the Bill of Rights'. Although this phrase expressly refers to the Bill and not the Constitution *per se*, this article shows that the former is an inseparable, integral part of the latter so that 'the spirit, purport and objects of the Bill of Rights' is infused by the spirit, purport and objects of the rest of the Constitution. Therefore, reference in s 39(2) to the 'spirit, purport and objects of the Bill of Rights' of necessity, and by necessary implication, includes the spirit, purport and objects of the Constitution read as a whole.

This article also reveals that the aforementioned phrase in s 39(2) which forms the subject of this article does not lend itself to easy interpretation. Hence, like the courts of SA, the author does not propose a precise or finite meaning of 'the spirit, purport and objects of the Bill of Rights' or the constituent elements thereof. This phrase is broad in its ambit and encompasses, *inter alia*, the normative standards, values, ethos and principles underlying the Constitution. In the light hereof, since values inform the Constitution's 'spirit', by extension it informs the 'spirit' of the Bill. As shown above, that 'spirit' is, *inter alia*, freedom, equality, human dignity, justice, democracy, human rights and democratic values. This 'spirit' of the Bill is evident from, for example, s 7(1) proclaiming the Bill to be 'a cornerstone of democracy' that 'enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom'. As for the Bill's 'purport', this may be gleaned from, *inter alia*, the declarations in ss 8(1) and (2), namely, that the Bill 'applies to all law, and binds the legislature, the executive, the judiciary and all organs of state', and that the Bill 'binds a natural or a juristic person if, and to the extent that, it is applicable'. As for the Bill's 'objects', these are to be found in, for example, the fundamental rights it guarantees and the values that underlie them. However, those rights do not operate as independent normative regimes isolated from each other. Their disparate textual protections are unified by the constitutional values immanent in them all. Thus, the relationship between the rights and their values is 'osmotic rather than hermetic' [147].

## References

1. 'Customary law' is the common rules and practices subscribed to by SA's indigenous people.
2. Section 2 reads: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." Section 237 reads: "All constitutional obligations must be performed diligently and without delay".
3. In this article, unless otherwise stated or indicated by context, constitutional 'values' and 'principles' bear the meaning explained at para 317.
4. KPMG Chartered Accountants (SA) v Securefin Ltd 2009 4 SA 399 (SCA) para 39.
5. Botha CJ (2005) *Statutory Interpretation: An Introduction for Students*. Juta and Company, Cape Town, South Africa.
6. For the principles of interpretation generally, see *Daniels v Campbell* 2004 5 SA 331 (CC) paras 43-46; *DPP, Transvaal v Minister of Justice and Constitutional Development* 2009 4 SA 222 (CC) paras 81-83; *Minister of Safety and Security v Sekhoto* 2011 5 SA 367 (SCA) paras 14-15; *Corpelo 2290 CC t/a U-Care v Registrar of Banks* 2013 1 All SA 127 (SCA) para 20; *Botha v Rich* 2014 4 SA 124 (CC) paras 28-32. For a collation of the development in the law relating to interpretation, see *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 5 SA 1 (SCA) paras 16-20.
7. *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 2 SA 494 (SCA) para 12. De Ville JR (1994) 'Proportionality as a requirement of the legality in administrative law in terms of the new Constitution' SAPL 9:360 at 365 points out that constitutional provisions "form a logical and systematic unity" requiring integrated interpretation in which provisions are "not [to] be interpreted in isolation from the rest of the constitution".
8. Section 39(1) reads: "When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) must consider foreign law".
9. *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) para 23.
10. *Mansingh v General Council of the Bar* 2014 2 SA 26 (CC) para 27. Moseneke D (2002) 'The fourth Bram Fischer memorial lecture: Transformative adjudication' SAJHR: 309 at 316 states that "austere legalism" and the "intention of the drafter" are ill-suited to constitutional interpretation. De Ville JR (2000) *Constitutional and Statutory Interpretation* Interdoc Consultants, South Africa at 36 contends that a resort to authorial intention as a basis for constitutional interpretation is an evasion of responsibility for judicial decision-making and must be avoided. Also, see Michelman FI (1998) 'Constitutional authorship, "Solomonic solution", and the unoriginalist mode of constitutional interpretation' *Acta Juridica*: 208 at 219.
11. *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) paras 54-55 58; *Thebus v S* 2003 6 SA 505 (CC) paras 27-28.
12. Erasmus G 'Limitation and suspension' in van Wyk D, Dugard J, de Villiers B & Davis D (1994) *Rights and Constitutionalism: The New South African Legal Order*, Juta & Co, Cape Town at 630.
13. *Thint (Pty) Ltd v NDPP; Zuma v NDPP* 2009 1 SA 1 (CC) at par 375; *Carmichele v Minister of Safety and Security* (n 11) para 54. The use of constitutional values in interpretation is an effective response to the 'countermajoritarian dilemma' (Moseneke (n 10) 316), discussed by Devenish GE (1994) A Commentary on the South African Bill of Rights, Butterworths, Durban at 4-5 and Venter F (2005) 'The politics of constitutional adjudication' *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*: 129 at 144-145.
14. See Kroeze IJ (2001) 'Doing things with values: The role of constitutional values in constitutional interpretation' *Stell LR* 12:265-276; Venter F (2001) 'Utilizing constitutional values in constitutional comparison' *Potchefstroom Electronic LJ* 4:20-41; Devenish GE (2008) 'Department of Land Affairs v Goedgelegen Tropical Fruits – a triumph for teleological interpretation, an unqualified contextual methodology and the jurisprudence of ubuntu' *SALJ* 125:231-240; Singh A (2009) 'An illustration of teleological interpretation par excellence – Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd' *Tydskrif vir die Heedendaagse Romeinse Hollandse Reg* 72:336-344.
15. *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) para 17; *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) para 53.

16. Per Davis J in *ABSA Bank Ltd v Trustees for the Time Being of the Coe Family Trust* 2012 3 SA 184 (WCC) at 190I.
17. Per Sachs J in *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) para 149.
18. *Brendenkamp v Standard Bank of SA Ltd* 2010 4 SA 468 (SCA) para 39.
19. *S v Zuma* 1995 2 SA 642 (CC) para 18.
20. For a discussion of separation of powers, see *De Lange v Smuts NO* 1998 (3) SA 785 (CC) para 60; *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 95; *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC) para 47; *Mkhize v Umvoti Municipality* 2012 (1) SA 1 (SCA) para 12; *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] 4 All SA 639 (SCA); *National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries* 2013 (5) SA 571 (CC) paras 13-38.
21. Henkin L (1992) *Constitutionalism, Democracy and Foreign Affairs*. *Indiana Law Journal* 67.
22. *S v Zuma* (n 19) para 17.
23. *Bertie van Zyl (Pty) Ltd v Minister of Safety and Security* 2010 2 SA 181 (CC) para 22.
24. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) paras 88-92.
25. *Association of Amusement & Novelty Machine Operators v Minister of Justice* 1980 2 SA 636 (A) at 660.
26. *South African Police Service v Public Servants Association* 2007 3 SA 521 (CC) para 17.
27. *Bertie van Zyl (Pty) Ltd v Minister of Safety and Security* (n 23) para 46.
28. Per Schreiner JA in *Jaga v Dönges*; *Bhana v Dönges* 1950 4 SA 653 (A) at 664H. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* (n 24) para 90; *Olitzki Property Holdings v State Tender Board* 2001 3 SA 1247 (SCA) para 12; *Thoroughbred Breeders' Association v Price Waterhouse* 2001 4 SA 551 (SCA) para 12.
29. Per Wendell Holmes J in *Gompers v United States* 1914 233 US 604 at 610.
30. *Aktiebolaget Hassle v Triomed (Pty) Ltd* 2003 1 SA 155 (SCA) para 1.
31. *Natal Joint Municipal Pension Fund v Endumeni Municipality* (n 9) para 25; *Novartis v Maphil* 2016 1 SA 518 (SCA) para 28.
32. *Standard General Ins v Commissioner for Customs and Excise* 2005 2 SA 166 (SCA) para 25.
33. *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* (n 15) para 53; *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC) para 33.
34. *Ahmed v Minister of Home Affairs* 2016 JOL 36695 (WCC) para 15.
35. *S v Zuma* (n 19) paras 14-15.
36. *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* (n 33) para 33.
37. *Leibbrandt v South African Railways* 1941 AD 9 at 12-13. See also *Kuhne & Nagel (Pty) Ltd v Elias* 1979 1 SA 131 (T) at 133E-F.
38. However, contrast the approach adopted in *Abrahamse v East London Municipality*; *East London Municipality v Abrahamse* 1997 4 SA 613 (SCA) at 632G-H.
39. *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) para 18.
40. *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* (n 7) para 12.
41. *Sarrahwitz v Martiz NO* 2015 4 SA 491 (CC) para 39.
42. For a discussion of the various contextual considerations, see *Mansingh v General Council of the Bar* (n 10) paras 22-23; *Brink v Kitshoff* 1996 4 SA 197 (CC) paras 40-42; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 22; *South African Police Service v Public Servants Association* 2007 3 SA 521 (CC) para 20; *Haffejee v eThekweni Municipality* 2011 6 SA 134 (CC) para 30. Also, see *Lenta P* (2002) 'Looking sideways: Constitutional interpretation, ethics and theory' *Stell LR* 13: 3-21; *Davis DM & Klare K* (2010) 'Transformative constitutionalism and the common and customary law' *SAJHR* 26:403 at 494-496.
43. *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) paras 21-26. For a summary of factors to be considered when ascertaining purpose, see *Minister of Land Affairs v Slamdien* 1999 4 BCLR 413 (LCC) at 422.
44. *S v Zuma* (n 19) paras 13-14; *Cool Ideas 1186 CC v Hubbard* 2014 4 SA 474 (CC) para 28.
45. *Bertie van Zyl (Pty) Ltd v Minister of Safety and Security* (n 23) para 21.
46. *Natal Joint Municipal Pension Fund v Endumeni Municipality* (n 9) paras 21-22.
47. *S v Mhlungu* 1995 3 SA 867 (CC) para 8.
48. *Standard Bank Investment Corporation v Competition Commission; Liberty Life Association of Africa Ltd v Competition Commission* 2000 2 SA 797 (SCA) paras 16-22; *S v FM* 2012 4 All SA 351 (GNP) para 19.
49. *S v Acheson* 1991 2 SA 805 (Nm) at 813C.
50. *Blaauw LC* (1990) 'The Rechtsstaat idea compared with the rule of law as a paradigm for protecting rights' *SALJ* 107:76 explains that *Rechtsstaat* 'is a norm which originated to discipline state authority in the interest of those who are subject to it'.
51. *United Nations (UN) General Assembly Resolution 2202 A (XXI)*, 16 December 1966. For an overview of SA's history from independence in 1961 to democracy in 1994, see *Davis D* (1999) *Democracy and deliberation: Transformation and the South African legal order*, *Juta & Co, Cape Town* at 1-6; *le Roux W* 'Descriptive overview of the South African Constitution and Constitutional Court' in *Vilhena O, Baxi U & Viljoen F* (eds) (2013) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa*, *PULP, South Africa* at 135-139-141.
52. *Per Cameron J in Holomisa v Argus Newspapers Ltd* 1996 1 All SA 478 (W) at 492.
53. In this article, unless the context indicates otherwise, 'Black' bears the meaning as defined in the *Employment Equity Act 55 of 1998*, namely, 'Africans, Coloureds and Indians'.
54. *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 6.
55. *Per O' Regan J in Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 35. In *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) para 49, *Ackermann J* stated emphatically: 'To deny people their freedom is to deny them their dignity.'
56. *Le Roux W & van Marle K* (2007) *Law, memory and the legacy of apartheid: Ten years after AZAPO v President of South Africa*. *PULP, South Africa*.
57. Paragraph 3 of the postscript 'National Unity and Reconciliation' in the 1993 interim Constitution.
58. *Per Froneman J in Qozeleni v Minister of Law and Order* 1994 3 SA 625 (E) at 635. See also *Dugard J* (1978) *Human rights and the South African legal order*, *Princeton University Press, Princeton* at 295-302.

59. Kaunda v President of the Republic of South Africa 2005 4 SA 235 (CC) para 157.
60. Cullet P (1995) 'Definition of an environmental right as part of a human rights context. *Netherlands Quarterly of Human Rights* 13: 25 at 26; Wenar L 'The nature of human rights' in Follesdal A & Pogge T (eds) (2005) *Real world justice*, Kluwer, Dordrecht at 285.
61. The interim and final Constitutions did not choose a specific model of democracy for SA but rather 'hedged its bets' by sketching 'the contours of a peculiarly South African form of democracy, leaving it to the legislature and the judiciary to fill in the details'. See Roux T 'Democracy' in Woolman S et al (eds) *Constitutional law of South Africa* 2 ed vol 1 (Original service 07-06) at 10-12.
62. For a discussion of the constitutional principles and their role, see Venter F (1995) 'Requirements for a new constitutional text: The imperatives of the constitutional principles' *SALJ* 112: 32-44. Kriegler J, in Du Plessis v De Klerk 1996 (3) SA 850 (CC) para 127, describes SA's Constitution as being 'constructed on unique foundations, built according to a unique design and intended for unique purposes'.
63. Fraser v Children's Court, Pretoria North 1997 (2) SA 218 (CC) para 20.
64. Liebenberg S (2010) *Socio-economic rights: Adjudication under a transformative constitution*, Juta & Co, Cape Town at 25.
65. Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit (n 43) para 21.
66. Skelton AM (2010) 'Face to face: Sachs on restorative justice' *SAPL* 25:94-107.
67. Mazibuko v Sisulu 2013 (6) SA 249 (CC) para 43.
68. Holomisa v Argus Newspapers Ltd (n 52) at 486.
69. Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995 1996 (3) SA 165 (CC) para 46.
70. In this context, 'diversity' refers to the composition of SA's people being individuals and communities with diverse racial, ethnic, religious, cultural and linguistic profiles, and who, whether for historical reasons or simply by accident of birth, do not share the same socio-economic position. As a value, 'diversity' is a norm based on pluralism in society requiring tolerance, care and respect for all persons and things and an accommodation of their differences. See Sarrahwitz v Martiz NO (n 41) para 67; S v Van Rooyen 2002 (5) SA 246 (CC) para 34; Prince v President of the Law Society of the Cape of Good Hope 2002 (2) SA 794 (CC) para 49; Oudekraal Estates (Pty) Ltd v City of Cape Town 2010 (1) SA 333 (SCA) para 75.
71. Paragraph 1 of postscript 'National Unity and Reconciliation', interim 1993 Constitution (postamble).
72. De Lange v Smuts NO (n 20) para 31.
73. Law Society of South Africa v Minister for Transport 2011 (1) SA 400 (CC) para 59. See also Sarkin J (1998) 'The effect of constitutional borrowings on the drafting of South Africa's Bill of Rights and interpretation of human rights provisions' *University of Pennsylvania Journal of Constitutional Law* 1: 176-204.
74. Sidumo v Rustenburg Platinum Mines Ltd (n 17) para 150.
75. Davis DM (2003) *Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience*. *International Journal of Constitutional Law* 1: 181-195.
76. Udombana NJ (2005) *Interpreting rights globally: Courts and constitutional rights in emerging democracies*. *African Human Rights LJ* 5: 47 - 69.
77. Van der Walt A 'A South African reading of Frank Michelman's theory of social justice' in Botha H, van der Walt A & van der Walt J (eds) (2003) *Rights and democracy in a transformative constitution*, Sun Press, Cape Town at 163 174.
78. City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd (n 33) paras 34-35.
79. Mahomed J held, in S v Acheson (n 49) at 813A-C, that 'the Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government.' This description of a constitution's ethos is apposite for SA's 1996 Constitution. See also S v Makwanyane 1995 (3) SA 391 (CC) para 262.
80. Art 28, UDHR reads: 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.'
81. Minister of Defence and Military Veterans v Thomas 2016 (1) SA 103 (CC) para 19; The Isibaya Fund v Visser [2016] JOL 34756 (SCA) para 10.
82. 2011 (3) SA 347 (CC) para 105.
83. Glenister v President of the Republic of South Africa (n 82) para 107.
84. Van der Walt AJ (2005) *The State's duty to protect property owners v the State's duty to provide housing: Thoughts on the Modderklip case*. *SAJHR* 21:144-161.
85. Act 2 of 2000. This statute is contemplated by s 32(2) of the Constitution that gives effect to the right of access to information held by the State and other persons that is required for the exercise or protection of a right. See My Vote Counts NPC v Speaker of the National Assembly 2016 (1) SA 132 (CC) paras 142-149.
86. Act 3 of 2000. This statute is contemplated by s 33(3) of the Constitution that gives effect to the right to lawful, reasonable and procedurally fair administrative action, as well as to the right to have written reasons furnished. See My Vote Counts NPC v Speaker of the National Assembly (n 85) para 148.
87. Parliamentary sovereignty connotes a politico-legal system in which the legislature is supreme and has the final word in the event of inter-branch conflict. See Roux (n 61) at 10-18. The principle of 'popular sovereignty' (see Henkin (n 21) at 885) is embodied in the Constitution's Preamble, the relevant portion whereof reads that '[w]e, the people of South Africa ... adopt this Constitution as the supreme law.
88. De Lille v Speaker of the National Assembly 1998 (3) SA 430 (C) para 25. See also Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly 2016 (3) SA 580 (CC) para 57.
89. Nortje v Attorney-General, Cape 1995 (2) SA 460 (C) at 471B-D.
90. Executive Council of the Western Cape Legislature v President of the Republic of South Africa 1995 (4) SA 877 (CC) para 62.
91. Kruger R (2010) *The South African Constitutional Court and the rule of law: The Masetlha judgment, a cause for concern?* *PELJ* 13: 468-492.
92. Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd 2015 (5) SA 370 (CC) paras 13-17.
93. Michelman FI 'The rule of law, legality and the supremacy of the Constitution' in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed vol 1 (Original service 02-05) at 11-35.
94. For discussion of the meaning of 'law', see Du Plessis v De Klerk (n 62) para 44; ITC 1788 (2005) 67 SATC 161 at 164; Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs & Development Planning 2012 (3) SA 441 (WCC) paras 60-61. See also van der Vyver JD (1994) 'The meaning of 'law' in the Constitution of South Africa' *SALJ* 111:569 at 571; Kritzinger KM (1995) 'The meaning of 'law' in the interim Constitution' *SALJ* 112:135 at 139; Woolman S 'Application' in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 02-05) at 31-56.

95. Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC) para 44. See also Dendy M (2009) ‘In the light of the Constitution I: The supremacy of the Constitution’ *De Rebus* January/February ed: 60.
96. Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs (n 24) para 71 at fn 3 thereof.
97. Soobramoney v Minister of Health (KwaZulu-Natal) (n 15) para 8.
98. Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit (n 43) para 21; Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo 2010 (2) SA 415 (CC) para 47.
99. Biowatch Trust v Registrar Genetic Resources 2009 (6) SA 232 (CC) para 17. Klare K (1998) ‘Legal culture and transformative constitutionalism’ *SAJHR* 14:146 at 153 describes the Constitution as ‘social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious about its historical setting and transformative role and mission’.
100. Du Plessis v De Klerk (n 62) para 157; Minister of Finance v Van Heerden 2004 6 SA 121 (CC) para 25.
101. Liebenberg (n 64) 98 distinguishes between transformative (‘positive’) and preservative (‘negative’) constitutionalism. The former is aimed at measures to redress the legacies of apartheid (such as measures protecting or advancing persons disadvantaged by past unfair discrimination). A detailed analysis of the concept ‘transformative constitutionalism’ falls beyond the purview of this article. For a discussion thereof, see Davis & Klare (n 42) 403; Langa P (2006) ‘Transformative constitutionalism’ *Stell LR* 17:351-360.
102. The destinies of SA’s people are ‘intertwined in a single interactive polity’ (August v Electoral Commission 1999 (3) SA 1 (CC) para 17).
103. MEC for Education in Gauteng Province v Governing Body of the Rivonia Primary School 2013 6 SA 582 (CC) paras 1-2.
104. Minister of Finance v Van Heerden (n 100) paras 22-23.
105. See South African Police Service v Solidarity on behalf of Barnard 2014 6 SA 123 (CC) paras 29-33. Davis D (2007) ‘Transformation and the democratic case for judicial review: The South African experience’ *Loyola University Chicago International LR* 5:45 at 46 identifies s 1, s 7, s 8, s 9, s 23, s 36 of the Constitution, as well as the various socio-economic rights in the Bill, as distinctive features serving as a blueprint for transformation. This can be achieved by, inter alia, the implementation of equality enhancing programmes or initiatives.
106. Per Sachs J in Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer, Port Elizabeth Prison 1995 (4) SA 631 (CC) para 46.
107. Currie I & de Waal J (2014) *The Bill of Rights Handbook* 6 ed, Juta & Co, Cape Town at 146.
108. Chaskalson P in S v Makwanyane (n 79) para 88 held: ‘It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.’ See also Chairperson of the National Council of Provinces v Malema [2016] 3 All SA 1 (SCA) at paras 11-12.
109. See Jordaan DW (2001) ‘The open society’ *THRHR* 64:107 at 114.
110. (1958) 357 US 513 at 537.
111. Shabalala v Attorney-General, Transvaal 1996 (1) SA 725 (CC) para 29.
112. S v Makwanyane (n 79) para 262.
113. Shabalala v Attorney-General, Transvaal (n 111) para 25.
114. Section 8(2) reads: ‘A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’ For a discussion of constitutional horizontality, see Du Plessis v De Klerk (n 62) para 8.
115. Du Plessis LM (1996) ‘The Bill of Rights in the working draft of the new Constitution: An evaluation of aspects of a constitutional text sui generis’ *Stell LR* 7:3-24.
116. Venter (n 14) 25-26. Michelman (n 93) 11-35 states: ‘Values ... serve as reasons for rules; conversely rules ... serve to implement values.’ De Vos P, Freedman W (eds) & Brand D et al (2014) *South African Constitutional Law in Context*, Oxford University Press, Cape Town at 789 define ‘values’ as follows: ‘Important and lasting beliefs or ideals contained in a constitution and/or shared by the members of a culture about what is good or bad and desirable or undesirable.’
117. Sidumo v Rustenburg Platinum Mines Ltd (n 17) para 149.
118. The paramountcy of the founding values is self-evident from the high threshold imposed by s 74(1) of the Constitution for an amendment to s 1 and s 74(1) itself. To pass muster, an amendment Bill must be supported by at least 75 percent of the members in the National Assembly and at least six provinces in the National Council of Provinces. This requirement is more stringent than that applicable to an amendment of any other provision in the Constitution. Sections 1 and 74(1) are, thus, the Constitution’s most entrenched provisions. This exemplifies the significance attached to the values entrenched in s 1.
119. Jackson VC (2004) ‘Constitutional dialogue and human dignity: States and transnational constitutional discourse’ *Montana LR* 65:15 at 23 states that ‘dignity of the human being is the “moral basis for democratic government”, and implies the “essential equality” of all people before the law’. For a discussion of human dignity, see *Kylie v CCMA* 2010 (4) SA 383 (LAC); *Le Roux v Dey* 2011 (3) SA 274 (CC). See also *Muswaka L* (2011) ‘Sex worker and the right to fair labour practices: *Kylie v Commissioner for Conciliation, Mediation and Arbitration*’ *SA Merc LJ* 23:533-541.
120. For a discussion of equality, see *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) paras 60-61. See also de Vos P (1994) ‘The right of a lesbian mother to have access to her children: Some constitutional issues’ *SALJ* 111:687-694; *Albertyn C & Goldblatt B* ‘Equality’ in *Woolman S et al* (eds) *Constitutional Law of South Africa* 2 ed vol 3 (Original service 03-07) at 35-1-35-85.
121. Accountability requires persons responsible for discharging public office to account or take responsibility for their actions. Openness reflects the government’s candour about its structures, functions and operations. See *Kriel RR & Monadjem M* ‘Public Finance’ in *Woolman S et al* (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 03-07) at 27-26.
122. Accountability and transparency are essential for achieving transformation. See *Kriel & Monadjem* (n 121) at 27-24 – 27-27. For the role of accountability in building strong democratic institutions, see *OXFAM International Held to Account: Putting Democratic Governance at the Heart of Development Finance* (October 2013) at 5 available at <http://www.oxfam.org/en/policy/held-account> (accessed 16 January 2017).
123. S v Makwanyane (n 79) para 222.
124. Cornell D ‘Is there a difference that makes a difference between ubuntu and dignity?’ in *Woolman S & Bilchitz D* (eds) (2012) *Is this seat taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution*, PULP, South Africa at 222 explains that a ground-norm is the grounding moral or ethical principle that undergirds not only a legal system but also society as a whole. *Roederer C* ‘Founding Provisions’ in *Woolman S et al* (eds) *Constitutional Law of South Africa* 2 ed vol 1 (Original Service 12-05) at 13-3 points out that the values in the Constitution are neither fixed, exhaustive nor settled.
125. *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders* 2005 (3) SA 280 (CC) para 21; *Chirwa v Transnet Ltd* 2008 4 SA 367 (CC) paras 74-76.
126. *Woolman S* (1994) *Riding the Push-Me Pull-You: Constructing a Test that Reconciles the Conflicting Interests which Animate the Limitation Clause*. *SAJHR* 10: 60-90.

127. Erasmus (n 12) at 634-635.
128. Woolman S (1996) Coetzee: The limitations of Justice Sachs's concurrence. *SAJHR* 12: 115-116.
129. For a discussion of the role played by constitutional values, see Botha H (1994) 'The values and principles underlying the 1993 Constitution' *SAPL* 9:233-244; Beukes M (1997) 'Justice and other values: Does the judiciary have a monopoly on their content?' *SAPL* 12:437-452; Henderson AJH (1998) 'Putting section 1 to work: Some preliminary thoughts on the first of the founding provisions of the new constitution' *SALJ* 115:215 at 216; Nishihara H (2001) 'The significance of constitutional values' *PELJ* 4:2-18.
130. The values that underlie the open and democratic society in SA based on human dignity, equality and freedom are the normative sources of the fundamental rights entrenched in the Bill. See Scott C & Alston P (2000) 'Adjudicating constitutional priorities in a transnational context: A comment on Soobramoney's legacy and Grootboom's promise' *SA-JHR* 16:206 at 220. For a discussion of these values, see Baer S (2009) 'Dignity, liberty and equality: A fundamental rights triangle of constitutionalism' *University of Toronto LJ* 59:417-468.
131. Sidumo v Rustenburg Platinum Mines Ltd (n 17) para 148.
132. MEC for Education, KwaZulu-Natal v Pillay 2008 (1) SA 474 (CC) at para 63.
133. Scott & Alston (n 130) 220.
134. Government of the Republic of South Africa v Grootboom (n 54) para 23.
135. ABSA Bank Ltd v Trustees for the Time Being of the Coe Family Trust 2012 (3) SA 184 (WCC) at 191B.
136. S v Mamabolo 2001 (3) SA 409 (CC) para 41.
137. Iles K (2007) 'A fresh look at limitations: Unpacking section 36' *SAJHR* 23:68 at 78-79.
138. Per Cameron J in *Holomisa v Argus Newspapers Ltd* (n 52) at 495.
139. Minister of Education v Syfrets Trust Ltd NO 2006 (4) SA 205 (C) at 218.
140. Bredenkamp v Standard Bank of SA Ltd (n 18) para 39; Cool Ideas 1186 CC v Hubbard (n 44) para 126; Combined Developers v Arun Holdings 2013 JDR 2017 (WCC) 19-25.
141. Loureiro v Imvula Quality Protection (Pty) Ltd 2014 (3) SA 394 (CC) para 34.
142. DE v RH 2015 (5) SA 83 (CC) paras 17-22. The Court, in *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 97, confirms that the texture and meaning of human rights are not 'frozen' but are 'open to elaboration, reinterpretation and expansion' as 'the conditions of humanity alter and as ideas of justice and equity evolve'.
143. Nortje v Attorney-General, Cape (n 89) at 471D.
144. Hunter v Southam Inc [1984] 11 DLR (4th) 641 (SCC) 649. Udombana (n 76) at 56 writes: 'In determining the meaning and scope of guaranteed rights, a constitutional court should constantly remind itself that a constitution is not a document frozen in time but is a living instrument to be applied to the changing needs of a society still in the process of maturation.'
145. Zimmermann R (1990) *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Juta and Company, Cape Town, South Africa.
146. DE v RH (n 142) paras 16 23-27.
147. Sidumo v Rustenburg Platinum Mines Ltd (n 17) para 151.



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