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**Fashioning judicial remedies that work in a
constitutional society – Establishing a framework for a
functional approach to the awarding of constitutional
damages in South African law and comparative
jurisdictions**

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*Dedicated to my late sister **Esnath Kika**, my late father **Sinoia Kika** and my mother **Agnes Suula**. I hope by this work I have made you proud.*

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Abstract

The propriety of awarding constitutional damages as appropriate relief in South Africa can be inferred from the discretionary ss 38 and 172(1) of the Constitution which empower the courts to 'grant appropriate relief' and to make 'just and equitable orders', respectively. These damages are claimable against the State for Bill of Rights infringements as opposed to private individuals or juristic entities. In spite of the remedy's promise, the jurisprudence of the Constitutional Court ('CC') has not been particularly encouraging, with clear guidance on the granting of the remedy still at large. There is a challenge of acceptance of the remedy as part of South African law, and the problem of approach and process. Unsurprisingly, the courts have sought refuge in treading with extreme circumspection, and have approached the remedy in a circumstantial and *ad hoc* manner. A hybrid and functional approach which is tailor-made and purpose-oriented would help do away with a formalistic approach that has stunted the growth of constitutional damages as a remedy in South African law. This would eliminate elevating form over substance, subordinating constitutional vindication to common law or statutory remedies, and subjecting constitutional rights violations to indirect as opposed to direct constitutional remedy. What must be looked at is the breach that has occurred, the 'mischief' that needs to be corrected, and the impact that such correction is intended to have. This would mean that there are instances where constitutional damages would remain appropriate despite the existence of a remedy in common law. This will inevitably involve departing from the archaic approach to remedies, to think in terms of a closed category of 'tried-and-tested' remedies. In determining quantum, the comparable common law measure of damages will often be a useful guide, but only to that extent. It is for the courts to make an award which reflects what a court considers to be fair and just under the circumstances. These are the hallmarks of a functional and pragmatic approach that South African courts and those of comparative democracies ought to adopt.

CHAPTER 1

AWARDING CONSTITUTIONAL DAMAGES FOR UNCONSTITUTIONAL BEHAVIOUR IN SOUTH AFRICA - AN INTRODUCTION

1.1 INTRODUCTION

More than anything else, South Africa's hope of developing a modern democratic state premised on good governance lies in the promise of the 'country's most hopeful feature – its big-spirited, visionary Constitution'.¹ From this stems the imperative of preserving constitutional supremacy and the rule of law. Judicial remedies have a central role to play in this endeavour and are yet another transformative element in the constitutional project, a project Corder described as 'the miraculous transformation of the formal instruments and processes of governance in South Africa'.²

Among the judicial remedies to enforce compliance with the Constitution and the rule of law are constitutional damages. Constitutional damages comprise a monetary award granted by a court to a victim of constitutional violation of rights by the *State*,³ giving them the character of a public remedy.⁴ Their essence is vindication of constitutional rights and the enforcement of constitutional duties,⁵ as opposed to restitution. Regrettably, in spite of being well-meaning, constitutional damages have found little application by South African courts. The granting of the remedy remains sketchy at best, and to date there is no clear framework guiding the awarding of this relief. This thesis makes proposals for a functional approach to the remedy, *vis*, a substantive approach illuminated by the function it seeks to serve that is not constricted by common law or statutory remedies, and that does not approach constitutional damages as a remedy of last resort, thus subjecting constitutional rights violations to indirect as opposed to direct constitutional redress. Much of this thesis thus addresses and dismantles traditional arguments that have been used to justify subordinating constitutional damages to delictual and statutory remedies, and that have been used to position constitutional damages as a remedy of last resort.

¹ Edwin Cameron *Justice: A Personal Account* (2014) Tafelberg, Cape Town 1.

² Hugh Corder 'Reviewing review: much achieved, much more to do' in Hugh Corder and Linda Van de Vijver (eds) *Realising Administrative Justice* (2002) Siberink, Cape Town 1.

³ The word 'State' is used here in its broadest sense, to encompass all arms of government at all levels (national, provincial and municipal), including government agencies and institutions.

⁴ The intersections of public and private remedies, as the question why constitutional damages are only available against the state as opposed to individual violators of constitutional rights, are explored in detail in subsequent Chapters.

⁵ Cora Hoexter *Administrative Law in South Africa* (2nd ed) (2012) Juta, Cape Town 568 and Iain Currie and Johan de Waal *The Bill of Rights Handbook* (6th ed) (2013) Juta, Cape Town 200.

1.2 PROBLEM STATEMENT AND RESEARCH QUESTION

Several cases have come before the courts with litigants seeking constitutional damages.⁶ The courts have been amenable and have obliged in some instances.⁷ Notwithstanding, there exists an uncertainty as to when constitutional damages are appropriate, and how the relief is to be approached. The few cases that have reached the courts seeking the relief have made this apparent. The problem is two-fold: there is a challenge of acceptance of the remedy as part of South African law; then there is a problem of approach and process. As regards the challenge of acceptance, courts themselves are not *ad idem* as to what purpose constitutional damages serve, and how the remedy relates to established damages at common law.⁸ Resistance against acceptance of this remedy by the courts and legal scholars alike, conditional or unconditional, is still apparent. The question arises: what difference is there between common law and constitutional damages? For the courts that accept the remedy as part of South African law, the second challenge kicks in: under what circumstances are constitutional damages appropriate?⁹ The latter faces the additional question of process and quantification, whose answers have thus far appeared elusive.

Owing to the uncertainty surrounding constitutional damages, the courts have sought refuge in treading with extreme circumspection. Discordance has been an inevitable result, and the minimal development of the remedy under those circumstances is hardly surprising. This is notwithstanding the time lapse from the date of promulgation of the interim Constitution, the date the first case on constitutional damages was heard, and the present day. In spite of a number of cases pronouncing on constitutional damages to date, most judges are no more enlightened on how to approach the remedy – as apparent from the discordant judgments. For the litigant, the status quo is effectively that seeking constitutional damages is akin to venturing into uncharted territory as the outcome is for all intents and practical purposes unpredictable.

⁶ Some of these cases include *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA); *Jayiya v MEC for Welfare, Eastern Cape* 2004 (2) SA 611 (SCA); *Modder East Squatters v Modderklip Boerdery (Pty) Ltd*; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 (8) BCLR 821 (SCA); *Ngomana v CEO of the SA Social Security Agency* 2010 ZAWCHC 172 39 and most recently *Minister of Police v Mboweni and Another* 2014 (6) SA 256 (SCA).

⁷ For example, *Modderklip* (note 6); *Kate* (note 6); *Mahambehala v MEC for Welfare, Eastern Cape, and Another* 2002 (1) SA 342 (SE) and *Mbanga v MEC for Welfare, Eastern Cape, and another* 2002(1) SA 359 (SE).

⁸ Constitutional damages have traditionally been understood to be premised on the vindication of constitutional rights. They are not a private law remedy synonymous to delictual damages. The misunderstanding, including by the courts, is perhaps best illustrated by Ackermann J's approach in *Fose* (note 6) where, having found that a case for constitutional damages had not been proven, he went on to argue against granting constitutional damages on the basis that punitive damages have no deterrent effect. (See para 71). One gets the impression that in the Judge's view, constitutional damages were primarily – if not solely - predicated on punishment and deterrence, and nothing on vindication of rights was mentioned.

⁹ Put differently, according to O'Regan, the challenge 'is the extent to which damages are appropriate relief for the vindication of constitutional rights'. See Kate O'Regan 'Fashioning Constitutional remedies in South Africa' (April 2011) *Advocate* 43.

Against this background, a two-part question forms the basis of this research: **Should constitutional damages be granted by South African courts, and if so, under what circumstances and process should the remedy be granted?** Key sub-questions have been identified as follows:

- 1 What are constitutional damages? What is their significance and how are they different from common law damages?¹⁰
- 2 What is the place of constitutional damages among judicial remedies broadly and constitutional remedies in particular?
- 3 How have the courts handled constitutional damages thus far, and how have other countries dealt with the remedy?
- 4 Can constitutional damages co-exist with other common law remedies? If so, how is 'double-compensation' prevented? Does the availability of alternative remedies negate a claim for constitutional damages?
- 5 How are constitutional damages quantified?
- 6 How much discretion do the courts have in dealing with the remedy?

1.3 PURPOSE OF RESEARCH AND SIGNIFICANCE OF STUDY

The primary aim of this research is to explore the desirability, possibility and practicality of the full acceptance of constitutional damages as part of South Africa's arsenal of constitutional remedies. More pertinent and complex, the research engages with the next step of attempting to establish a guiding framework for the granting of monetary damages for unconstitutional behaviour by the State and its officials, identifying possible options for consideration. Attempts at a framework and possible options focus on three parts, namely: identification of appropriate circumstances for constitutional damages, the process in dealing with a constitutional damages case, and the quantification of an award.

At a much broader level, the results of this research are envisaged to add to the understanding of constitutional remedies in general, including innovations in the area of judicial remedies. It is hoped that this will make a meaningful contribution to a much more effective, proactive and responsive understanding of constitutionalism and the rule of law, and the courts' role in exacting accountability on duty bearers.

In both endeavours, this research seeks to reap the benefits of both the theoretical and practical understanding of the remedy under investigation, and supporting concepts such as the rule of law and constitutionalism.

¹⁰ It will be noted that by far the most significant argument used to stunt the growth of constitutional remedies is the availability of common law damages.

1.3.1 Academic/theoretical value

Before a practical and effective framework is developed, there is the need for a developed understanding of the theoretical, philosophical and academic underpinnings of the constitutional damages remedy - its foundation, value, and utility. It is for this reason that a detailed investigation will be conducted on the rule of law and the role of courts in advancing constitutionalism through judicial remedies, with a view of locating constitutional damages within that scheme. The origins of constitutional damages are traced, and the value and necessity of developing a framework for the granting of the remedy outlined. Significantly, there is an existing gap in academic research in South Africa in the area of judicial remedies in general and constitutional damages in particular. This research will therefore contribute to closing this lacuna.

1.3.2 Practical value

This research deals with an important area of law that has a strong bearing on the role and authority of the courts in upholding the rule of law and executing their constitutional mandate. The remedies and orders that courts grant are indispensable to cementing that role and authority, hence the importance of investigating judicial remedies. Currently there is no framework for the granting of constitutional damages in South Africa and it remains an issue open to surmise and conjecture for litigants, with the courts approaching the remedy on a case by case basis, albeit with no uniform understanding of precisely what considerations and process ought to be followed for the relief to be granted. The development of a framework for the granting of the remedy therefore furthers ongoing legal reform.

1.4 LOCATING CONSTITUTIONAL DAMAGES WITHIN CONSTITUTIONAL REMEDIES

1.4.1 The rule of law, limited government and judicial remedies in general

A constitution is a necessary foundation and ingredient for constitutionalism. Without more, however, it does not in itself translate to constitutionalism.¹¹ Constitutionalism is defined by its fundamental elements. The first is the concept of limited government, the limitation of state power under a supreme constitution and the protection of individual rights through a Bill of Rights.¹² The separation of powers is another, such that there is no arm of government

¹¹ The terms 'constitution' and 'constitutionalism' refer to two different things. Thomas Paine in *Rights of Man: Part II* (1972) New York: AMS Press 93 defines a 'constitution' in these classical fascinating but accurate terms: 'A constitution is not the act of a government, but of a people constituting a government, and a government without a constitution is power without right ... A constitution is a thing antecedent to a government; and a government is only the creature of a constitution.' 'Constitutionalism' on the other hand would mean principles which govern the legitimacy of government action by *describing* and *prescribing* both the *source* and the *limits* of governmental power. Such principles include, among others, accountability, responsiveness, separation of powers, rule of law and supremacy of the Constitution.

¹² In South African this is achieved through Chapter 2 of the Constitution.

with unfettered powers to run government as it deems fit.¹³ Then there is the rule of law, which means governance under rules and not arbitrary discretion, whereby there is compliance with the constitution and the laws made under it.¹⁴

Underlining all this is accountable governance. With this concept, an independent judiciary becomes central as a key arm in the *trias politica* whose role is to ensure that the constitution is upheld and enforced, and that the rule of law is maintained. In order to effectively carry out this role the judiciary must be clothed with the necessary powers and enforcement mechanisms to hold those under its jurisdiction to account for their actions or omissions and to be a check on the overreaches of the executive and the legislature.¹⁵ A matrix of injunctions and sanctions helps the courts to exercise this role. It is the coercive and binding nature of the sanctions that give the courts their effective authority and integrity. Without that power of effective remedies legal and constitutional excesses occur unmuted and with impunity and the essence of limited government is lost. People are left at the mercy of those who wield power.

It is against this background that constitutional remedies are formulated for the protection of the constitution by judicial means. In the South African context, they are designed to ensure accountability pursuant to ss 1(d) and 195 of the Constitution.¹⁶ In *Olitzki Property Holdings v State Tender Board & another*,¹⁷ the Supreme Court of Appeal (SCA) explained the importance of accountability by stating that ‘there can be no doubt that the accord of civil remedies securing its observance will often play a central part in realising our constitutional vision of open, uncorrupted and responsive government’.¹⁸

Four broad categories of constitutional remedies exist: declarations of invalidity (with severance, reading-in and reading down as ‘sub-remedies’ in the category); prohibitory interdicts; mandatory interdicts (mandamuses and structural interdicts); and awards of damages.¹⁹ Of these, constitutional damages are a nascent addition. The purpose of constitutional remedies is two-fold. Firstly, the individual wronged must find an adequate remedy. Secondly, there is a higher calling to constitutional remedies, which is the maintenance of the rule of law, the enforcement of the principles of limited government, and the maintenance of constitutionalism and a just society. This second purpose is the collective

¹³ See *Tlouamma and Others v Speaker of the National Assembly and Others* 2016 (1) SA 534 (WCC) para 59-63 and the sources quoted therein, for a succinct description of the separation of powers doctrine.

¹⁴ The concept of the rule of law and what it means receives detailed attention in Chapter 2 of this thesis.

¹⁵ Section 165 (1) of the Constitution states that: ‘The judicial authority of the Republic is vested in the courts’. Section 165 (5) states that: ‘An order or decision issued by a court binds all persons to whom and organs of state to which it applies’.

¹⁶ Constitution of the Republic of South Africa, 1996.

¹⁷ 2001 (3) 1247 (SCA).

¹⁸ *Ibid* para 31.

¹⁹ Currie and De Waal (note 5) 183-203 and also Jonathan Klaaren ‘Judicial Remedies’ (1999) in Chaskalson *et al Constitutional Law of South Africa* [Revision Service 5, 1999] 9-5.

or societal dimension of constitutional remedies. Constitutional remedies must meet these two objectives at all times, directly or indirectly.

But constitutional remedies are neither uncontroversial nor necessarily clear-cut. Part of the problem stems from the fact that there are now generally accepted formulations of the remedies that seem to have solidified into 'principles'. One such 'principle' is that constitutional remedies must be forward-looking, community-oriented and structural as opposed to backward-looking, individualistic and corrective or retributive.²⁰ Another even more controversial formulation is that constitutional remedies are remedies of last resort.²¹ Again, this is an area in which the courts are at variance. But from where does this formulation emerge? Is it a matter of convenience or there is fundamental justification rooted in law and with a bearing on the substance of the law itself or its practice? Proponents of this formulation rely on the so-called subsidiarity principle, which is often described interchangeably as the principle of avoidance.²² What has largely emerged from scholars and judges who oppose constitutional damages is that this remedy does violence to these 'established rules' or 'principles' of law. Whether this violation of 'established principles' is perceived or real is an issue that very few have been able to confront head-on. This thesis proposes to consider these criticisms to their logical conclusions.

As well-intentioned and seemingly justified these formulations may be, they have an often downplayed effect of limiting the scope and reach of constitutional remedies, in the process losing the magnanimity of the Bill of Rights and individual justice. While constitutional remedies have a goal of upholding a constitutional system and the rule of law, this does not mean the individual should be relegated to the periphery and must be sacrificed in the pursuit of community-oriented justice. It remains a principle of law that justice must be individualised.²³ The individual's victimhood should be recognised.

This thesis will seek to address the double standards imbued in these 'principles', deconstructing them in making a case for the full acceptance of constitutional damages as a constitutional remedy that does no violence to established notions of remedies. This is done

²⁰ Ian Currie and Johan de Waal (eds) *The New Constitutional and Administrative Law* Volume 1, Constitutional law (1st ed) (2001) Juta, Cape Town 288.

²¹ In *Kate v Member of the Executive Council for the Department of Welfare, Eastern Cape* [2005] 1 All SA 745 (SE) at para 20, the court took to task this notion of using constitutional remedies as a last resort and criticised the remarks made in *Jayiya v MEC for Welfare, Eastern Cape* 2004 (2) SA 611 (SCA) that constitutional damages may only be awarded where no statutory or common-law remedies exist. This was conformed on appeal in *Kate* (note 6) before the SCA at para 27 where Nugent JA said: 'But the relief that is permitted by s 38 of the Constitution is not a remedy of last resort, to be looked to only when there is no alternative – and indirect – means of asserting and vindicating constitutional rights.'

²² See Currie and De Waal (note 5) 24-25 where the principle and how it operates is discussed.

²³ In addition, there exists circumstances where backward-looking constitutional remedies are apposite. In *Mahambhlala* (note 7) at 355-356, the court stated that '[i]n essaying the determination of appropriate relief, it is important to bear in mind that, although constitutional remedies will often be forward-looking to ensure that the future exercise of public power is in accordance with the principle of legality [...] they may also be backward-looking.'

fully conscious of the fact that constitutional remedies in their formulation are not supposed to be overly constrained with technicalities attendant to statutory and common law remedies, making them a unique species of remedies.²⁴

1.4.2 The notion of effective remedies

A court will not give an order that it cannot enforce and that is *brutum fulmen*. This is known as the ‘principle of effectiveness’.²⁵ This principle means that the remedy chosen by a court must be one that strikes effectively at the source of the constitutional infringement.²⁶ Partly for this reason, the superior courts²⁷ have the discretion to fashion new remedies where the existing are inadequate.²⁸ This is to allow the courts to grant ‘appropriate relief’ pursuant to s 38 of the Constitution and the need for the courts to make orders that are ‘just and equitable’ in terms of s 172(1) of the Constitution. Save for declaratory orders, an effective remedy in the form of an enforceable verdict must follow each case. In *Fose v Minister of Safety and Security*²⁹ the CC noted that:

‘Particularly in a country where so few have the means to enforce their rights through the courts, it is essential on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated ... The courts have a particular responsibility in this regard and are obliged to “forge new tools” and shape innovative remedies, if needs be, to achieve this goal [...] [A]n appropriate remedy must be an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced.’³⁰

The premise is that there must be an effective remedy for each right, as rights and remedies are complementary.³¹ This is, in the words of Marshall CJ in the defining case of *Marbury v Madison*,³² ‘[t]he very essence of civil liberty’. In determining appropriate relief, the CC has stated that ‘we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source’.³³ This speaks to the approach that must be taken in formulating, developing and granting constitutional remedies in South Africa. This theme will feature throughout the analysis in this research. There are several instances where constitutional damages will stand as the most effective relief available in the circumstances, and the relief will be examined within this context.

²⁴ This is against the backdrop of the Constitution being supreme, and the Bill of Rights being ‘a cornerstone of democracy in South Africa’ in terms of s 7(1) of the Constitution.

²⁵ Currie and De Waal (note 5) 179 put it this way: ‘Courts are more likely to be more hesitant to find a violation of a right in situations where there is no appropriate remedy for the violation.’

²⁶ Per the Constitutional Court in *Hoffman v South African Airways* 2001 (1) SA 1 (CC) para 45.

²⁷ The Superior Courts Act 10 of 2013 defines ‘superior court’ in s 1 as the Constitutional Court, the Supreme Court of Appeal, the High Court and any court of a status similar to the High Court.

²⁸ Section 38 of the Constitution, 1996.

²⁹ 1997 (3) SA 786 (CC).

³⁰ *Ibid* para 69.

³¹ The concept is discussed by Centlivres CJ in *Minister of the Interior and Another v Harris and Others* 1952 (4) SA 769 (A) at 780H-781B. Several subsequent cases also articulate this position.

³² 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803).

³³ *Hoffman* (note 26) para 45.

1.4.3 Necessity and utility of the remedy

Constitutional damages as a part of constitutional remedies serve a specific purpose, just as with every constitutional remedy. It is this purpose that makes a case for the acceptance of constitutional damages in a clear, precise and ascertainable manner. Constitutional damages are about recognising the value of individual rights and are an expression of aversion towards violations of constitutional rights and duties. But this remedy is beyond individual interests. At the core of constitutional damages is the vindication of rights.³⁴ While this is done by means of monetary compensation, this is not compensation in the delictual sense.³⁵ Neither is it necessarily about punishing an offender. While these elements are an inevitable part of it, the essence of the relief is in affirming the wider public interest in upholding the Constitution and the Bill of Rights.³⁶

A new legal culture emerged in South Africa post-1994, and in the process of democratic consolidation there are serious challenges putting the constitutional project at risk. For instance, police torture is a prevalent problem. *Fose*,³⁷ the first case to bring constitutional damages before the CC was on this subject. Denial of socio-economic rights, despite their justiciability, is a live issue. An even more disturbing problem is the widespread non-compliance with court orders (or dragging of feet in doing so) by government and its departments.³⁸ De Beer and Vettori expose how non-implementation of legislative provisions in social assistance cases as well as non-compliance with court orders is rife in the Eastern Cape,³⁹ attributed by some to 'sheer laziness and incompetence on the part of the officials of the Department of Social Development'.⁴⁰ Corder suggests that the seemingly endless series

³⁴ Hoexter (note 5) 568 and Currie and De Waal (note 5) 200.

³⁵ The Cape High Court in *Ngomana v CEO of the SA Social Security Agency* 2010 ZAWCHC 172 para 39, said the following in this regard: 'The purpose of constitutional damages is not primarily to compensate for financial prejudice or patrimonial loss; it is rather a means by which the courts may seek by surrogate relief to give expression to the fulfilment or realisation of a claimant's abrogated constitutional rights by way of an award in monetary compensation ...'

³⁶ Nigel Lowe and Brenda Sfrin Lowe *Borrie & Lowe The Law of Contempt* (3rd ed) (1996) LexisNexis Butterworths 1.

³⁷ *Fose* (note 6).

³⁸ There is a growing body of cases in South Africa that records instances of wilful disregard of court orders by the executive and administrative branch of government. For a listing and discussion of some of these cases see Rolien Roos 'Executive disregard of court orders: enforcing judgments against the state' (2006) 123 (4) *SALJ* 744 who cites Clive Plasket 'Administrative justice and social assistance' (2003) 120 *SALJ* 494, 518 and *Vumazonke v MEC for Social Development, Eastern Cape and three similar cases* 2005 (6) SA 229 (SE) paras 1–2. See also De Bruin 'Official ignores court order' (http://www.news24.com/News24/South_Africa/News) 28 October 2003; and Gibson 'Manto facing jail threat' (http://www.news24.com/News24/South_Africa/Politics) 22 October 2003; *Magidimisi NO v Premier of the Eastern Cape Magidimisi NO v Premier of the Eastern Cape* 2005 (6) SA 267 (TkD) para 1; and Rassie Malherbe and Michele Van Eck 'State Non-Compliance with Legal Duties: The Constitutional Court Finally Cracks the Whip Nyathi v MEC for the Department of Health, Gauteng 2008 9 BCLR 865 (CC)' (2009) 1 *TSAR* 191.

³⁹ De Beer, RJ and Vettori, S 'Enforcing Socio-economic Rights' (2007) 1 *PELJ* 27 at 26, citing the comments of Plasket J in *Vumazonke v MEC* 2005 (6) SA 229 (SE) 233 paras 3-8 where a number of judges who have had to deal with such cases are quoted.

⁴⁰ *Ibid.*

of decisions about contempt of court when rights are violated emanating from mainly the Grahamstown and Port Elizabeth High Courts suggest 'a very poor, even callous, approach in that province to the administration of social welfare grants'.⁴¹ This phenomenon has unfortunately reached unacceptable proportions prompting references to it as 'an imminent constitutional crisis'.⁴² So serious is the situation that Froneman J in the High Court in *Kate*⁴³ remarked that the courts have become 'the primary mechanism for ensuring accountability in the public administration of social grants'.⁴⁴ This is a tendency that strikes at the very heart of South Africa's democracy,⁴⁵ thus justifying the intervention of the judiciary.⁴⁶

To what extent are the rights of individuals, and the constitutional duties of state officials enforceable by law? To this Levine *et al* assert that: 'Unless a duty can be enforced, it is not really a duty; it is only a voluntary obligation that a person can fulfil or not at his whim. In such circumstances, the holder of the correlative 'right' can only hope that the act or forbearance will occur'.⁴⁷ Constitutional damages can play a major role in addressing this.

1.4.4 Legal provisions and jurisprudence in South Africa

The lawful availability of constitutional damages as a remedy is no longer moot by virtue of s 38 of the Constitution which empowers the courts to 'grant appropriate relief'.⁴⁸ The Constitution does not define what is meant by 'appropriate relief', and the only relief expressly mentioned is a declaration of rights. Another guide comes from s 172(1) which requires that courts should make 'just and equitable orders'.⁴⁹ This clause makes another express mention of other constitutional remedies: declarations of invalidity; orders limiting the retrospective effect of such declarations; as well as orders suspending the declarations of invalidity for any period and on any conditions to allow the competent authority to correct

⁴¹ Hugh Corder 'Securing the rule of law' in Carnelly and Hoctor (eds) *Law, Order and Liberty: Essays in Honour of Tony Mathews* (2011) University of KwaZulu-Natal Press, Pietermaritzburg 28.

⁴² Roos (note 38) (2006) 745, also citing article 'SA could face constitutional crisis' Mail & Guardian Online, 28 August 2006 and 'Judge warns of constitutional crisis' *LegalBrief Today* Issue Number 1652, 29 August 2006.

⁴³ Note 21 above.

⁴⁴ *Ibid* para 4.

⁴⁵ Malherbe and Van Eck (note 38) 191.

⁴⁶ De Beer and Vettori (note 39) 26.

⁴⁷ David I Levine, David J Jung and Tracy A Thomas *Remedies: Public and Private* (2009) West 10-11.

⁴⁸ Section 38 provides as follows:

'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. ...'

⁴⁹ '172 Powers of courts in constitutional matters

(1) When deciding a constitutional matter within its power, a court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

...'

the defect.⁵⁰ What this implies is that there is a permissive and flexible regime of constitutional remedies, and that the courts are given a wide discretion to define them, the guide being that such remedies must be 'appropriate' in the circumstances.

Nothing in the Constitution prevents a court from awarding damages as a remedy for the violation of fundamental rights.⁵¹ As Hoexter argues, the wide and permissive regime makes room for constitutional damages where the aim is to regally promote respect for human rights and deter future violations of rights.⁵² Several statutes enacted to give effect to constitutional rights have also made express provision for damages. For instance, the Promotion of Administrative Justice Act (PAJA)⁵³ in s 8(1)(c)(ii)(bb) allows a court in review proceedings to direct an administrator or any party to the proceedings to pay compensation in exceptional cases, and this is in addition to setting aside a decision.⁵⁴

What further emerges from a constitutional and legislative analysis is that there is nothing preventing the breach of the Constitution by the State from being vindicated directly,⁵⁵ and constitutional damages are no less legitimate as an exercise of judicial authority.⁵⁶ They can be awarded as long they are justifiable. This should be viewed as a component of the frantic attempt to narrowing the disjuncture between the Constitution and its implementation. It is not overstressing it to say that the controversial formulation that constitutional damages are a remedy of last resort is the key factor responsible for the stunted growth of the remedy in South African law.

From the courts' vantage point, quite a significant number of cases have been argued before them, with litigants seeking the relief. The jurisprudence of the CC has not been particularly encouraging.⁵⁷ This is because the CC has not provided clear guidance on the granting of the remedy. Of importance however, in the country's leading judicial authority on constitutional damages, *Fose*,⁵⁸ the existence of constitutional damages was not denied by the CC. The claim in that case failed because the plaintiff failed to make out a case on the merits. The positive aspect of this is that the court did not dismiss constitutional damages as being unsound at law. What simply emerged from the claimant's failure to make a case was that the suitability of constitutional damages as relief ultimately turns on facts. The court further denied the use

⁵⁰ Ibid.

⁵¹ Currie and De Waal (note 5) 200; Currie and De Waal (note 20) 297. Hoexter (note 5) 568 states that by empowering a court to grant 'appropriate relief' for the infringement of fundamental rights, s 38 gives scope for the award of various sorts of damages.

⁵² Hoexter (note 5) 568.

⁵³ Act 3 of 2000.

⁵⁴ In *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 101 Sachs J in his separate concurring judgment noted that '[j]ust compensation today can be achieved where necessary by means of PAJA'. Arguments on whether PAJA damages are constitutional damages are addressed in Chapter 4.

⁵⁵ *Kate* (note 6).

⁵⁶ Gene R Nichol 'Bivens, Chilicky, and Constitutional Damages Claims' (1989) 75(6) *Virginia LR* 1154.

⁵⁷ Currie and De Waal (note 5) 200.

⁵⁸ 1997 (3) SA 786 (CC).

of the remedy for punitive purposes. Disturbingly, however, the court gave weight and credence to the ‘remedy of last resort’ narrative. Subsequently, the High Court in *Jayiya v MEC for Welfare, Eastern Cape*⁵⁹ also propagated the notion that ‘constitutional damages’ may only be awarded where no statutory or common-law remedies exist.

On the other hand, however, some progressive jurisprudence has emerged. In *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd*,⁶⁰ constitutional damages were awarded for the violation of property rights, and in *Kate v MEC: Department of Welfare, Eastern Cape*⁶¹ damages were awarded for the breach of the right to social assistance. Instructive guidance emerged from both the *ratio* and *obiter* of these cases, and the court in *Kate*⁶² especially was not constrained in taking issue with the notion that constitutional remedies, and in this case constitutional damages, are remedies of last resort.⁶³ The award of damages for the breach of social assistance rights came in the backdrop of other similar cases in previous years, reported as *Mahambehlala v MEC for Welfare, Eastern Cape, and Another*⁶⁴ and *Mbanga v MEC for Welfare, Eastern Cape, and another*⁶⁵.

From these leading cases, and others that have addressed this relief, the conflict is apparent. The circumspection and the confusion are pronounced. Without a framework, the courts have approached the remedy in a circumstantial and *ad hoc* manner.⁶⁶ This very approach is responsible for the misunderstanding, over-cautiousness and disappointing growth of the remedy in South African jurisprudence. The existing jurisprudence can be summed up as having an overall ambiguous stance. Regardless, none of the cases has expressly dismissed constitutional damages as untenable at law.

1.5 OPTIONS FOR CONSIDERATION

Admittedly, constitutional damages do not represent a clear-cut area. The question is not simply whether to accept or reject the remedy in South African law. It is a highly complex question that has a bearing on several established legal principles and areas of law. There are additional questions relating to the circumstances under which the remedy should be granted, the procedure the courts ought to follow to reach such a decision, and the quantification of the damages. The conflicting arguments on constitutional damages present

⁵⁹ 2004 (2) SA 611 (SCA).

⁶⁰ 2005 (5) SA 3 (CC).

⁶¹ *Kate* (note 21) and *Kate* (note 6).

⁶² *Supra*.

⁶³ This is discussed in detail in the Chapters to follow.

⁶⁴ 2002 (1) SA 342 (SE).

⁶⁵ 2002(1) SA 359 (SE).

⁶⁶ Generally, the courts have dealt with each case as it comes. In *Modderklip* (note 6) the SCA, referring to cases such as *Fose and Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) stated at para 43 that: ‘[C]onstitutional remedies will differ by circumstance. The only appropriate relief that, in the particular circumstances of the case, would appear to be justified is that of “constitutional” damages, i.e. damages due to the breach of a constitutionally entrenched right. No other remedy is apparent. ...’

the researcher and theorist with several options on how a constitutional damages remedy may be applied in South Africa. This thesis will present and weigh these options, with a view to identifying and advocating a more workable approach, tailor-made for South African purposes and circumstances. Of the options considered in this thesis, there are three major ones.

The first is a 'purpose-oriented approach'. Such an approach would look at the goal to be achieved by a remedy, and then consider the most appropriate remedy to address the problem. To constitutional damages, this approach would mean that the existence of a delictual or other alternative remedy to a claimant would not necessarily mean that a constitutional damages claim will be met with failure. Instead, the onus would rest on the plaintiff who is claiming constitutional damages to establish why they are the most appropriate relief, while the state's role would be to show how there are other more appropriate remedies, or any special reason why constitutional damages should not be granted. This approach seems to find support in Canadian jurisprudence, where the courts have allowed for monetary damages for the breach of rights in the Canadian Charter of Rights and Freedoms.⁶⁷ Canada follows the same approach in awarding non-pecuniary damages in personal injury cases.⁶⁸ With this approach, what must be looked at is the breach that has occurred, the 'mischief' that needs to be corrected, and the impact that such correction is intended to have. This would mean there are instances where even though there is a remedy in common law, constitutional damages will be appropriate.

A second option is the use of constitutional damages only where no common law or statutory remedies are applicable. This is a narrow and constrained approach to the relief. The main advantage of such an approach is that it does away with potential overlaps when one has other remedies at common law, statute or the Constitution. There are no blurred lines. The downside, however, is that this approach subtracts from the essence and purpose of constitutional damages, relegating constitutional damages to a 'residual remedy' that applies when none else applies. This would be an anti-thesis in that vindication of the Bill of Rights is of central importance given that this is the cornerstone of the country's democracy and rule of law.⁶⁹ It is submitted in this thesis that constitutional remedies were never meant to be inferior to common law and statutory remedies.⁷⁰ Regrettably, this approach more than the others appears to reflect the cautious and conservative approach the judiciary in South Africa

⁶⁷ Part I of the Constitution Act, 1982. In Canada the Supreme Court allowed the claim for breach of a fundamental right by the City Police Department in *Vancouver (City) v Ward* 2010 SCC 27, [2010] 2 S.C.R. 28. Constitutional damages, commonly referred to as 'Charter damages', were granted for unreasonable search and seizure in terms of section 24(1) of the Charter.

⁶⁸ *Andrews v Grand & Toy Alberta Ltd.* [1978] 2 S.C.R. 229.

⁶⁹ Section 7(1) of the Constitution, 1996.

⁷⁰ This submission is based on the following: the supremacy of the Constitution (s 2 of the Constitution); the centrality of the Bill of Rights and the need for the rights contained therein to be protected (s 7(1)); the presence of remedies clauses in the Constitution (in particular, ss 38 and 172(1)); and the questionable use of subsidiarity as the basis to elevate common law over constitutional remedies.

has seemingly taken. The key question with this option is whether the existence of other remedies in common law and in statute in and of itself extinguishes a potential constitutional damages claim. More fundamentally, it introduces the debate of mutual exclusivity between common law and constitutional remedies.

Closely tied to the second option, the third option is of using constitutional damages where the existing common law and statutory remedies are inadequate and fall short of addressing the issue at hand. This is where there are gaps, despite there being common law and statutory remedies available. In such a case, there may be an impetus to then use constitutional damages as a 'gap-filler' remedy. The question becomes whether this is the correct or the intended utility of constitutional damages. But there is another more poignant issue: when the existing common law remedies fall short or are inadequate, the court has the constitutional duty to develop the common law.⁷¹ Would the use of constitutional damages then amount to an option for the court between developing the inadequate common law or using constitutional remedies to fill the gap? As with the second option, constitutional damages here would occupy an inferior and peripheral position.

In considering these options, sight is not lost of the fact that the co-existence or mutual exclusivity of constitutional damages and common law remedies is not a question confined to constitutional damages alone. It is a question with wider fundamental implications for the dichotomy of constitutional remedies and common law remedies, and of private law remedies and public law remedies.⁷² As Moseneke DCJ signaled in *Steenkamp NO*,⁷³ this is a complex debate. At best, a determination of a viable framework for constitutional damages would consider tenets in all these options, and craft a tailor-made framework that addresses the practical and real problems at home.

1.6 STRUCTURE OF THESIS

This thesis is divided into eight Chapters that each focus on key questions as outlined by the research questions above. Each Chapter gives a detailed exposé of specific questions, building

⁷¹ Section 8(3) of the Constitution, 1996, provides as follows:

'When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-
in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).'

Section 39(2) provides that:

'When 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.'

⁷² This issue was briefly dealt with by the CC in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 106, with the court asserting that 'private law damages claims are not always the most appropriate method to enforce constitutional rights'.

⁷³ (Note 54) para 1.

into the main question of what framework constitutional damages should follow. The Chapters are structured as follows:

CHAPTER 1: AWARDING CONSTITUTIONAL DAMAGES FOR UNCONSTITUTIONAL BEHAVIOUR IN SOUTH AFRICA – AN INTRODUCTION

This Chapter provides a synopsis of constitutional damages in South Africa and identifies the research questions. It places the research in context and provides the necessary background information and problem areas, and in so doing provides justification for the research. The Chapter gives some insight into the course the thesis follows, and the propositions made.

CHAPTER 2: THE PLACE OF CONSTITUTIONAL REMEDIES IN A CONSTITUTIONAL SOCIETY - THEORETICAL ASPECTS

This Chapter presents a theoretical discussion of the role of judicial remedies in general and constitutional remedies in particular. The aspects of limited government, separation of powers, rule of law, and the role of the judiciary are discussed. The enforceability of constitutional rights and duties is given particular focus, and constitutional damages are located within that context. In particular, the Chapter argues that the emergence of constitutional law as a legal culture is the foundation for constitutional damages. It argues for judicial activism to aid the growth of constitutional remedies in general and damages in particular. In the discussion, a literature survey is conducted on these aspects.

CHAPTER 3: MONETARY DAMAGES AS A CONSTITUTIONAL REMEDY

With Chapter 2 having located constitutional damages within the constitutional remedies framework, Chapter 3 deals with the fundamentals of constitutional damages, starting with the definition. Differences with common law damages are drawn, and the utility of constitutional damages as a remedy is established. A literature survey on constitutional damages will be conducted in this Chapter.

CHAPTER 4: A CONSTITUTIONAL, STATUTORY AND JURISPRUDENTIAL ANALYSIS OF THE SOUTH AFRICAN LAW ON CONSTITUTIONAL DAMAGES - THE GOOD AND THE BAD

This Chapter carries out a detailed analysis of the current South African approach to constitutional damages. It starts with a look at the remedies provisions of the Constitution and literature around them, and then statutory provisions that allow for monetary damages to be paid for violations of constitutional rights. Thereafter follows a look at the seminal jurisprudence informing the constitutional damages remedy. An analysis of this jurisprudence is conducted and a clear problem statement emerges from this, informing the areas of intervention needed in crafting a framework for the remedy.

CHAPTER 5: COMPARATIVE PERSPECTIVES ON CONSTITUTIONAL DAMAGES

This Chapter weighs the South African experimentation with the remedy against the approaches of jurisdictions where the remedy is in advanced use. The first comparator is Canada, where the remedy has been developed under the banner of ‘Charter damages’ pursuant to s 24(1) of the Canadian Charter of Rights and Freedoms. The United States of America is considered next, where a jurisprudence referred to as ‘constitutional torts’ has been developed. Trinidad and Tobago, New Zealand, India and Sri Lanka are also considered for their developed approach to constitutional damages and the clarity with which the courts handle the relief. Closer to home, Botswana and Zimbabwe are considered. France is then considered as a leading civil law country where damages have been awarded for violation of fundamental human rights, and afterwards a brief look at the awarding of damages for violation of human rights at international law. Finally, a wholesome analysis of the different approaches is then conducted with a view to identify lessons.

CHAPTER 6: SUBSIDIARITY, THE CO-EXISTENCE OF CONSTITUTIONAL AND COMMON-LAW DAMAGES, AND JUDICIAL DISCRETION

This Chapter addresses the most common and forceful criticisms against constitutional damages, being the use of common law remedies to solve constitutional violations and the use of constitutional remedies as remedies of last resort. The principle of subsidiarity and how it affects direct application of the Constitution and vindication of constitutional rights is addressed, in particular, how subsidiarity should not be used to relegate constitutional damages and constitutional remedies in general to the status of ‘residual remedies’. The Chapter closes with a discussion on how much discretion the courts must exercise in awarding constitutional damages.

CHAPTER 7: IMPLICATIONS OF A MONETARY REMEDY IN CONSTITUTIONAL LAW – SUBSTANTIVE ASPECTS AND ADDITIONAL CRITICISMS

This Chapter addresses the key substantive aspects of constitutional damages and their implications. Most such aspects are also the basis for criticisms of the remedy, and these criticisms are addressed, in addition to the ones identified in Chapter 6. Among these are the financial costs of damages to the state; the separation of powers doctrine; the non-restitutionary rationale of the damages; the deterrence effect of the relief; and the unintended consequences of the relief.

CHAPTER 8: CONCLUSION - STRUCTURAL AND PROCEDURAL ASPECTS OF A FUNCTIONAL APPROACH

In this final Chapter, procedural aspects relating to the awarding of constitutional damages are addressed, specifically, the nature of the defendant, the elements of a claim, the rights for which constitutional damages are claimable and the quantification of the damages. Conclusions from the preceding analysis are drawn and the various alternative options for a framework on constitutional damages weighed. This is done against the backdrop of lessons emerging from the comparative analysis in Chapter 5, and a viable option for South Africa is singled out as a functional approach that borrows from other options.

1.7 METHODOLOGY

Conceptually, this research is largely based on the normative constitutional theory, and stems from the premise of the supremacy of constitutional rights and the imperative to vindicate them where possible with specially-designed constitutional remedies. Normative theory, as opposed to empirical propositions, seeks to understand the law as it should operate as opposed to how it currently operates. In other words, it is a discipline of re-imagining different approaches to the law, with a view to offer propositions of both substantive and procedural law, on how best one thinks certain objectives of the law may be achieved. 'Normative constitutional law' is simply a constitutional law adaptation of 'normative theory', which is a decision-making matrix of rationality to help people maximise expected utility of outcomes. It is concerned with what should and ought to be, as opposed to what is. Desk research is used, and this is justified by the nature of the research questions, which can all be answered precisely by desk research and data analysis. However, given the need for practicality in both the analysis and recommendations, albeit without losing sight of the importance of theory in legal reform, the research seeks as much as possible to merge theory and practice. It will also attempt to steer clear of romanticised propositions, that is, it will avoid addressing the subject in an idealised and unrealistic fashion over practical considerations. The research begins on a conceptual and theoretical level, examining the theories underlying constitutional remedies in general and constitutional damages in particular. It then proceeds to a practical investigation into the viability, feasibility and process of the remedy.

A diversified approach to sources is taken. This is in order to get a comprehensive assessment and a multiplicity of views before proffering suggestions of a framework. The following sources are used:

The Constitution and statutes - The constitutional and statutory provisions which open the doors for constitutional damages are examined in detail. Scholarly commentary and jurisprudence around the provisions is evaluated.

Jurisprudence - Court judgments shape the interpretation and application of the law, and give in-depth legal analyses of legal concepts and principles and all their nuances. They take the

leading role in steering legal reform. The courts' attitude towards the remedy, and how the treatment of the remedy has been changing over a progressive period of time is examined. Cases from the High Courts all the way to the Constitutional Court are examined, and the academic commentary surrounding such cases is considered.

Academic literature - There is little local academic writing on the topic of constitutional damages. This is because this topic is relatively nascent and has not been explored to its logical conclusions. However, significant arguments and propositions exist in the little writing there is, and the current academic thinking as captured in journal articles, books, reports, conference papers and presentations, and any similar work, is explored. The literature review is done thematically in the preliminary Chapters.

International Law - As with any other area of law, South Africa operates as a member of the family of nations and seeks to align its constitutional remedial practice with international jurisprudence and best practice. Thus the authoritative and often cutting-edge voice of international law is sought.

Comparative law - Finally, a core component of this thesis is a comparative analysis of constitutional damages in theory and practice in other jurisdictions. Mostly common-law jurisdictions will be examined, with the benefit of a different perspective from a leading European civil law jurisdiction. Comparators are chosen on the basis of similarities of Constitutions and constitutional remedial provisions with South Africa, and the wealth of constitutional damages jurisprudence from their courts. There is immeasurable value in learning from other jurisdictions, and this benefit is harnessed in this research, especially given that constitutional damages are a growing phenomenon in many jurisdictions.

1.8 CONCLUSION

It is not always that when government officials violate constitutional rights or when they fail to carry out their constitutional mandates, it is out of malice, repugnance, incompetence or recalcitrance. At times pressing and justifiable political, policy or economic considerations may inform the course of action that the government takes and such reasons must be given due consideration before the government is castigated or action is taken against it. This is not, of course, to imply immunity, impunity or indifference. Rather it is an acknowledgement that the administrator or the executive official entrusted with a task is better suited to carry out a task and is the one coming face to face with the realities of discharging their constitutional and legal duties. One must not be drawn therefore into making observer commentary that is devoid of pragmatism and out of touch with realities. To this end both the theorist and the courts should not be oblivious to such challenges, and this thesis will be alive to this danger in its assertions and postulations.

However, where constitutional violations and dereliction of duty occur without legally permissible justification, the judiciary is called upon to exercise its constitutional mandate of holding perpetrators to account. This calls for a wider pool of constitutional remedies from which the courts can draw, and constitutional damages fit squarely within this framework. The effectiveness of constitutional remedies flows from properly defined and detailed frameworks within which the courts should operate. Constitutional damages are largely lacking in this aspect, but cannot remain so perpetually. Establishing a framework for the remedy is therefore an apt endeavour to reap the benefits of the remedy. Before a framework and its nuances is proposed, however, it is crucial to illustrate how we arrive at the need for constitutional damages and for a framework. This is the subject of the next Chapter.

CHAPTER 2

THE PLACE OF CONSTITUTIONAL REMEDIES IN A CONSTITUTIONAL SOCIETY - THEORETICAL ASPECTS

2.1 INTRODUCTION

This Chapter seeks to lay down the theoretical framework for constitutional damages. The primary sub-question addressed is: *What is the place of constitutional damages among judicial remedies broadly and constitutional remedies in particular?* I thus proceed from the general to the specific: why do we need constitutional remedies in a constitutional society and how do constitutional damages fit in that cluster of remedies? Answers to these questions are to be found in legal principles that include the rule of law, separation of powers, and the role of the courts, and these are discussed first. I then look at the emergence of a new constitutional culture in South Africa that places a premium on the protection of rights as giving relevance to constitutional damages. The primary point is that the post-1993 constitutional culture dictates a robust protection of the Constitution, and requires the development and evolution of constitutional remedies that work to achieve that goal. I then consider judicial activism as a tool that has often been used in both the common law and civil law traditions alike to develop the law, including remedies. I argue that judicial activism will lend to a strong and meaningful application of constitutional damages.

2.2 LIMITED GOVERNMENT AND THE RULE OF LAW

2.2.1 Significance of the rule of law

In South Africa's constitutional society, the Constitution must now be understood as the beacon of the rule of law and the ultimate source of legal authority.¹ All laws and conduct must satisfy the demands of the Constitution. To fully understand the import of this statement, we must look more closely at the concept of rule of law. Although the phrase 'rule of law' was popularised by Dicey in his seminal work *Introduction to the Study of the Law of the Constitution* as early as 1885, Bingham² cites authors who in turn cite a number of antique sources where the idea itself appeared. Among these is Aristotle who in a literal English translation is captured in the following words: 'It is better for the law to rule than one of the citizens so even the guardians of the laws are obeying the laws.'³ Another seminal scholar, Fuller, put it in the following terms in 1733: 'Be you never so high, the Law is above you.'⁴

¹ *Tlouamma and Others v Speaker of the National Assembly and Others* 2016 (1) SA 534 (WCC) para 135.

² Tom Bingham 'The Rule of Law' (2007) 66 *Cambridge LJ* 67.

³ John Warrington (ed. and trans.) *Aristotle's Politics and Athenian Constitution* (1959) JM Dent, Book III, s.1287, 97.

⁴ Thomas Fuller *Gnomologia: Adages and Proverbs* (1733) 943. This was quoted by Lord Denning in *Gouriet v Union of Post Office Workers* [1977] QB 729, 762.

Indeed the 10th edition of Dicey's work records that '[I]et no one suppose that Dicey invented the rule of law. He did of course put his own interpretations upon the meaning of that rule'.⁵ It is an idea that, in Devenish's words, has an ancient lineage.⁶

The rule of law speaks of a society where the law is respected and is the ultimate authority. This, of course, presupposes that there has been a democratic law-making process and all who are subject to the law consent to its authority even if they are not necessarily in agreement with all that the law says. Put differently, the law must command the moral respect of the people.⁷ Under rule of law, no one given power by the law for a certain purpose may act beyond the confines of such powers, or usurp the power conferred on another – a principle known as *ultra vires*.

According to Humphreys,⁸ '[t]he notion that "the rule of law" captures a particular quality of law or a legal system, a quality that must be more or less present or absent in a given legal system and that thus provides a basis for evaluating such a system, imbues most accounts of the rule of law.'⁹ It is a concept having a universal validity,¹⁰ encompassing inherent principles like uniformity, certainty, impartiality and equity.¹¹ Also added to this is the principle of legality, which Devenish calls 'the core or seminal meaning of the rule of law'.¹² Zimbabwe's former Chief Justice Anthony Gubbay said the following:

'...[I]t is an undeniable fact that whatever system of law is applicable, whether it is the English common law, the Napoleonic Code, my own, or that of other countries, the rule of law forms an essential foundation in any democratic system of governance. It is a concept of universal validity and application. It embraces those institutions and principles of justice which are considered minimal to the assurance of human rights, and the dignity of man. ... [I]t is generally accepted that a society in which the rule of law prevails is one in which a climate of legality, observance of the law and an effective judiciary, are evident. ... [I]t is the antithesis of the existence of wide, arbitrary and discretionary powers in the hands of the executive. ...'¹³

From this emerges an understanding that the rule of law can be understood both as having a moral foundation and significant political foundations, though essentially of a jurisprudential

⁵ Albert V Dicey *Introduction to the Study of the Law of the Constitution* (10th ed) (1960) Macmillan & Co Ltd, London xcvi-xcvii.

⁶ George Devenish *Constitutional Change and Reform in South Africa*, unpublished doctoral thesis, Unisa (1986), 381, cited in George Devenish 'The rule of law revisited with special reference to South Africa and Zimbabwe' (2004) 4 *TSAR* 677.

⁷ In a representative and parliamentary democracy, the citizens empower their representative institutions to make binding laws which the executive must put into effect. Disagreements must be resolved through the courts rather than self-serving disobedience. See Tom Bingham *The Rule of Law* (2010) Allen Lane, London 60.

⁸ Stephen Humphreys *Theatre of the Rule of Law: Transitional Legal Intervention in Theory and Practice* (2010) Cambridge University Press.

⁹ *Ibid* 6.

¹⁰ George Devenish 'The rule of law revisited with special reference to South Africa and Zimbabwe' (2004) 4 *TSAR* 677, 675.

¹¹ *Ibid*.

¹² *Ibid* 678.

¹³ Anthony R Gubbay 'The Progressive Erosion of the Rule of Law in Independent Zimbabwe' (2009) Third International Rule of Law Lecture: Bar of England and Wales, 9 December 2009.

nature.¹⁴ In modern society, this quality cannot be divorced from the protection of rights. Bingham argues that '[t]he rule of law must, surely, require legal protection of such human rights as, within that society, are seen as fundamental.'¹⁵ This is true for South Africa where the Bill of Rights occupies pride of place within the constitutional framework. This is reflected by Oakeshott who submits that the rule of law is not merely a procedural attribute, but that it also says something about the content of law, and that law should be restricted to the task of ensuring that justice prevails.¹⁶

While one may be tempted to view it as such, the 'rule of law' is not a broad, vague and abstract phrase simply to be used as 'a shorthand description of the positive aspects of any given political system' as Raz warns.¹⁷ It refers to something more concrete. Devenish¹⁸ suggests that the German concept of the *Regstaat* or constitutional state is a more comprehensive one than that of the rule of law, encapsulating 'everything that is good in statecraft and public law'.¹⁹ The concept, he proceeds, includes *inter alia* the separation of powers, enforceable guarantees in respect of individual rights, the supremacy of the constitution, the principle of legality, legal certainty, access to independent courts and multi-party democracy.²⁰ This is largely correct and true. However, save for the aspect of multi-party democracy, it is not easily discernible how the rule of law is exclusive of all the other aspects identified by Devenish, and how lines can be drawn between these two concepts in the modern legal society. Hence we have cases such as *National Party v Jamie*,²¹ where the court referred to the rule of law as 'that supreme principle of a civilized constitutionality'. The rule of law must not be understood in overly restrictive terms. Price captures the dynamism and content-laden nature of the rule of law principle describing it as '[t]he continuing evolution of South Africa's conception of the rule of law as a justiciable constitutional master-principle'.²² The rule of law is therefore also value-laden and at Devenish's own admission, 'the pursuance of social justice and economic improvement is therefore compatible with the rule of law'.²³ Bingham is of the view that the core of the existing principle is that 'all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.'²⁴ The rule of law itself is not dependent only upon positive law,

¹⁴ Devenish acknowledges this two-sided face of the rule of law in his work (note 10) wherein he cites scholars who criticised Dicey's conception of the rule of law.

¹⁵ Bingham (note 2) 77.

¹⁶ Michael Oakeshott *On History and Other Essays* (1999) Liberty Fund, Indianapolis.

¹⁷ Joseph Raz 'The Rule of Law and its Virtue' in Joseph Raz *The Authority of Law: Essays on Law and Morality* (1979) Oxford University Press 270.

¹⁸ Devenish (note 10) 681.

¹⁹ He relies on IM Rautenbach and EFJ Malherbe *Constitutional Law* (1999) 11 as authority.

²⁰ For this he relies on DH Van Wyk 'Suid-Afrika en die regstaat idee' (1980) *TSAR* 153.

²¹ 1994 (3) SA 483 (EWC) 492F. See also *ANC (Border Branch) v Chairman, Council of State of the Republic of Ciskei* 1992 (4) 434 (Ck).

²² Alistair Price 'The Evolution of the Rule of Law' (2013) 130 *SALJ* 658

²³ Devenish (note 10) 682.

²⁴ Bingham (note 7) 8.

and while it may be couched in positive law terms, it essentially consists of values and not institutions.²⁵ What is equally true, however, is that even in a country like Zimbabwe where there is a written constitution and a justiciable bill of rights the rule of law can be abrogated,²⁶ the point being that having a constitution does not necessarily imply rule of law.

In a constitutional democracy such as South Africa, the constitution is the supreme law of the land, and the rule of the law in this case requires that all laws and all conduct, including by the judiciary, comply with the constitution. To remove doubt, the rule of law was captured as a foundational value of the South African society in s 1(c) of the Constitution.²⁷ In the context of the adjudication of disputes and constitutional enforcement, the rule of law 'appears as a sort of social glue, a connective tissue holding society together.'²⁸ It means adequate protection of fundamental human rights. Ultimately, the promotion of the rule of law 'is explicitly bound up with the primary currents of international political and economic development, and today provides a leading language for the articulation and justification of overarching public policy orientations.'²⁹ It is also explicitly bound up with socio-political and economic development at national level. The aspirations of a nation that are seen to be encapsulated by a constitution are themselves dependent on the rule of law, that is, on the primacy of that constitution. Preoccupation with the rule of law can therefore not be easily dismissed or disassociated from the progress of the nation as a whole, politically, socially and economically. This is not to deny the role of other currents to such progress, such as social cohesion, economic development, culture, tradition and religion.

2.2.2 Separation of powers and the role of the courts

One of the fundamental tenets of the rule of law is the separation of powers.³⁰ This is so because separation of powers, the *trias politica* doctrine, allows for checks and balances that ensure that no one is acting *ultra vires*. Following the monumental threats to the Zimbabwean judiciary during the land reform period, Judge Hefer stated that 'unfailing loyalty to the concepts of separation of powers and the independence of the judiciary is required. Without it there can be no rule of law'.³¹ Under the *trias politica*, state power is separated between the legislature, the executive and the judiciary.³² Specific functions, duties and responsibilities

²⁵ Arthur L Goodhart 'The Rule of Law and Absolute Sovereignty' (1958) 106 *Penn LR* 943-963 cited in Dicey (note 5) cx.

²⁶ *Ibid* 690.

²⁷ Constitution of the Republic of South Africa, 1996.

²⁸ Humphreys (note 8) 29.

²⁹ *Ibid* 7.

³⁰ See also *Tlouamma* (note 1) para 59.

³¹ 'Rule by fear' Cape Times, 5 March 2001.

³² In *Tlouamma* (note 1) at para 60 the court traces the origins of the separation of powers principle in South Africa to Constitutional Principle VI of the Interim Constitution of 1993 which provided that '*There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.*' The final Constitution adopted in 1996 had to give effect to this principle, albeit without expressly stating that principle anywhere in the Constitution. The principle is

are allocated to the distinctive institutions with defined areas of competence. Seedorf and Sibanda³³ aptly describe this as separation of public institutions and of public functions. That translates to the making of law, application and execution of the law, and dispute resolution.³⁴ The Western Cape High Court had this to say:

'The separation of powers is premised on the principle that each branch of government is independent, has a separate function and unique powers that the others cannot infringe upon. The doctrine therefore recognizes the functional independence of the three branches of government, namely, the legislature, the executive and the judiciary. [...] The three branches are not hermetically sealed from each other and exhibit a degree of overlap.'³⁵

The above echoes how the principle was understood by the CC in the *First Certification* judgment,³⁶ where it was held that there is 'no universal model of separation of powers and, in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute [...] The principle of separation of powers, on the one hand, recognises the functional independence of branches of government.'³⁷ This proposition was repeated in *De Lange v Smuts NO and Others*.³⁸

The separation of powers doctrine is thus dynamic.³⁹ In early accounts such as Montesquieu's *The Spirit of the Laws*⁴⁰ separation of powers was shown to have been intended to guard against tyranny and preserve liberty. Montesquieu in his celebrated work *L'Esprit de Lois*

imbued in the nature and structure of the Constitution itself, and the powers allocated to each arm of state. For authority for this proposition see: *Glenister v President of the Republic of South Africa and Others* 2009 (1) SA 287 (CC) paras 29-30; *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 91; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC); *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); and *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC). In *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) para 37 the court held that:

'The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle has important consequences for the way in which and the institutions by which power can be exercised.'

³³ Sebastian Seedorf and Sanele Sibanda 'Separation of Powers' in Woolman *et al* (eds) *Constitutional Law of South Africa* (2014) 1 Revision Service 6, 12-1.

³⁴ *Ibid* 12-2.

³⁵ *Tlouamma* (note 1) para 60, citing Kate O'Regan 'Checks and Balances: Reflections on the Development of the doctrine of separation of powers under the South African Constitution' (2005) 8 *PELJ* 1, 125.

³⁶ *Ex Parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) paras 108-109.

³⁷ *Ibid* paras 108-109.

³⁸ 1998 (3) SA 785 (CC) para 60. See also *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) para 24, where the court held that '[t]he practical application of the doctrine of separation of powers is influenced by the history, conventions and circumstances of the different countries in which it is applied.'

³⁹ *Glenister* (note 32) para 22.

⁴⁰ Charles de Secondat, Baron de Montesquieu *The Spirit of the Laws* (1748).

'methodically expanded the ideas and doctrine of the *trias politica*', holding that the separation of the three branches of government was a necessary precondition for liberty and to curtail centralised authority.⁴¹ Similarly in contemporary times, Chief Justice Pius Langa identified the objective of separation of powers as that of 'secur[ing] the freedom of every citizen by seeking to avoid an excessive concentration of power, which can lead to abuse, in one person or body'.⁴² This is an accurate observation given that the essence of the constitutional state is the fundamental notion of limited power and accountability. Absence thereof attracts abuse or maladministration.⁴³

Where disputes arise and where there is abuse of power or failure to meet constitutional obligations, the courts become central. In a society based on the rule of law, people should be able, in the last resort, to have their rights and disputes settled by the courts.⁴⁴ In South Africa's democracy all public power is subject to constitutional control.⁴⁵ Section 165 of the Constitution vests judicial authority in the courts and renders them 'independent and subject only to the Constitution and the law'. Section 172 grants the judiciary the power to scrutinize the conduct of the other two branches of government and declare any law or conduct inconsistent with the Constitution invalid. This power of judicial review is essential for the maintenance and enforcement of the separation of powers among the three branches of government and the rule of law. As Moseneke DCJ notes in *International Trade Administration Commission v Scaw South Africa (Pty) Ltd*,⁴⁶ in the end courts must determine whether unauthorised trespassing by one arm of the state into the terrain of another has occurred.⁴⁷ In that narrow sense, the courts are the ultimate guardians of the Constitution and the rule of law.⁴⁸ They are auditors of legality,⁴⁹ and not only do they have the right to intervene in order to prevent the violation of the Constitution, but also the duty.⁵⁰

It is in the performance of judicial review that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention.⁵¹ In circumstances requiring such judicial intervention courts must observe

⁴¹ George E Devenish 'The doctrine of separation of powers with special reference to events in South Africa and Zimbabwe' (2003) 66(1) *TSAR* 84, 85, quoted in Pieter Labuschagne 'Trias politica as guiding constitutional principle in the modern state: Obsolete relic or constitutional necessity' (2006) 25 (1) *Politeia* 18, 20.

⁴² Pius Langa 'The separation of powers in the South African Constitution' (2006) 22 *SAJHR* 2, 4.

⁴³ Devenish (note 41) 85.

⁴⁴ Bingham (note 7) 85.

⁴⁵ *Pharmaceutical Manufacturers* (note 32) paras 19-20; *Doctors for Life* (note 32) para 38.

⁴⁶ 2012 (4) SA 618 (CC).

⁴⁷ *Ibid* para 92.

⁴⁸ *Doctors for Life* (note 32) para 38 and also *Glenister* (note 32) para 33.

⁴⁹ Bingham (note 7) 61.

⁵⁰ *South African Association of Personal Injury Lawyers* (note 38) para 25; *Doctors for Life* (note 32) paras 68-69. For instance, while the Interim Constitution might not have been explicit, the Final Constitution, 1996 expressly grants upon the Constitutional Court the power in terms of section 167(4)(e) to decide whether a provincial or even the national legislature has failed in its obligation to enact legislation. See *SCAW South Africa* (note 32) para 93. Also *Glenister* (note 32) para 19.

⁵¹ *Glenister* (note 32) para 33.

the limits of their own power.⁵² This is the approach that the CC followed in *Doctors for Life*.⁵³ Ngcobo J speaking for the majority held that:

'Courts have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of the Constitution. [...]'⁵⁴

Having courts that can pronounce on the constitutional compliance of the executive and the legislature is of essence to the rule of law, and an independent, impartial and empowered judiciary is essential for this task.

2.2.3 Judicial remedies as sanctioning powers of the courts

Having established the meaning and import of the rule of law, and having placed the courts' role under the separation of powers in perspective, it is crucial that we examine the practical powers of courts. The coercive power that guarantees the efficacy of the law is found in the courts. This is the power to issue binding orders to affected parties. If that is the case, then the nature of such orders or judicial remedies is fundamentally important.

It is a foundational tenet of the law that the law must be intelligible, clear and precise. In expressing this principle, the European Court of Human Rights said as follows:

'[T]he law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case [...] a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.'⁵⁵

This is true of judicial remedies. It is in the interest of the rule of law that judicial remedies as a part of the law are clear and that there be some degree of predictability. It is a requirement of the rule of law that decisions should be based on stated criteria. Constitutional remedies and damages in particular, are not excluded from this. In the following section I proceed to explore constitutional remedies and their enforcement. I start by laying the ground on how we arrive at having constitutional remedies and why they occupy a unique position in the judicial remedies matrix. The answer to these questions is to be found in the emergence of a new legal culture in South Africa.

⁵² Ibid. See also *Bato Star Fishing* (note 32) para 47 where the following dicta of the House of Lords in *R (on the application of Prolife Alliance) v British Broadcasting Corporation* [2003] 2 All ER 977 (HL) at para 76 was quoted with approval: 'This means that the courts themselves often have to decide the limits of their own decision-making power.'

⁵³ Note 32 above.

⁵⁴ *Doctors for Life* (note 32) at paras 68-69.

⁵⁵ *Sunday Times v United Kingdom* (1979) 2 EHRR 245, 271 para 49.

2.3 JUDICIAL ENFORCEMENT OF CONSTITUTIONAL RIGHTS AND DUTIES

2.3.1 The emergence of constitutionalism as a legal culture

Every legal system is premised on a legal culture particular to that system. Cover puts it this way: 'The creation of legal meaning takes place always through an essentially cultural medium.'⁵⁶ Law is one of those cultural domains.⁵⁷ Every legal system has its own distinct history and origins and this significantly informs the system's legal culture. Rosen thus postulates that we can approach a variety of legal systems by looking for the ways in which, as part of their larger cultures, each finds itself having to address certain common problems.⁵⁸ In short, if culture is by definition constitutive, then the law must be formative and not simply formed.⁵⁹ Thus for instance, delict as a system of law originates and is anchored in Roman law and amplified in the Roman Dutch common law. It has a certain value system that places a premium on specific aspects of life and society. So when delict protects the right to dignity, for example, certain values are attached to it, values and the extent of which may vary with other legal traditions and systems. For instance, the common law rests upon an individualistic conception of society and lacks the means of enforcing public rights as such.⁶⁰ This is the reason why the fundamental rights mainly protected in delict are personality (individual) rights such as dignity, privacy, reputation and bodily integrity. This is but one example of differences in value systems between different legal cultures.

At the centre of South Africa's legal cultural transformation is the new Constitution. This new Constitution brought in a new constitutionalism to South Africa – what Klare described as 'transformative constitutionalism'.⁶¹ According to Landau constitutions in developing countries, South Africa included, are thoroughly transformative documents by necessity as no

⁵⁶ Robert Cover, cited in Lawrence Rosen *Law as Culture: An Invitation* (2006) Princeton University Press, Princeton and Oxford 1.

⁵⁷ *Ibid* 4-5.

⁵⁸ *Ibid* 8.

⁵⁹ *Ibid* 11.

⁶⁰ Dicey (note 5) ciii.

⁶¹ Karl Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146, 150. Klare's thesis has been developed and expanded upon by several eminent jurists and authors, among them Dikgang Moseneke 'The Fourth Bram Fischer Memorial Lecture: transformative adjudication' (2002) 18 *SAJHR* 309; Catherine Albertyn and Beth Goldblatt 'Facing the challenges of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248; Henk Botha, André van der Walt and Johan van der Walt (eds) *Rights and democracy in a transformative constitution* (2003); Mtendeweka Mhango 'Transformation and the Judiciary' in Cora Hoexter and Morné Olivier *The Judiciary in South Africa* (2014) Juta 68; Pius Langa 'Transformative constitutionalism' (2006) 3 *Stell LR* 351; Marius Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *SAPL* 155; Cora Hoexter 'Judicial Policy revisited: Transformative adjudication in administrative law' (2008) 24 *SAJHR* 281; T Roux 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?' (2009) 20 *Stell LR* 258; AJ van der Walt 'Tentative Urgency: Sensitivity for the Paradoxes of Stability and Change in Social Transformation Decisions of the Constitutional Court' (2001) 16 *SAPL* 1; K van Marle 'Transformative Constitutionalism as/and Critique' (2009) 20 *Stell LR* 286.

developing country wants to stay as it is.⁶² That the South African Constitution is centred on the need to transform South Africa into a society based on democratic values, social justice and fundamental human rights is now settled.⁶³ In *Soobramoney v Minister of Health, KwaZulu-Natal*,⁶⁴ Chief Justice Chaskalson wrote that a commitment to transform the South African society lies at the heart of the new constitutional order.⁶⁵ Transformation will thus continue to play a key role in interpreting the Constitution.⁶⁶

When South Africa adopted the Interim Constitution in 1993 and subsequently the Final Constitution in 1996, a new constitutional culture began to emerge. It was premised on the Constitution as the supreme reference point of the law, and the supreme source of legal legitimacy. According to Price, the enactment of the South African Constitution amounted to a 'constitutional revolution' that altered the legal system's ultimate rules of recognition.⁶⁷ Pieterse speaks of a 'complete overhaul of South African legal culture.'⁶⁸ A new constitutional and legal order emerged, affecting the treatment of both rights and remedies.⁶⁹

Traditionally, as with pre-1993 South Africa, constitutional law was primarily structural and was concerned with defining government power and limiting its reach over citizens, and in that process protected individual rights. The introduction of a democratic Constitution with a Bill of Rights as a cornerstone of the evolved society, however, made individual rights much more powerful and directly enforceable through the Constitution itself. This made the transformation to be one beyond mere change of legal system, formal institutions and structures of government.⁷⁰ It is clear that the functionality of constitutional law in transitional South African society has changed.⁷¹ As per Chief Justice Ngcobo, the new Constitution now demands a change in the legal norms and values of the society.⁷² What this means is that whilst there was no evolution of the *grundnorm*, the way fundamental rights were perceived changed as there was now a new legal ethos designed to safeguard rights and

⁶² David Landau 'Political Institutions and Judicial Role in Comparative Constitutional Law' (2010) 51 *Harv Int LJ* 319.

⁶³ Mhango (note 61) 78.

⁶⁴ 1998 1 SA 765 (CC).

⁶⁵ *Ibid* para 8.

⁶⁶ Langa (note 61) 351.

⁶⁷ Alistair Price 'The Influence of Human Rights on Private Common Law' (2012) 129 *SALJ* 330, 359, citing Lourens Ackermann 'The legal nature of the South African constitutional revolution' (2004) *NZLR* 633. Chief justice Pius Langa has also described the transformation project in similar terms as 'a social and economic revolution'. See Langa (note 61) 352.

⁶⁸ Pieterse (note 61) 155.

⁶⁹ The basis of such a proposition can be found in what Chief Justice Pius Langa traced back to the Interim Constitution Epilogue which stated that that Constitution was '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'. This, the Chief Justice goes on, is a magnificent goal for a Constitution: to heal the wounds of the past and guide us to a better future. See Langa (note 61) 352.

⁷⁰ Mhango (note 61) 78.

⁷¹ John Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (2nd ed) (2004) Juta, Lansdowne 1.

⁷² *Daniels v Campbell NO* 2004 (5) SA 331 (CC) para 56.

promote social justice against a backdrop of political oppression, abuse of power and socio-economic inequality.⁷³ A violation of a fundamental right now assumes a different, more reprehensible character than it did prior to the introduction of the Bill of Rights. For this reason, when the Constitution itself provides a framework for the remedying of breach of constitutional rights, that framework must find application.

Two competing concerns are at play when a legal system goes through a period of transformation after the adoption of a new Constitution. According to both Roux and Pieterse, there is simultaneously the need for legal continuity as well as the imperative that old order rules change to give effect to the new Constitution.⁷⁴ According to Mubangizi, a characteristic of a transitional society is that it is invariably engaged in the process of dealing with change after the move to democracy.⁷⁵ The society is primarily concerned with issues of justice in response to human rights violations perpetrated during the reign of a former regime.⁷⁶ What is envisaged is a sort of legal and social revolution in accordance with institutional values and prescripts, and such transformation is not pursued simply for the sake of it, but is intended to bring social change of a fundamental and dramatic kind.⁷⁷ South African constitutionalism attempts to transform society from one deeply divided by the legacy of a racist and unequal past into one based on democracy, social justice, equality, dignity and freedom.⁷⁸ This requires an explicit engagement with social vulnerability in all legislative, executive and judicial action and the empowerment of poor and historically marginalised sectors of society through both pro-active and context-sensitive measures affirming human dignity.⁷⁹

Such an interpretation and application of the Constitution is neither misplaced nor amusing. It is proper use of the law to bring positive social change. According to Dror, '[o]ne of the

⁷³ François Du Bois et al *Wille's Principles of South African Law* (9th ed) (2007) Juta, Cape Town 38. See also the following on the transformational ambition and potential of post-apartheid constitutional law: Hugh Corder 'From Prisoner to Patriarch: Transforming the Law in South Africa, 1985-2000' (2001) *SALJ* 118 772-793; Klug *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2000) Cambridge University Press, Cambridge; Chaskalson (note 61) 193; and Moseneke (note 61) 309-319.

⁷⁴ Theunis Roux 'Continuity and Change in Transforming Legal Order: The Impact of Section 26(3) of the Constitution on South African Law' (2004) *SALJ* 466 and Pieterse (note 61) 155.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Mhango (note 61) 78

⁷⁸ See Dennis Davis *Democracy and deliberation: Transformation and the South African legal order* (1999) Juta, Kenwyn 44; Pierre De Vos 'A bridge too far? History as context in the interpretation of the South African Constitution' (2001) 17 *SAJHR* 9-10; Dennis Davis 'Elegy to transformative constitutionalism' (2003) in Henk Botha, André van der Walt and Johan van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (Stellenbosch University Press, Stellenbosch 57; Klare (note 61) 153; Moseneke (note 61) 315.

⁷⁹ Pieterse (note 61) 159, citing Moseneke (note 61) 318-319; Pierre De Vos 'Grootboom, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *SAJHR* 258, 267; Sandra Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?' (2002) 6 *Law, Democracy and Development* 159, 160-162; and Marius Pieterse 'Beyond the welfare state: Globalisation of neo-liberal culture and the constitutional protection of social and economic rights in South Africa' (2003) 14 *Stell LR* 3, 18.

more important devices used to initiate and control directed social change is law, a device the use of which is *prima facie* (and, in most cases, perhaps mistakenly) believed to be cheaper and quicker than education, economic development and other instruments and ways of directed social change'.⁸⁰ In South Africa's ongoing constitutional reform and transformation process, an essential part of the process is having solid and meaningful constitutional remedies in response to constitutional violations that the country is seeking to move away from, especially for those groups that were previously disenfranchised and continue to be vulnerable. This is an issue of transformation in the sense that most of those who find themselves needing the might of these constitutional remedies, including constitutional damages, are the previously oppressed and marginalised, those who are at the receiving end of societal prejudice and neglect. These are the people who seek social assistance that they will need to enforce; they are the people who need their right to housing to be protected; they are the ones who will seek to enforce the right to basic education to have their children educated; and they are the ones who will seek protection and vindication of their rights against police brutality when they face force during demonstrations against poor living conditions.

South Africa's kind of constitutional evolution is not novel. The United States experienced the same evolution, including through important amendments introducing rights to the Constitution. In this regard, Park remarks that '[i]nitially, constitutional law was concerned with defining the powers of the federal government in relation to the states and the branches of the federal government in relation to each other.'⁸¹ He adds: 'That is not to say that the Constitution was irrelevant to the relationship between government and society; it indirectly protected the rights of private citizens by limiting the reach of government power.'⁸² Constitutionalism in the present day United States now also focuses on protection of fundamental rights.

It is prudent to recognise here that before the coming into effect of the Interim Constitution in South Africa there were some rights that were litigated upon and protected at common law, such as privacy and dignity,⁸³ albeit under sustained assault by the apartheid regime. In the Interim Constitution and eventually in the Final Constitution there was a deliberate and conscious decision to include those rights in the Bill of Rights as fundamental rights.⁸⁴ This was not devoid of consequence or effect. It meant that these rights assumed a new character and importance as fundamental rights upon which the society is founded - a different characterisation from the one they had at common law.

⁸⁰ Yehezkel Dror 'Law and Social Change' (1958-1959) 33 *Tulane LR* 787, 802.

⁸¹ James J Park 'Constitutional Tort Action as Individual Remedy' (2003) 38 *Harv Civil Rights-Civil Liberties LR* 393, 408.

⁸² *Ibid* 409.

⁸³ Johann Neethling and Johan M Potgieter *Law of Delict* (2010) Lexis Nexis, Durban 17.

⁸⁴ Du Bois et al (note 73) 37.

The judiciary occupies a pinnacle position in advancing the new constitutional culture. In Mhango's words, the judiciary is necessarily implicated in achieving the goal of transforming South African society and its various institutions.⁸⁵ Not only is the judiciary itself required to be transformed; it has an important role to play in realising the transformation of the legal system and of society more broadly.⁸⁶ The CC in particular, was created for the very purpose of enforcing a constitutional culture when the Interim Constitution was adopted,⁸⁷ and is today at the apex of the transformation agenda in relation to the country's evolving constitutional jurisprudence.⁸⁸ While there is much progressive jurisprudence that has emanated from the judicial institution in the country, more still needs to be done by the judiciary in order to fully advance the transformative purpose of the Constitution.⁸⁹

2.3.2 Criticisms of the legitimacy of the South African constitutional project

In as much as this thesis seeks to push the boundaries of protection of constitutional rights as guaranteed in the Constitution of the land, and I advance aspects such as judicial activism and an expanded remedial regime in both approach and interpretation of what the law provides, I do so within the context of the current existing Constitution and constitutional framework. I neither advocate for constitutional reform, nor for the amendment of anything within the current constitutional framework.

I accept the individualised nature of the remedy of damages, but at the same time, I accept and advance the damages remedy for its deterrent attribute, and also its ability to redress systemic violations that occur. In this nature, it has a two-pronged objective of both remedying the breach to the wronged individual(s), and also to solve systemic violations by being deterrent. This is essentially the same even with delictual damages. The systemic nature of constitutional violations within the context of South Africa is acknowledged and accepted throughout the thesis, such as the challenge of social grants administration in the Eastern Cape, and the prevalent police torture and unlawful arrests that I refer to in Chapter

⁸⁵ Mhango (note 61) 69.

⁸⁶ Ibid.

⁸⁷ See the website of the Constitutional Court of South Africa, <http://www.constitutionalcourt.org.za/text/court/main.html>, (accessed 03 June 2016), which gives the history of the court and why it was created: 'It was agreed that a new court, more representative of South Africa's diverse population, should be established to protect the Constitution and the fundamental human rights it entrances. ... A question that arose in the negotiating process concerned the sort of institution needed to protect a constitution and the rights enshrined in it. Should South Africa create a specialist Constitutional Court, use the existing court structure to act as the guardian, or opt for a hybrid? It was felt that that the new Constitution needed as its protector a new court - one untainted by the past. In this sense, the decision to create a Constitutional Court was a political one.' See also Department of Justice and Constitutional Development 'Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State' (2012) para 5.1.2: The constitutional court was created 'with a view to championing the reform of the South African law and jurisprudence, which was influenced by the unjust laws of the erstwhile apartheid regime.'

⁸⁸ Department of Justice and Constitutional Development (note 87) para 5.1.2.

⁸⁹ Ibid para 3.3.4.

1. Therefore, the thesis advances constitutional damages both as individual relief, and as far-reaching relief for systemic violations.

In academic theory, very little is ever settled, if anything at all. All find itself within the context of contestation, and the legitimacy of the constitutional project is no different. It has to be acknowledged that South Africa's constitutional project does not perch itself uncontested. Quite the contrary. The liberal democratic nature of the Constitution as well as the rights that the Constitution protects are contested within the theoretical and philosophical realm. Thus, scholars such as Ramose,⁹⁰ have taken on this contestation, quite adventurously so and in a remarkable way, questioning and challenging the confinement of our democratic appreciation only within the four corners of the Constitution and its underpinning framework, in the process questioning the very legitimacy of the very constitutional project. This school of thought reimagines the nature of rights protected under the Constitution, and the conceptualisation of rights and remedies. Part of what fortifies such contestation is the manner in which the Constitution was developed – a process led by a Constitutional Assembly and certified by the Constitutional Court, with no direct involvement of the people beyond public consultations. Even then, many have argued that the public consultations were themselves largely cosmetic, to give the process a resemblance of popular legitimacy. Whatever merit there is to this argument, realities of the day are that the resultant Constitution of 1996 is the present law of the land, and underpins democracy as it is now known and practiced in South Africa today. Further, the South African blend of representative, constitutional, direct and popular democracy dictate that none is above the other, but that these run and operate concurrently. Thus, while popular democracy may have lacked in some degree, representative and constitutional democracy was still at play in the manner and process in which the Constitution was enacted. The process of drafting and adopting the Constitution involved political consensus on constitutional principles, checks and balances through a Constitutional Assembly, and then certification by the Constitutional Court. Together, these processes gave legitimacy and credibility to the process. Unless that Constitution is repealed, or certain parts of it are amended, it remains law. It is within the context of that existing law that I interrogate the question of constitutional damages in this thesis.

However, this thesis does not dwell on academic contestations, but rather it is a pragmatic work rooted in that which currently obtains and applies as the country's Constitution and constitutional framework, as opposed to whether and why that whole Constitution, constitutional framework and the rights protected may be wrong or inadequate. As such, I do not see it necessary to elaborately address any legitimacy contestations of the very constitutional order that applies under the current Constitution.

⁹⁰ Mogobe B Ramose 'Towards a post-conquest South Africa: beyond the constitution of 1996' (2018) *SAJHR* 326.

The fit and appropriateness of constitutional remedies, is a discussion that can be fully had without resorting to critiques or contestations about the legitimacy of the whole constitutional project. Whatever the merits of the contestation of the legitimacy of the Constitution, the Constitution is currently the valid law of the land – both based on the realities and the principle of the presumption of validity of law. Unless that Constitution is legally changed, courts cannot shy away from awarding certain remedies that are allowable under the Constitution for constitutionally protected rights.

2.3.3 Constitutional remedies

The emergence of a new constitutional culture could not have been without consequence to the kind of injunctions and remedies pronounced by the courts. Okpaluba notes that:

[W]ith the coming into effect on that date of an autochthonous Constitution entrenching an elaborate Bill of Rights incorporating strongly worded enforcement provisions empowering the courts to grant ‘appropriate relief’ and to make ‘just and equitable’ orders for the enforcement of the guaranteed rights, the South African perspective on public law remedies in general and recovery of damages for governmental wrongs in particular, was destined to change.⁹¹

Constitutional remedies in contemporary South Africa must be understood through these lenses. They bear a particularly important utility in the country’s democracy, and for this reason cannot be relegated to a peripheral role, nor can they be viewed in the same way as ordinary common law remedies. This is so for at least two reasons. Firstly, constitutional remedies are there to atone for constitutional rights violations, rights of which occupy pride of place as ‘a cornerstone of democracy’⁹² in South Africa. Remedies to redress violation of these rights must naturally occupy a pinnacle position. Secondly, constitutional damages achieve ‘group justice’ as opposed to just individual justice by vindicating the Bill of Rights as opposed to merely an individual’s interests. A constitutional culture drives the greater good, and has a public dimension to it, even public welfare. Currie and De Waal put it this way:

‘The harm caused by violating constitutional rights is not merely a harm to an individual applicant, but a harm to a society as a whole: the violation impedes the realisation of the constitutional project of creating a just and democratic society. Therefore the object in awarding a remedy is not only to grant relief to the litigant before the court but also to vindicate the Constitution and deter future infringements. Vindication is necessary because harm to constitutional rights, if not addressed, will diminish the public’s faith in the Constitution. ...’⁹³ (Footnote omitted)

Similarly, Didcott J in *Fose v Minister of Safety and Security*⁹⁴ mentioned that ‘[s]ociety has an interest in the defence that is required here. Violations of constitutionally protected rights harm not only their particular victims, but it harms society as a whole too. That is so because,

⁹¹ Chuks Okpaluba ‘The Law of Bureaucratic Negligence in South Africa: A Comparative Commonwealth Perspective’ (2006) *Acta Juridica* 118.

⁹² Section 7(1) of the Constitution, 1996.

⁹³ Currie and De Waal (note 5) 181.

⁹⁴ 1997 (3) SA 786 (CC).

unless they are adequately remedied, they will impair public confidence and diminish public faith in the efficacy of the protection, and for a good reason too since one invasion discounted may well lead to another.⁹⁵ To then take a right founded in constitutional culture and deny it a remedy modelled, developed and founded in the constitutional framework itself, preferring instead to extract or even create a remedy in delictual culture, does disservice to the country's constitutional culture. For this reason, the use of the Constitution as a protector of last resort is inappropriate insofar as it relegates constitutional supremacy to the legal periphery, and devalues the Constitution. The South African Bill of Rights is not only highly progressive in substance but it is also entirely justiciable, hence any affected person may approach a competent court alleging that a right in the Bill of Rights has been infringed and the court must remedy such violation.⁹⁶

The Constitution, unlike the inherited and subsequently adapted law of delict, is autochthonous, having 'sprung not only from the native African soil, but indeed from the soul of the land'.⁹⁷ This alone changes the legal value system, and where the law places higher currency. Thus for instance, though there is an undeniable social justice dimension to delictual remedies, delict is not *primarily* known for protecting socio-economic or political rights, nor for being social justice-oriented. This is the prerogative and premium of a constitutional culture, whose remedies are generally forward-looking, community-oriented and structural, rather than backward-looking, individualistic and corrective or retributive.⁹⁸ The CC in *Steenkamp NO v Provincial Tender Board, Eastern Cape*⁹⁹ expressed a similar sentiment that the purpose of a public law remedy is to pre-empt, correct or reverse improper actions.¹⁰⁰ Additionally, a public law remedy is meant to advance efficient and effective public administration compelled by constitutional precepts and, at a broader level, entrench the rule of law.¹⁰¹

As to the nature of the remedies themselves, Klaaren¹⁰² postulates that the South African Constitution has what he terms 'primary remedies' and 'secondary remedies'. He identifies

⁹⁵ Ibid para 82.

⁹⁶ There are numerous publications dealing specifically with the South African Bill of Rights. A non-exhaustive list includes Currie and De Waal *The Bill of Rights Handbook* (2013); Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2002); Govindjee, Vrancken and Holness *Introduction to Human Rights Law* (2009) Lexis Nexis; and Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (2004).

⁹⁷ George Devenish *The South African Constitution* (2005) LexisNexis Butterworths 39. This is a document crafted by South African people, informed by the nation's experiences and aspirations, embodying the values and aspirations of the nation, and designed to usher the nation into its next phase of social, political and economic development.

⁹⁸ Currie and De Waal (note 96) 181.

⁹⁹ 2007 (3) SA 121 (CC) para 29.

¹⁰⁰ See also Currie and De Waal (note 96) 181.

¹⁰¹ Ibid.

¹⁰² Jonathan Klaaren 'Chapter 9 - Judicial Remedies' (1999) in Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz, and Stu Woolman (eds) *Constitutional Law of South Africa* (1st ed) Revision Service 5, 9-i.

what he terms two primary remedies in the Final Constitution: the supremacy clause (s 2) and the fundamental rights remedy clause (s 38) – though without clarifying on why he describes the supremacy clause as a remedy. Perhaps he implies the power of the supremacy clause to render any law or conduct contrary to the Constitution to be void and of no effect. Then there is s 172 which deals expressly with powers of the courts in constitutional matters, mentioning remedies which Klaaren identifies as the secondary remedies. Klaaren also identifies what he terms ‘non-judicial’ remedies in the form of s 7(2), which requires the state to ‘respect, protect, promote and fulfil the rights in the Bills of Rights’. Much analysis can be done on why there are two separate clauses specifying certain remedies including the interpretation to be employed in dealing with these clauses, but that is beyond the scope of this section. What is of interest to this research are three points: identifying the unique remedies that exist under the banner of ‘constitutional remedies’, highlighting the place which these remedies occupy among judicial remedies in general, and demonstrating the broad and permissive scheme of these clauses that allow for constitutional damages to be awarded.

Sections 38 and 172(1) each make express mention of a number of constitutional remedies. Section 38 mentions ‘a declaration of rights’, while s 172(1) mentions a declaration of invalidity, including an order limiting the retrospective application of the invalidity declaration, and an order suspending the declaration for any period and on any conditions pending remedial action by the concerned authority. Additionally, s 172(2)(b) allows a court which makes an order of constitutional invalidity the discretion to grant a temporary interdict or other temporary relief to a party, or to adjourn the proceedings pending a decision of the CC on the validity of that act or conduct. While these remedies are specifically listed in the Constitution, s 38 introduces a flexible constitutional remedies regime. The section allows courts to grant ‘appropriate relief’. This means there is an open-ended list of the remedies that can be applied for constitutional breaches and on other constitutional questions. In essence, it leaves the judiciary with the creative discretion to formulate remedies that best address the matters before them, as long as such remedies fit the description of ‘appropriate relief’.¹⁰³ The judiciary is allowed to continue engaging in a case-by-case inquiry into the relief appropriate in the circumstances,¹⁰⁴ and the end sought in all this is adequate justice.

This is confirmed in s 172(1)(b) of the Constitution which allows the court to make ‘any order that is just and equitable’ when deciding a constitutional matter within its power. In addition to declarations of rights and declarations of invalidity, other commonly known and accepted constitutional remedies take the form of reading-down,¹⁰⁵ reading-in, severance and

¹⁰³ See Chapter 1 which briefly discusses the notion of ‘appropriate relief’ and sources cited therein.

¹⁰⁴ Klaaren (note 102) 9-16A.

¹⁰⁵ While reading down is an interpretive tool, it is as much a judicial remedy in the sense that it can be employed as the solution (remedy) to a problem of a law deemed to be infringing the Constitution by way of its excessive reach. Judicial remedies on infringing provisions of the law are not only textual (in the sense that they delete or insert text – that is severance or reading-in), but also conceptual, in the sense that the text is not altered, but the reach of the text is placed within boundaries. As a remedy, reading down ‘involves shrinking the reach of a statute to remove its unconstitutional applications or effects without regard to the explicit statutory language

interdicts. These all qualify as remedies in the broad sense of them being interventions that a court can make to undo or prevent a constitutional infringement. Interdicts turn take the form of mandatory interdicts, prohibitory interdicts, interim interdicts, final interdicts and structural interdicts. Of these, structural interdicts have generated the most debate because of their close intersection with separation of powers and judicial deference. Added to this are constitutional damages, a relatively novel and contested addition in many jurisdictions. The courts are not limited to choosing only one of these remedies per case or issue. Rather, the broad discretion conferred by s 172(1)(b) allows for any combination of remedies that will lead to an 'order that is just and equitable'.¹⁰⁶

Currie and De Waal identify certain factors which guide judges in awarding constitutional remedies, in addition to what has already been said above. These factors are as follows: there is need for effective remedies; a court's order must not only afford effective relief to a successful litigant, but also to all similarly situated people; the need for good government; and the principle of separation of powers that requires the court to show the deference it owes to the legislatures when devising a constitutional remedy.¹⁰⁷ Then there is also the need to consider the identity of the violator; the nature of the violation; the consequences or impact of the violation on the victim; fault and causation; victim responsibility; and the prospects of successful implementation of the court's order when considering the appropriateness of the remedy.¹⁰⁸

The Constitution was not enacted devoid of remedial mechanisms. The clauses and remedies enumerated above are directly derived from the Constitution. This means that they are specially formulated to deal with constitutional problems, although some of these, such as

that would be required to achieve that result' (see for example *R. v. Grant*, [1993] 3 S.C.R. 223; *Canada (Attorney General) v. Federation of Law Societies*, 2015 SCC 7; *R. v. Appulonappa*, 2015 SCC 59 at para 85). The South African Constitutional Court in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at para 23 rendered this rule thus: 'Judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.' When such choice is made, reading down becomes a remedy. I am mindful that some scholars such as Michael Bishop think of it not as a 'true remedy'. Bishops says the following:

'Described in this sense, reading down does not appear as a remedy but as a mandatory rule of interpretation. Unlike "true" remedies, reading down does not follow a finding of invalidity, but avoids such a finding by choosing an interpretation that does not violate the Final Constitution. Is it still accurate to talk about reading down as a "remedy"?'

[Michael Bishop 'Constitutional Remedies' in S Woolman et al (eds) *Constitutional law of South Africa* 2ed (Original Service 06-08) 9-1 to 9-99 at 9-88.]

It is an interesting fact of recognition nonetheless that this discussion is had in a Chapter titled "Constitutional Remedies", and under a subsection on categorisation of remedies.

¹⁰⁶ Ibid. At 9-26 Klaaren cites the case of the National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 1999 (3) SA 173 (C), per Davis J, as having done this through invoking this general remedial discretion to solve a problem relating to a challenge to the constitutionality of s 25(5) of the Aliens Control Act 96 of 1991.

¹⁰⁷ Currie and De Waal (note 96) 183.

¹⁰⁸ Ibid.

declarations of rights, are also found in the common law and the courts remain entitled to apply them.¹⁰⁹

2.3.4 Judicial activism in applying constitutional remedies

The preceding discussion has traced the origins of, and reasons for, the existence of constitutional remedies. What has emerged is that constitutional remedies are significant in directly enforcing the Constitution. The courts find themselves occupying a critical position in this regard: standing firmly between the individual citizen and those wielding power, and being the ultimate arbiter on constitutional rights.¹¹⁰ The important position that constitutional remedies occupy, and the transformation agenda require the bench to have a transformative mind-set in its approach to constitutional remedies. It is to this approach that this section now turns.

When applying constitutional remedies there is need for the courts to 'undo the formalistic and authoritarian legal tradition that was inherited from the apartheid era',¹¹¹ as well as to adopt a judicial policy that overcomes legal formalism.¹¹² This is because the South African transformation project presupposes a unique approach to constitutional adjudication that is aimed at achieving the transformative objects and values of the Constitution.¹¹³ The judiciary must embrace and actively engage in transformative adjudication.¹¹⁴ This is one manifestation of judicial activism.

Judicial activism is an inscriptive term, meaning different things to different people and escaping precise definition.¹¹⁵ Generally however it can be defined as entailing dispensing justice through making decisions that are in line with the temper and tempo of the Constitution, most often arising from inactivity by the executive and the legislature. It stands on the opposite side of judicial restraint and is the use of judicial power to articulate and enforce what is beneficial for the society in general and people at large.¹¹⁶ This implies proactiveness in dealing with particularly problematic issues plaguing the polity, and must necessarily mean 'the active process of implementation of the rule of law, essential for the

¹⁰⁹ Chapter 6 in particular addresses the co-existence of remedies and the principle of subsidiarity.

¹¹⁰ EK Quansah and CM Fombad 'Judicial Activism in Africa: Possible Defence Against Authoritarian Resurgence?' <http://www.ancl-radc.org.za/sites/default/files/Judicial%20Activism%20in%20Africa.pdf>23. (Accessed 05 June 2016) 3.

¹¹¹ Cora Hoexter 'Judicial Policy revisited: Transformative adjudication in administrative law' (2008) 24 *SAJHR* 81, 287 cited in Mhango (note 61) 79.

¹¹² Hoexter *Ibid* 285-7.

¹¹³ Mhango (note 61) 79.

¹¹⁴ Moseneke (note 61) 316-18.

¹¹⁵ See generally Christopher Wolfe *Judicial Activism: Bulwark of Freedom or Precarious Security?* (1997) Lanham, Rowman & Littlefield 1-33 and Quansah and Fombad (note 110) 8.

¹¹⁶ Lipika Sharma 'Judicial Activism in India: Meaning and Implications' http://www.academia.edu/2148025/JUDICIAL_ACTIVISM_IN_INDIA_MEANING_AND_IMPLICATIONS (Accessed 03 June 2016).

preservation of a functional democracy'.¹¹⁷ An activist court would feature judges who are outspoken supporters of the political, social, and economic rights of oppressed peoples, a court committed to the agenda of social justice.¹¹⁸ While the concept of judicial activism is quite controversial, it has an important role to play in entrenching the rule of law and constitutional governance.¹¹⁹ At the core of the concept is the notion that in deciding a case judges, especially those in higher courts, must reform the law if the existing rules or principles appear defective.¹²⁰

Judicial activism is philosophically and theoretically legitimate. Particularly in a society wherein executive malfeasance and legislative shortcomings are common, the courts are seen as the main bearers of the public's vision of constitutional transformation, the best embodiment of the transformative project of the Constitution.¹²¹ Essentially, courts are the last line of defence. This is especially true when many people still live in circumstances below the threshold of constitutional promise. The challenge of the day becomes to make legal justice closer to social justice, and judicial activism can aid the judiciary in its role as a stakeholder in collaborative governance with the other two arms of government.

Judicial activism usually manifests itself in progressive interpretation and application of the Constitution. Oftentimes it is seen as 'damage control' to correct executive or legislative excesses, thus it is only temporary or ad hoc. Notwithstanding, judicial activism has a long and fruitful history of protecting fundamental rights, particularly when dealing with rights of society's most vulnerable and powerless.¹²² This, Swart captures in the following terms: '[I]f one believes in judges as vindicators of a socially progressive Constitution, one would expect judges to be activist and creative in the formulation of constitutional remedies,' especially when assisting society's most vulnerable.¹²³ This is an area of protracted debate in constitutional interpretation theory, but it cannot be denied that globally, human rights and constitutionalism owe much to activist judiciaries. An activist court is far more effective than

¹¹⁷ Manika 'Judicial Activism: A means for Attaining Good Governance' (2006) VII (3) *Nyaya Deep NALSA* 117, 120.

¹¹⁸ Carl Baar 'Social Action Litigation in India: The Operation and Limits of the World's Most Active Judiciary' in Donald W Jackson and C Neal Tate (eds) *Comparative Judicial Review and Public Policy* (1992) who discusses public interest litigation in India.

¹¹⁹ Quansah and Fombad (note 110) 3.

¹²⁰ *Ibid* 3-4.

¹²¹ Vicky Jackson and Mark Tushnet *Comparative Constitutional Law* (3rd ed) (2014) Foundation Press 780 and David Landau 'Political Institutions and Judicial Role in Comparative Constitutional Law' (2010) 51 *Harv Int LJ* 31.

¹²² According to Sharma (note 116), the following are some of the well accepted reasons which compel a court or a judge to be activist: i) near collapse of responsible government; ii) pressure on judiciary to step in aid; iii) judicial enthusiasm to participate in social reform and change; iv) legislative vacuum left open; v) the constitutional scheme; vi) authority to make final declaration as to validity of a law; vii) role of judiciary as guardian of fundamental rights; and viii) public confidence in the judiciary. In the South African context, we are dealing primarily with the role of the judiciary as a guardian of fundamental rights, the rule of law and the maintenance of responsible government.

¹²³ Mia Swart 'Left out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor' (2005) *SAJHR* 215.

a positivist conservative court in protecting the society against legislative adventurism and executive tyranny.¹²⁴

Judicial activism has at its core the notion that judges should not hesitate to go beyond their traditional role as interpreters of the Constitution and laws given to them by others in order to assume a role as independent policy makers or independent 'trustees' on behalf of society.¹²⁵ As Nwabueze notes, 'when the courts seek to confine their own function unduly by a narrow, positivist interpretation of the law, constitutionalism may be endangered.'¹²⁶ Judicial activism is of particular relevance to South Africa in that the transformative constitutional culture requires an approach to adjudication that is an antithesis to a mere formalistic or technical approach to law. Klare criticised a formalistic approach as 'highly structured, technicist, literal and rule-bound' as opposed to the 'policy-oriented and consequentialist' approach that should be favoured.¹²⁷ He argues that:

'The new South Africa has a Constitution with massively egalitarian commitments superimposed on a formalistic legal culture without a strong tradition of substantive political discussion and contestation through the medium of legal discourses. An opening to transformation requires South African lawyers to harmonize judicial method and legal interpretation with the Constitution's substantively progressive aspirations.'¹²⁸

In support of this, Hoexter identifies a formalistic approach as a pre-democratic era-inherited 'handicap' to the judiciary.¹²⁹ A shift from conservative, formalistic and technical adjudication must now be encouraged as a value-laden constitutional dispensation cannot be upheld and advanced by an empty, plain and technical approach to legal adjudication of the past purely positive law tradition.¹³⁰

¹²⁴ Om Dutt 'The role of judiciary in the democratic system of India (judicial activism under the Supreme Court of India) (2012) 2(3) *Golden Research Thoughts* 1.

¹²⁵ Quansah and Fombad (note 113) citing Lino A Graglia 'It's not Constitutionalism, It's Judicial Activism' (1996) 19 *Harvard Journal of Law and Public Policy* 293, 296 where he defines the concept as: 'By judicial activism I mean, quite simply and specifically, the practice by judges of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit.' See also G Jones 'Proper Judicial Activism' (2002) 14 *Regent Univ LR* 141, 143 where the term is defined as 'At its broadest level, judicial activism is any occasion where a court intervenes and strike down a piece of duly enacted legislation.'

¹²⁶ See Benjamin Obi Nwabueze *Judicialism in Commonwealth Africa: The Role of the Courts in Government* (1977) St Martin's Press, New York 286.

¹²⁷ (1998) 14 *SAJHR* 146, 168.

¹²⁸ Klare (note 61) 188.

¹²⁹ Hoexter 'Judicial Policy revisited: Transformative adjudication in administrative law' (2008) 281.

¹³⁰ Chief Justice Pius Langa (Note 61) 357 argues that a conservative or formalist approach to law is inconsistent with a transformative Constitution.

In the Constitutional Court, judicial activism began to slowly manifest in the early years of its existence.¹³¹ One can point to seminal cases such as *S v Makwanyane and Another*;¹³² *Minister of Home Affairs v Fourie*;¹³³ *Government of the Republic of South Africa v Grootboom*;¹³⁴ *Minister of Health v Treatment Action Group (TAC) (No.2)*;¹³⁵ and *Doctors for Life International v Speaker of the National Assembly*¹³⁶ among several others, as apt examples. When dealing with rights such as housing, security of the person, social welfare, right to health, and others of a similar nature, the courts find themselves being the pronouncer of dignity and its opposite, security and vulnerability, and life and death. It is in these kind of cases that judicial activism in the hands of the courts may be very useful and of assistance to redeem and protect vulnerable individuals.

Perhaps one of the best illustrations of judicial activism is to be found in the case of *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* ('TAC case').¹³⁷ Writing as 'The Court',¹³⁸ the strongest way a court can express itself,¹³⁹ the government was ordered to supply the drug nevirapine, a fast-acting and potent antiretroviral drug for use against intrapartum mother-to-child transmission of HIV and not to confine the drug provisions to a few select pilot centres. The court found that the policy of confining nevirapine to research and training sites failed to address the needs of mothers and their new-born children who did not have access to these sites, and was unreasonable under the circumstances. In a comprehensive analysis, the court also found the government approach to be unreasonable on the basis that it violated children's rights in terms of section 28 of the Constitution.¹⁴⁰ The court recognised that while HIV/AIDS was but one of many illnesses that required attention under an overstretched health sector budget, it was the greatest threat to public health in the country,¹⁴¹ and the pandemic was beyond a mere health issue thus requiring the court to intervene.¹⁴² The government contested the order sought, arguing that owing to the separation of powers, the courts should show deference to decisions taken by the executive

¹³¹ This is especially true of public interest litigation cases which were invariably human rights cases. Much of the country's socio-economic rights jurisprudence grew in this manner. For a discussion of public interest litigation jurisprudence in South Africa, see Musa Kika 'Justice for the Poor and Many: Public Litigation in South Africa Through the Cases – 20 Years of Impact Litigation' (2013-2014) 2 *UKZN Student LR* 45. A similar position obtains in India, and for this see: KL Bhatia *Judicial Review and Judicial Activism - A comparative study of India and Germany from an Indian perspective* (1997) New Delhi: Deep & Deep Publications 116.

¹³² 1995 (3) SA 391 (CC).

¹³³ 2006 (1) SA 524 (CC).

¹³⁴ 2001 (1) SA 46 (CC), although the judicial deference displayed by the court in its order was the subject of criticism by Dannie Brand in 'Judicial deference and democracy in socio-economic rights cases in South Africa' (2011) 3 *Stell LR* 614.

¹³⁵ 2002 (5) SA 721 (CC).

¹³⁶ 2006 (6) SA 416 (CC).

¹³⁷ 2002 (5) SA 721 (CC).

¹³⁸ The judgment was written by Chaskalson CJ, Langa DCJ, Ackermann J, Du Plessis AJ, Goldstone J, Kriegler J, Madala J, Ngcobo J, O'Regan J, Sachs J and Skweyiya AJ.

¹³⁹ Edwin Cameron *Justice: A Personal Account* (2014) Tafelberg, Cape Town 192.

¹⁴⁰ Para 78.

¹⁴¹ Para 93.

¹⁴² Para 94.

concerning the formulation of its policies,¹⁴³ and that making policy is the prerogative of the executive and not the courts.¹⁴⁴

The court did acknowledge that '[c]ourts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community' and that '[t]he Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation'.¹⁴⁵ That consideration however did not cause the court to back off. It is important to reproduce the following lengthy quote from the judgment:

'This Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. *This does not mean, however, that courts cannot or should not make orders that have an impact on policy.* ... The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the state to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. *In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.* There is also no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of state can affect their policy and may well have budgetary implications. ...'¹⁴⁶ (My emphasis).

The court went further:

'A dispute concerning socio-economic rights is thus likely to require a court to evaluate state policy and to give judgment on whether or not it is consistent with the Constitution. If it finds that policy is inconsistent with the Constitution, it is obliged in terms of section 172(1) (a) to make a declaration to that effect. But that is not all. Section 38 of the Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant appropriate relief. It has wide powers to do so and in addition to the declaration that it is obliged to make in terms of section 172(1) (a) a court may also make any order that is just and equitable'.¹⁴⁷

This confirmed what the court had found earlier in *Grootboom*¹⁴⁸, that an otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the State's obligations.¹⁴⁹ For this reason, the courts should be prepared to be creative, active and forceful in fashioning and granting 'appropriate relief' that is required to protect

¹⁴³ Para 22.

¹⁴⁴ Paras 96-97.

¹⁴⁵ Para 38.

¹⁴⁶ Paras 98-99. The court cited examples where this has been done by the Constitutional Court before as *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) and *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC), both decisions that altered policy, planning and regulations and had manifest cost implications.

¹⁴⁷ *TAC* (note 137) para 101.

¹⁴⁸ Note 134.

¹⁴⁹ *Ibid* para 42.

and enforce the Constitution. In emphatic terms, the court rejected the separation of powers argument.¹⁵⁰ The court emphasised that what must be made clear is that when it is appropriate to do so, courts may - and if need be, must - use their wide powers to make orders that affect policy as well as legislation.¹⁵¹ By way of comparison the court cited other jurisdictions where courts have granted injunctive remedies, such as in the United States in the cases of *Brown et al v Board of Education of Topeka et al* (Brown I)¹⁵² and *Brown et al v Board of Education of Topeka et al* (Brown II)¹⁵³ and in India, the UK, Canada and Germany.¹⁵⁴

Following the *TAC* case, the government was forced to draft a policy responding to the concerns of the Treatment Action Campaign Committee. It is a fact that had the court not intervened, thousands if not millions of people would have died of AIDS in South Africa. According to Justice Edwin Cameron this case was seminal for two reasons.¹⁵⁵ Firstly, it saved the lives of millions of people, effectively bringing an end to an era of government's denial of the AIDS pandemic and its catastrophic effects.¹⁵⁶ Today, about 2, 5 million South Africans are on antiretroviral treatment,¹⁵⁷ and these policy outcomes are directly attributable to the *TAC* case. Secondly, the decision by President Thabo Mbeki and the government to abide by the order of the court endorsed the rule of law in South Africa and was a seal of political will to abide by the Constitution and the rule of law.

Such is the power of appropriately employed judicial activism. Regrettably, the activism displayed in the earlier CC cases such as *TAC* has not permeated the development of constitutional damages. While it is clear that the courts are clothed with wide powers, they

¹⁵⁰ *TAC* (note 135) para 106. At para 105 the court referred to a case that addressed the same subject, *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC), in which it was said that:

‘Nor would it necessarily be out of place for there to be an appropriate order on the relevant organs of State in South Africa to do whatever may be within their power to remedy the wrong here done to Mohamed by their actions, or to ameliorate at best the consequential prejudice caused to him. To stigmatise such an order as a breach of the separation of State power as between the Executive and the Judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of State and it is our constitutional duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights. ...’

¹⁵¹ *TAC* (note 137) para 113.

¹⁵² 347 US 483 (1954).

¹⁵³ 349 US 294 (1955) para 107.

¹⁵⁴ After discussing the jurisprudence in foreign jurisdictions on the permissible scope of court orders the court said in para 112: ‘... The various courts adopt different attitudes to when such remedies should be granted, but all accept that within the separation of powers they have the power to make use of such remedies – particularly when the State’s obligations are not performed diligently and without delay.’

¹⁵⁵ Address at the University of KwaZulu-Natal, Howard College Law School, 2014. For a detailed account on AIDS denialism in South Africa and the impact of the *TAC* decision, see Edwin Cameron *Witness to Aids* (2005) IB Tauris.

¹⁵⁶ According to the Human Sciences Research Council, 6.4 million people are living with HIV/AIDS in South Africa (I van der Linde ‘HIV/AIDS in South Africa: At last the glass is half full’, 20 June 2013. <http://www.hsrc.ac.za/en/media-briefs/hiv-aids-stis-and-tb/plenary-session-3-20-june-2013-hiv-aids-in-south-africa-at-last-the-glass-is-half-full> (Accessed 31 July 2014)).

¹⁵⁷ See Laura Gonzalez ‘How South Africa’s fight against HIV stacks up’, 3 September 2013. <http://www.health-e.org.za/2013/09/23/south-africas-fight-hiv-stacks/> (Accessed 31 July 2014).

require creativity and courage to impose remedies that may seemingly be offensive and not palatable to the government of the day, yet for the greater good of society. The Chief Justice of Tanzania remarked as follows in describing the crucial responsibility played by judges:

‘Through judicial activism and the delivery of equitable justice, judges fulfil the expectations of the poor, the ignorant and the illiterate. We judges cannot escape from addressing the question that confronts the people in their quest for justice and freedom. They are demanding freedom from want, independence from poverty and destitution, from ignorance and illiteracy. The judges, in interpreting fundamental rights, cannot forget these quests for freedom, the demands of the people for social and economic advancement, which in reality constitutes “social justice”’.¹⁵⁸

Comparatively, the leading activist courts worldwide can be found in the Colombian Constitutional Court and the Indian Supreme Court, with the former being necessitated by dysfunctional constitutional and political systems and institutions. It has been said that the greatest contribution of judicial activism in India has been that of providing a safety valve in a democracy and a hope that justice is not beyond reach.¹⁵⁹ The point to be made is how important judicial activism can be used to create robust and vigilant judiciaries that can step in to cover the gaps in legislative and executive failures to protect constitutional guarantees.

With judicial activism, the note of caution to be sounded is the danger of ‘unrestrained activism’, when a judge injects their personal views into judgments or expresses political preferences which may lead to far-reaching political consequences that could undermine the body politic.¹⁶⁰ Justice Rao of the Indian High Court said the following in this regard:

‘Judicial activism should not result in rewriting of the Constitution or any legislative enactments. Reconciliation of the permanent values embodied in the Constitution with the transitional and changing requirements of the society must not result in undermining the integrity of the Constitution. Any attempt leading to such a consequence would destroy the very structure of the constitutional institutions. Conscious of the primordial fact that the Constitution is the supreme document, the mechanism under which laws must be made and governance of the country carried on, the judiciary must play its activist role. No constitutional value propounded by the judiciary should run counter to any explicitly stated constitutional obligations or rights. In the name of doing justice and taking shelter under institutional self-righteousness, the judiciary cannot act in a manner disturbing the delicate balance between the three wings of the State.’¹⁶¹

Chief Justice Langa correctly put the need for this balancing as follows: ‘Overly activist judges can be as dangerous for the fulfilment of the constitutional dream as unduly passive judges. Both disturb the finely-balanced ordering of society and endanger the ideals of

¹⁵⁸ Department of Justice and Constitutional Development ‘Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State’ (2012) citing ‘The Judiciary in Africa’ 198–19.

¹⁵⁹ SP Sathe ‘Judicial Activism: The Indian Experience’ (2001) 6 *Washington Univ Journal of Law & Policy* 2. In addition, see the following for insights on judicial activism in India: Madhav Khosla ‘Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate’ (2009) 32 *Hastings International and Comparative LR* 55 and Upendra Baxi ‘The Avatars of Judicial Activism: Explorations in the Geography of (In) Justice’ (2001) in Verma and Kusum (eds) *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (2000) Oxford University Press and Indian Law Institute, Delhi 156–209.

¹⁶⁰ Sathe (note 159) 20.

¹⁶¹ See MN Rao ‘Judicial Activism’ to be found at www.geocities.com/bororissa/jud.html?20088.

transformation.¹⁶² Justice Albie Sachs in his judgment in *Prince v President of the Law Society of the Cape of Good Hope*¹⁶³ reflected that '[u]ndue judicial adventurism can be as damaging as excessive judicial timidity.' There can be no denying that judicial activism must function within the limits of the judicial process.¹⁶⁴ That is not necessarily restrictive. The reality is that the *trias politica* scheme anticipates the necessary or unavoidable intrusion of one branch on the terrain of another.¹⁶⁵ The CC in the *First Certification judgment*¹⁶⁶ held that no constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.¹⁶⁷ In any case, there was no intention that the judiciary is to be the passive of the three arms of government, but must 'rise to the challenge of the nation's Constitution, whereby the judicial arm as guardian of the Constitution must shed any form of inferiority complex and take its proper place as a co-ordinate arm of government with the mandate of checking the exercise of both the executive and legislative arms of government.'¹⁶⁸ Thus while the courts cannot prescribe how the executive or the legislature should carry out their functions where policy and political choices are concerned, the courts have a constitutional mandate to prescribe how these branches should operate where such prescriptions are an enforcement of what the Constitution requires. As Humphreys notes, '[e]ven if the courts are not necessarily the best arbiters of social welfare policy, they remain the privileged centre of legitimacy under orthodox rule of law conditions, as the final arbiters of legal interpretation.'¹⁶⁹

Remarkably, judicial activism was endorsed in the Department of Justice and Constitutional Development's 'Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State' released in February 2012. This document pits judicial activism as 'a yardstick for change' and expressly acknowledges that 'judges are perceived as organs of change through their judicial activism',¹⁷⁰ and that this 'requires a judiciary that is progressive in its philosophy and inclination'.¹⁷¹ In that document it was expressed that '[i]n constitutional democracies, the Judiciary has the significant task of safeguarding and protecting the Constitution and its values. [...] It is through exercising their judicial power that judges are perceived as agents of change through their judicial activism.'¹⁷² This recognition by the government is crucial. A healthy measure of judicial activism is necessary and beneficial. Such a healthy dose would strike a balance between being activist

¹⁶² Langa (note 61) 357-8.

¹⁶³ 2002 (2) SA 794 (CC) para 56.

¹⁶⁴ Dutt (note 124).

¹⁶⁵ *Certification judgment* (note 36) para 108-109.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ Nigerian Supreme Court Justice Obakayode Eso, quoted in Gbolahan Gbadamosi 'Eso at 83: Judicial Activism revisited' 27 September 2011, <http://www.nigerianlawguru.com/articles/general/ESO-20at-2083-20judicial-20activism-0revisited.pdf>. (Accessed 23 October 2017).

¹⁶⁹ Humphreys *Theatre of the Rule of Law: Transitional Legal Intervention in Theory and Practice* (2010) 83.

¹⁷⁰ Para 3.3.3-4.

¹⁷¹ *Ibid.*

¹⁷² Para 3.3.2.

and avoiding conservatism. As Quansah and Fombad put it, it must now be recognised and accepted that the effectiveness of the Constitution depends very much on the ability of judges to breathe life and relevance into its provisions to ensure that they are not frozen in time.¹⁷³

2.4 CONCLUSION

The emergence of a new constitutional culture in South Africa has brought a different, more progressive and value-laden understanding of the rule of law, and with it, a more critical role for the courts in the separation of powers arrangement. Constitutionalism that has a transformative agenda is at play and judicial remedies have become all the more important for the maintenance of the rule of law and the attainment of social justice. Consequently, there is a legitimate and fundamental need to develop effective constitutional remedies in order to enforce the Constitution, including constitutional damages. That task is in the hands of the judiciary, and a healthy dose of judicial activism will aid the completion of the task. The next Chapter introduces constitutional damages in detail, differentiating them from common law damages and outlining why they are an important remedy. This will lay the ground for an argument on why the remedy must be fully accepted in South African law, and how courts should go about granting the remedy.

¹⁷³ Quansah and Fombad (note 110) 21.

CHAPTER 3

MONETARY DAMAGES AS A CONSTITUTIONAL REMEDY

‘[P]rivate law damages claims are not always the most appropriate method to enforce constitutional rights’.
Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) para 106

3.1 INTRODUCTION

Having laid down the theoretical foundations of constitutional remedies in general in the previous Chapter, and having located constitutional damages within that framework, this Chapter narrows the focus to constitutional damages. Specifically, this Chapter answers the questions: *What are constitutional damages; what is their significance, and how are they different from common law damages?* The Chapter begins by attempting a definition for constitutional damages, followed by a discussion of the South African literature on the subject. I then proceed to lay out the utility of constitutional damages, and the Chapter closes by looking closely at the differences between constitutional and common law damages.

3.2 DEFINING CONSTITUTIONAL DAMAGES

At an elementary level, constitutional damages are a ‘constitutional rights monetary remedy’.¹ This is when a litigant sues government, its employees and officials for damages based on an infringement or denial of the litigant’s fundamental rights or freedoms.² In South Africa these rights are primarily contained in the Bill of Rights, but also elsewhere in the Constitution, in statutes, in international conventions to which South Africa is party, and at common and customary law.³ These rights serve the primary purpose of protecting the individual’s constitutional rights against unacceptable infringement.

Constitutional damages as a remedy are not predicated on restitutory compensation. The relief serves a greater purpose than that. It is part of the broader constitutional remedies scheme that focuses not only on the harm inflicted on the complainant, but also on the harm to the constitutional goal of creating a just and fair society.⁴ Rather than it being an exercise of attaching a monetary value to each right, constitutional damages make the Bill of Rights relevant, meaningful and tangible to individuals, particularly those frequently denied their rights. This is what the CC in *Sobramoney v Minister of Health (KwaZulu-Natal)*⁵ alluded to

¹ Lisa Tortell *Human Rights Law in Perspective: Monetary Remedies for Breach of Human Rights: A Comparative Study* (2006) Hart Publishing, Oxford 46-55.

² See Kenneth Cooper-Stephenson *Charter Damages Claims* (1990) Calgary: Carswell v, and Sheldon Nahmod, Michael Wells and Thomas Eaton *Constitutional Torts* (1995) Anderson Publishing Company, Cincinnati 1.

³ Section 39(3) of the Constitution provides that ‘The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill’.

⁴ Pierre de Vos and Warren Freedman (eds) *South African Constitutional Law in Context* (2014) Oxford University Press 393.

⁵ 1998 (1) SA 765 (CC).

by saying that unless the material conditions in which people live are changed, legal rights are hollow.⁶ Not only do damages address the individual violation of the claimant(s); they address systemic violations of rights by deterring future violations, and by the very act of a court pronouncing on certain conduct as unconstitutional, and sanctioning the violation in monetary terms. Although damages by nature look back at the infringement that has happened in an attempt to redress the wrong, damages are also awarded to mitigate future loss suffered as a result of the wrongful conduct of an individual or the State.⁷ In this sense, they are forward-looking.⁸

To the student and practitioner of constitutional law, dealing with this remedy entails combining knowledge of damages in general, constitutional law and civil procedure, all combined in a dynamic field of litigation.⁹ Just as with any other common law or constitutional remedy, constitutional damages have both substantive and structural dimensions.¹⁰ Questions of substance deal with the content and utility of the relief, as well as its desirability and applicability. The structural questions on the other hand focus on the nature of the rights and the nature of the violations for which constitutional damages are claimable. From a structural perspective, there are two constituent parts: the elements of the *prima facie* case, encompassing the duty, basis for liability and causation on the one hand, and various immunities and defences that serve to counter claims for damages on the other.¹¹ Together, the substantive and structural considerations form a framework in the granting of constitutional damages.

3.3 SOUTH AFRICAN LITERATURE ON THE TOPIC

The area of constitutional damages in South Africa is scarcely researched. This is not surprising given that judicial remedies in general receive little attention, more so constitutional remedies. Nonetheless there exists a small body of work on constitutional damages in South Africa, and it is this work that this section focuses on. A significant body of work exists on this topic in non-South African jurisdictions, but this section will focus on South African literature in order to understand local scholarly thought on the subject. Work from other jurisdictions is referred to throughout this thesis, and specifically in Chapter 5 where comparative jurisprudence is discussed.

⁶ Ibid para 8.

⁷ De Vos and Freedman (note 4) 409.

⁸ One of the main arguments against constitutional damages is that they do not fit into the description of constitutional remedies as 'forward-looking, community-oriented and structural'. This aspect is discussed in detail in a subsequent chapter, in which it is shown how constitutional damages are also forward-looking and community-oriented. In any case, seeking to confine constitutional damages to these descriptions is now outdated and inhibitive.

⁹ See Nahmod *et al* (note 2) xv.

¹⁰ Ibid 1.

¹¹ Ibid.

On the local front, a few constitutional scholars have written on constitutional damages, albeit with limited discussion. Conversely, a good number of prominent constitutional scholars such as George Devenish have not said a word on the subject. Currie and De Waal in *The Bill of Rights Handbook*¹² address the substantive aspects of constitutional damages extensively, relative to other scholars. They acknowledge that constitutional damages are permissible under the broad and flexible remedies regime of the Constitution, and that nothing in the Constitution prevents a court from awarding damages as a remedy for the violation of fundamental rights.¹³ They identify at least two reasons why constitutional damages are necessary. Firstly, there are certain situations where a declaration of invalidity or an interdict makes little sense and the award of damages is the only form of relief that will 'vindicate the fundamental right and deter future infringements'.¹⁴ Secondly, the possibility of a substantial award of damages may encourage victims to come forward and litigate. This may serve to vindicate the Constitution and deter future infringements.¹⁵ The second reason is particularly interesting given that traditional constitutionalists who oppose constitutional damages would regard this type of relief as having the effect of 'opening the floodgates of litigation' as opposed to achieving deterrence.¹⁶

Correctly so, Currie and De Waal recognise how constitutional damages seemingly depart from the conventional 'principles' guiding constitutional remedies. These 'principles' stipulate that constitutional remedies must be forward-looking, community oriented and structural.¹⁷ Instead, a court faced with a constitutional damages claim is required to 'look back to the past in order to determine how to compensate the victim or even to punish the violator'.¹⁸ Currie and De Waal then proceed to discuss 'general principles' attendant to the relief, primarily relying on the CC case of *Fose v Minister of Safety and Security*.¹⁹ They extract two 'general principles' from this case. First, in cases where the violation of constitutional rights entails the commission of a delict, an award of damages, in addition to those available under the common law, will seldom be available as it will amount to the awarding of punitive damages.²⁰ Indeed, a negative attitude towards 'punitive damages' permeates the majority judgment of the court.²¹ Second, even in circumstances where delictual damages are not available, constitutional damages will not necessarily be awarded for a violation of human rights.²²

¹² Iain Currie and Johan de Waal *The Bill of Rights Handbook* (6th ed) (2013) Juta, Cape Town 200-205.

¹³ *Ibid* 200.

¹⁴ *Ibid*.

¹⁵ *Ibid* 201.

¹⁶ It will be noted later that while the court in the country's leading judicial authority on constitutional damages, *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), did not address the issue of opening the floodgates of litigation, it expressed pessimism as to the capacity of monetary damages to deter future violations.

¹⁷ Currie and De Waal (note 12) 200.

¹⁸ *Ibid*.

¹⁹ 1997 (3) SA 786 (CC).

²⁰ Currie and De Waal (note 12) 202.

²¹ *Ibid*.

²² *Ibid*.

This is pessimism derived directly from *Fose* where the court ‘blows hot and cold’²³ on the issue, approbating and reprobating at the same time. The court states that there is no reason why appropriate relief cannot include constitutional damages, then expresses doubt as to when exactly these damages would be appropriate. Following this line of the CC in *Fose*, Currie and De Waal’s inclinations are that one must rather seek common law remedies first, which the court would develop to cover constitutional breaches if needs be. Only when no common law remedies are applicable should one then resort to constitutional damages. Thus, they favour the indirect application approach to constitutional damages.²⁴ The choice, they say, is essentially one between awarding constitutional damages to individual litigants, and structural relief aimed at addressing the systemic problem that caused the infringements.²⁵ The former, they argue, may appear to be an effective short-term remedy from a litigant’s perspective, but it does not sit well with the purpose of constitutional relief, which is forward-looking and community-oriented.²⁶

Currie and De Waal acknowledge however that the jurisprudence of the CC has not been particularly encouraging.²⁷ Despite the difficulties surrounding the relief, Currie and De Waal opine that there is room for the development of damages as a remedy ‘for certain violations of fundamental rights’.²⁸ As to what these ‘certain violations’ are, the scholars are silent. This is a dilemma that even the courts themselves are faced with, a dilemma perpetuated by the courts’ failure to define the ‘certain violations’. This is a question for this thesis to address.

De Vos and Freedman *et al*²⁹ list constitutional damages as one of the constitutional remedies available in South Africa. As with Currie and De Waal, the scholars discuss constitutional damages through the lens of *Fose*. They identify two ‘principles’ from *Fose* similar to the ones identified by Currie and De Waal above. De Vos and Freedman go on to cite the case of *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd*³⁰ where constitutional damages were granted by the CC, but express the view that the *Modderklip* case is certainly not authority for the proposition that constitutional damages are always available.³¹ Their premise for this proposition is *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*³² where constitutional damages were not granted under what the scholars consider to be quite similar circumstances as in *Modderklip*. I would argue, however, that in as much as both these cases deal with eviction of unlawful occupiers from private land, the facts of the cases are too materially divorced from each other for any accurate comparison to be drawn in a discussion of

²³ Ibid.

²⁴ Ibid 203.

²⁵ Ibid 205.

²⁶ Ibid.

²⁷ Ibid 200.

²⁸ Ibid.

²⁹ De Vos and Freedman (note 4) 409-412.

³⁰ 2005 (5) SA 3 (CC).

³¹ De Vos and Freedman (note 4) 412.

³² 2012 (2) SA 104 (CC).

appropriate remedies. For that reason, De Vos and Freedman's argument is to be faulted. Finally, De Vos and Freedman refer with approval to Currie and De Waal's suggested reasons as to why constitutional damages are necessary.³³

Hoexter enters the debate with her work *Administrative Law in South Africa*.³⁴ She starts by identifying and examining s 38 of the Constitution as giving scope for the award of 'various sorts of damages' as 'appropriate relief'.³⁵ She singles out three types of damages that can be awarded under this section: delictual or compensatory damages, constitutional damages and punitive or exemplary damages.³⁶ She ascribes to constitutional damages the purpose of generally promoting respect for human rights and deterring future violations, and to punitive damages the purpose of punishing public officials for their flagrant disregard of rights.³⁷ In her view, the CC has adopted a cautious approach to damages that goes beyond compensation, and she refers specifically to *Fose* for this assertion.³⁸ Hoexter also refers to the administrative justice case of *Olitzki Property Holding v State Tender Board*,³⁹ a case that was heard before the coming into force of the Promotion of Administrative Justice Act (PAJA).⁴⁰ In this particular case, the SCA displayed caution when it was asked to award damages to the plaintiff arising out of the breach of administrative justice rights. The damages sought were in the form of profits the plaintiff would have accrued had it had been awarded the tender in question. Similar arguments against constitutional damages as were raised in *Fose* were raised by the SCA in this case. Hoexter proceeds to refer to another SCA case where damages were awarded: *Transnet Ltd v Sechaba Photoscan (Pty) Ltd*.⁴¹ In that case damages were awarded for a fraudulent tender process. Similarly, Hoexter also mentions *Modderklip* as a case in which constitutional damages were awarded for want of an effective remedy.⁴²

Hoexter then turns to compensation under the PAJA. She identifies s 8(1)(c)(ii)(bb) which states that 'in exceptional cases' the court may direct 'the administrator or any other party to the proceeding to pay compensation'.⁴³ Hoexter raises the concern that what makes a case 'exceptional' is not explained, and it is not entirely clear whether harm or loss is a requirement and to what extent. She speculates that other features that may be thought to justify an award for compensation are inexcusable incompetence on the part of the administrator, and dishonesty.⁴⁴ She discusses *Jayiya v MEC for Welfare, Eastern Cape*,⁴⁵ and particularly how the court rejected the request to grant constitutional damages for administrative justice

³³ De Vos and Freedman (note 4) 412.

³⁴ Cora Hoexter *Administrative Law in South Africa* (2nd ed) (2012) Juta, Cape Town 568-574.

³⁵ *Ibid* 568.

³⁶ *Ibid*.

³⁷ *Ibid*.

³⁸ Hoexter (note 34) 568.

³⁹ 2001 (3) SA 1247 (SCA).

⁴⁰ Act 3 of 2000.

⁴¹ 2005 (1) SA 299 (SCA).

⁴² Hoexter (note 34) 569.

⁴³ *Ibid* 570.

⁴⁴ *Ibid*.

⁴⁵ 2004 (2) SA 611 (SCA).

breaches. Hoexter ends with a discussion of *MEC for the Department of Welfare v Kate*.⁴⁶ The court in this instance was critical of the approach in *Jayiya*, and awarded constitutional damages.

Klaaren, in his discussion of constitutional remedies,⁴⁷ starts by identifying other jurisdictions where constitutional damages have been granted, and refers to India, Ireland, the United States, Trinidad and Tobago and Canada. At the time of writing, Klaaren noted that although the Canadian High Courts had granted constitutional damages, known as Charter damages, the Canadian Supreme Court was yet to do so. This has since changed as the Canadian Supreme Court has awarded Charter damages in *Vancouver (City) v. Ward*⁴⁸ and subsequent cases. Klaaren proceeds to look at the nature of the remedy itself. He finds that while the form of the action is generally parallel, the standards appropriate for awards of damages under the common law may not be appropriate for constitutional damages claims, thus considerably shifting South African law on damages.⁴⁹

As with all other scholars, Klaaren traces the origins of the remedy in South African law to *Fose*.⁵⁰ In highlighting the pessimism of the court towards punitive damages, Klaaren finds that while the action was unsuccessful in *Fose*, the court held that damages could be appropriate relief.⁵¹ Klaaren goes on to highlight concerns raised by the court. These are the need to prevent overcompensating a plaintiff, more so coming as an expense to the State;⁵² the argument that deterrence would be ineffective; and the desire to leave the field of determining damages to Parliament.⁵³ Following the judgment of *Fose*, Klaaren finds that there appears to be three routes to judicially granted constitutional damages. The first of these, he says, would be where the common law does not provide an adequate compensatory remedy.⁵⁴ The tension here will be whether relief should be confined to remedies of general validity, such as invalidity or severance, or should include appropriate individual relief, such as damages.⁵⁵ An instance where the common law would not provide adequate compensation is where the Constitution protects an interest that the common law does not recognise.⁵⁶ With these claims, he proceeds, the choice will be between developing the common law and invoking the Constitution directly to award damages.⁵⁷ He argues that the

⁴⁶ 2006 (4) SA 478 (SCA).

⁴⁷ Jonathan Klaaren 'Judicial Remedies' in Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz, and Stu Woolman (eds) *Constitutional Law of South Africa* (1st ed) (1999) Revision Service 5.

⁴⁸ 2010 SCC 27. This and other cases from other jurisdictions are discussed in detail in Chapter 5.

⁴⁹ Klaaren (note 47) 9-9.

⁵⁰ Ibid 9-10.

⁵¹ Ibid.

⁵² Ibid.

⁵³ The latter is premised on the notion that as damages are an expense to the State, the legislature is best placed to decide on this remedy i.e. a separation of powers question. This was raised by Didcott J in his concurring judgment at para 85.

⁵⁴ Klaaren (note 47) 9-12.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

common law cannot be developed to fit every situation before the courts, stating that '[w]hile the *Fose* decision views the South African common law as flexible enough to be stretched to provide compensation in most cases, it cannot be bent and pulled out of all recognition.'⁵⁸ He makes a strong case for the existence of constitutional damages in this submission.

The second route to judicially granted constitutional damages, as identified by Klaaren, is the pursuit of an award for punitive damages. Taking a lead from the CC's argument in *Fose* that punitive damages would serve no deterrent effect,⁵⁹ Klaaren argues that instances where punitive damages would be awarded would be those circumstances where they would be likely to have deterrent effect.⁶⁰ Notably, Klaaren further takes a cue from Kriegler J's concurrence in the judgment where he emphasized that punitive damages were inappropriate in *Fose* because the problem (the allegation of a pattern of police torture) was widespread.⁶¹ Klaaren, in this regard, argues that by extension, cases where constitutional violations were identifiable and discrete and where the deterrent effect would be felt by the specific likely wrongdoers would be those matters in which an argument for punitive damages might be made.⁶² The third route he identifies is to seek nominal or *per se* damages. As with punitive damages, the presumption against this category of damages is a rebuttable one where no compensation has been awarded in the matter.⁶³ Such awards would have little monetary value but would serve to vindicate the constitutional rights at issue, such as in political rights cases.

Following his assessment of *Fose*, Klaaren concludes that a litigant seeking to remedy a practice of persistent torture is well advised to seek relief in the form of an interdict rather than an award of damages.⁶⁴ Klaaren however ends his discussion by endorsing Didcott J's views that Parliament should rather deal with the issue of constitutional damages as opposed to the courts. He argues that Parliament must pass legislation laying down general guidelines on the topic.⁶⁵ Questions of institutional implementation and funding, he argues, are best addressed by a legislature. For this reason, he proceeds, courts should not be eager to allow constitutional damages claims although in appropriate cases a court may order damages without legislative authorisation.⁶⁶ Klaaren does not spell out what those 'appropriate cases' would be.

⁵⁸ Ibid.

⁵⁹ Para 71 (Ackermann J); see also para 65, where Ackermann J provides a lengthy list of arguments against punitive damages.

⁶⁰ Klaaren (note 47) 9-12.

⁶¹ Para 103 (Kriegler J concurring).

⁶² Klaaren (note 47) 9-12.

⁶³ Para 68.

⁶⁴ Klaaren (note 47) 9-11.

⁶⁵ Ibid 9-13.

⁶⁶ Ibid.

Funnah and Sibanda, in their comment on *Fose*,⁶⁷ explore punitive damages specifically, and consider how they have been dealt with by South African courts. They observe that the position at present seems to be that, in general, punitive damages as a distinct and independent category of damages may not be recovered.⁶⁸ They then present *Fose*'s conclusion as follows: 'After much consideration and survey on the issue, including the examination of pre-1994 era cases on the subject of punitive damages, Ackermann J held that there was no reason, in principle, to award punitive constitutional damages as "appropriate relief" for constitutional violations.'⁶⁹ They quote Ackermann J's reasoning in the following terms: 'I can see no reason at all for perpetuating an historical anomaly which fails to observe the distinctive functions of the civil and the criminal law and which sanctions the imposition of a penalty without any of the safeguards afforded in a criminal prosecution'.⁷⁰ In that sense, Funnah and Sibanda view Ackerman J as having taken a purist approach to the civil and criminal law divide. They argue that his rejection of punitive damages, based on the delineation between the civil and criminal laws derives from the old English position, pigeon-holed as the function of punishment in close association with criminal law.⁷¹ I agree with this observation in view of the fact that public law litigation in general does not necessarily lend itself to clear categorisation under either criminal or civil law. Very often it is cross-cutting. So too are the remedies. Hence we have, for instance, committal for contempt of court as a punitive civil remedy.

What Funnah and Sibanda seem to suggest however is that constitutional damages are merely punitive and nothing more, and their analysis is premised on the understanding that when we speak of constitutional damages, we are speaking of punitive damages. They take the erroneous view that constitutional damages are 'punitive constitutional damages'. No doubt, they hold this view following *Fose* where the court also seemed to view constitutional damages solely as 'punitive constitutional damages' as opposed to a remedy that can serve other purposes unrelated to punishment. Interestingly, despite their narrow view of constitutional damages as punitive damages, the scholars see no merit in the CC's restrictive approach:

'The South African Constitution enjoins the respect and protection of fundamental rights and freedoms. In our view, when such rights are threatened and violated, punitive damages could make more sense in vindicating them. Unfortunately, the Constitutional Court has branded punitive constitutional damages as not appropriate, and saw no reason to introduce such damages. Interestingly, the Court gave no convincing reason for its stance in this regard except for the inadequately and unconvincingly substantiated argument of due process and fair trial guarantees, double jeopardy and, the possible exploitation of limited state resources.'⁷² (Footnotes omitted)

⁶⁷ Abdul Karim Funnah and Omphemetse Sibanda 'Towards a Selective Awarding of Punitive Damages Awards in South Africa? A Comment on *Fose v The Minister of Safety and Security*' (2008) 48(2) *Codicillus* 36.

⁶⁸ *Ibid* 38.

⁶⁹ Funnah and Sibanda (note 67) 38 citing *Fose* (supra) para 70.

⁷⁰ See *Fose* (note 19) para 70.

⁷¹ Funnah and Sibanda (note 67) 39.

⁷² *Ibid* 40-41.

It is their view that punitive constitutional damages could also vindicate rights. Funnah and Sibanda then proceed to reject the other policy consideration used by the CC to deny damages, being the ripple effect damages awarded against the State can have on the country's 'economic and social reform' agenda and on taxpayers' money.⁷³ They dismiss this argument as 'ironic' in light of the manner in which the government ineffectively uses its resources. 'In any event', they argue, 'when did the government start giving a damn about taxpayers' plight?'⁷⁴

Similarly, they go on to discuss the rejection of the remedy based on the deterrence argument.⁷⁵ The CC expressed doubt as to the efficacy of punitive damages as a deterrent. Didcott J argued that such deterrence could in fact be achieved with private firms.⁷⁶ Funnah and Sibanda pick on Didcott J's view that punitive damages can easily be justified against big corporations and argue that this idea reflects some socio-economic bias of awarding damages against those who can pay like big private corporations.⁷⁷ This, they argue, does not give credence to the court's doubt of the efficacy of punitive damages.⁷⁸ Although deterring individuals is fundamentally different from deterring firms, they argue, what is important is that punitive damages are most likely to discourage the behavior or the conduct in question.⁷⁹

Unlike other scholars above, Funnah and Sibanda attempt an approach to quantum. They suggest that there must be case-specific amount ceilings.⁸⁰ They argue that some standard should be introduced to determine the proper amount of punitive damages, and setting a limit on the amount of damages in certain cases. According to them, putting ceilings on the amounts to be awarded has become an important feature of punitive damages reforms in the United States. They find examples in the states of Alabama and Alaska.⁸¹ This is an interesting suggestion as to the calculation of quantum, a novel suggestion in South African jurisprudence. The merits of this submission are explored in Chapter 8 where quantum is discussed in detail. Suffice it to mention at this stage that this suggestion raises more problems than solutions.

⁷³ *Fose* (note 19) para 71.

⁷⁴ *Ibid* para 87.

⁷⁵ Funnah and Sibanda (note 67) 43.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*.

⁷⁸ *Ibid*.

⁷⁹ *Ibid*.

⁸⁰ *Ibid* 48-49.

⁸¹ *Ibid*. They state that in Alabama the limitation of the amount of damages depends on the nature of the harm - whether the harm is physical or non-physical, and on the type of the defendant and the defendant's business' net worth. Funnah and Sibanda in this regard refer to American Tort Reform Association 'Punitive Damages Reform: SB 137' (1999); Alaska Code § 6-11-21 and David Gold 'Trial by Jury and Statutory Caps on Punitive Damages: Lessons for Alabama from Ohio's Constitutional History' (2001) 31(2) *Cumberland LR* 287, where the supposed limits are discussed. Similarly, they state that the State of Alaska limits the amount of damages to be awarded in terms of the nature of the wrong and of the defendant. For this one, the authors refer to American Tort Reform Association 'Punitive Damages Reform: HB 58' (1997) and several comparative cases from the State of Florida, Colorado and Iowa.

Former Constitutional Court Justice Kate O'Regan also enters the debate.⁸² According to her, one of the challenging aspects of the country's constitutional jurisprudence is the extent to which damages are appropriate relief for the vindication of constitutional rights.⁸³ As with other scholars she starts with the *Fose* judgment. Correctly so, she characterises Mr Fose's claim as one of 'constitutional damages which included punitive damages.'⁸⁴ This is the correct position, as constitutional damages have been misconstrued as punitive damages many a times. Punitive damages are merely an element or a part of constitutional damages, but are themselves not defining of what constitutional damages are. O'Regan's position is reflective of the broad thinking of the CC when it comes to constitutional damages. She holds the opinion that '[t]he South African law of delict provides suitable remedies for the breach of constitutional rights and requires relatively little adjustment to meet this purpose.'⁸⁵ In most cases therefore, she argues, where a constitutional right has been infringed and loss or harm occasioned, a claim for damages will lie under one or other delictual action.⁸⁶ Unsurprisingly, she finds it difficult to determine when it is appropriate for damages sounding in money to be awarded for the breach of constitutional rights.⁸⁷

O'Regan discusses a number of cases where delictual damages have been claimed against the State for dereliction of duty and violation of rights. Quite contradictory, however, is her identification of the dictum in *Minister of Safety and Security v Van Duivenboden*⁸⁸ where the SCA demonstrated how it is not always appropriate for delictual damages to be used to remedy constitutional rights breaches:

'Where the conduct of the state, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights in my view the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognized in any particular case. *The norm of accountability, however, need not always translate constitutional duties into private law duties enforceable by an action for damages, for there will be cases in which other appropriate remedies are available for holding the state to account.* Where the conduct in issue relates to questions of state policy, or where it affects a broad and indeterminate segment of society, constitutional accountability might at times be appropriately secured through the political process, or through one of the variety of other remedies that the courts are capable of granting.'⁸⁹ (My emphasis)

This shows that we cannot always conflate delictual and constitutional damages, especially in view of the different utilities of each of these remedies. Further, it shows how delictual damages will not always apply where there are legitimate concerns to enforce public accountability in the interests of constitutional vindication.

⁸² Kate O'Regan 'Fashioning constitutional remedies in South Africa: some reflections' (2011) April *Advocate* 41.

⁸³ *Ibid* 43.

⁸⁴ *Ibid*.

⁸⁵ *Ibid*.

⁸⁶ *Ibid*.

⁸⁷ *Ibid*.

⁸⁸ 2002 (6) SA 431 (SCA).

⁸⁹ *Ibid* para 21.

O'Regan concludes on a similar note to Klaaren by opining that it remains a difficult question whether an infringement of a particular constitutional right, or of a statutory obligation should give rise to a claim for constitutional damages, but 'an express statutory provision providing for damages will put the matter beyond doubt'.⁹⁰ She is of the view that the legislature should intervene when it comes to constitutional damages.

A much more positive outlook comes from Swart.⁹¹ Swart tackles judicial remedies in socio-economic rights litigation and argues that there is reason to be critical of the relief granted in the CC's socio-economic jurisprudence. She notes that the orders granted in cases such as *Grootboom*⁹² have actually not resulted in any change to the situation of poor litigants. She thus argues that the CC should be concerned with remedies that assist in realising socio-economic rights, primarily affirmative remedies including declarations, damages, reading-in, mandatory interdicts and statutory interdicts.⁹³ Of these, she argues, 'constitutional damages and structural interdicts are particularly suitable as remedies that would increase government accountability.'⁹⁴ Swart echoes the growing chorus that when it comes particularly to structural interdicts and damages, the CC's jurisprudence has not been too encouraging, and she argues that the High Courts instead have been more adventurous in the remedies they grant, and the CC should follow suit.⁹⁵

As to the source of the court's power to fashion remedies, Swart traces this back to the fact that superior courts have wide powers to fashion new remedies. She identifies the empowering provisions as being those that enjoin the courts to uphold the rights of all and to ensure compliance with constitutional values by granting 'appropriate relief',⁹⁶ 'just and equitable' orders⁹⁷ and by developing the common law 'taking into account the interests of justice.'⁹⁸ In addition, the supremacy clause of the Constitution provides that the obligations imposed by the Constitution must be fulfilled.⁹⁹ Not only are courts empowered to fashion remedies, she argues, they have a constitutional mandate and obligation to develop appropriate remedies if existing conventional remedies fall short.¹⁰⁰

⁹⁰ O'Regan (note 82) 44.

⁹¹ Mia Swart 'Left out in the Cold? Crafting Constitutional Remedies for the poorest of the Poor' (2005) *SAJHR* 215.

⁹² *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

⁹³ Swart (note 91) 218-19. Remedies that would not qualify as affirmative remedies, she says, would be remedies described by Hogg as 'defensive remedies' such as declarations of invalidity, reading down, severance, suspension of orders of invalidity, exclusion of evidence, etc. See Peter Hogg *Constitutional Law of Canada* (3rd ed) (1992) 2, 909- 910.

⁹⁴ Swart (note 91) 215.

⁹⁵ *Ibid.*

⁹⁶ Section 38 of the Constitution.

⁹⁷ Section 172 (1) (a) of the Constitution.

⁹⁸ See *Kate v MEC, Department of Welfare, Eastern Cape* 2005 (1) SA 141 (SE) para 16.

⁹⁹ Section 2 of the Constitution.

¹⁰⁰ Swart (note 91) 216.

Swart is not oblivious to the transformative nature of constitutional remedies. She explicitly acknowledges that the development of constitutional remedies for which she is advocating is essentially an act of developing remedies for the poorest of the poor, the people described in the *Grootboom* judgment as ‘those most desperate’.¹⁰¹ Due to the deep-seated and large-scale systemic conditions of poverty in which almost fifty per cent of the South African population lives, she says, the South African debate surrounding remedies should focus first and foremost on relieving desperate poverty.¹⁰²

Swart acknowledges the scepticism that has permeated constitutional damages in the country, specifically referring to Klaaren and his argument that courts should not be eager to grant damages, and should instead leave it to the legislature to pass legislation since it is a matter involving institutional funding and implementation.¹⁰³ In spite of this scepticism by other scholars, Swart is positive and argues that ‘constitutional damages could be an effective remedy in appropriate circumstances and that the courts should not shy away from awarding damages.’¹⁰⁴ In doing this, she addresses the argument of avoidance with reference to the *Pharmaceutical Manufacturers*¹⁰⁵ judgment, an argument that is raised by antagonists of constitutional damages.¹⁰⁶ She argues that after the *Pharmaceutical Manufacturers* judgment the principle of constitutional avoidance and indirect application of the Bill of Rights may no longer be appropriate in the area of constitutional remedies. Instead, she holds the firm belief that ‘[p]erhaps the time has come to resort directly to the Bill of Rights in claims for damages’.¹⁰⁷

Turning to Kriegler J and Ackermann J’s approach in *Fose*, Swart characterises the decision as ‘unnecessarily conservative’.¹⁰⁸ She takes to task Kriegler J’s statement that punitive damages were inappropriate in this case because the problem of police torture was widespread and the damages would therefore not have a deterrent effect. She argues that deterrence is but one of the functions of an award of damages,¹⁰⁹ and that damages also have a compensatory and vindictory function.¹¹⁰ Swart also summarily discusses *Modderklip*,¹¹¹ *Jayiya*,¹¹² and

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid 225, citing Jonathan Klaaren ‘Judicial Remedies’ in S Woolman *et al* (eds) *Constitutional Law of South Africa* (2nd ed) (2004) 9-13.

¹⁰⁴ Swart (note 91) 225.

¹⁰⁵ *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

¹⁰⁶ The argument of avoidance is discussed in Chapter 6 below.

¹⁰⁷ Dennis Davis ‘Socio Economic Rights in South Africa: The Record After Ten Years: Towards “Deference Lite”?’ (2006) 22 *SAJHR* 301 writes that the structural injunction is not intended to substitute the judiciary for the administration ‘but to relieve the judge from framing relief in a way which would constitute democracy by means of judicial decree’.

¹⁰⁸ Swart (note 91) 225.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ *Supra*.

¹¹² *Supra*.

Kate,¹¹³ and how these cases tackled the question of damages, and dismisses the applicability of sovereign immunity as a defence available to the state. Her basis for this is that the idea of sovereign immunity in constitutional litigation is not only foreign, but even in those countries such as Canada and America where immunity exists the defence has been held to be inapplicable to constitutional damages.¹¹⁴

Importantly, Swart attempts to answer the question of whether constitutional remedies can be granted in administrative law cases.¹¹⁵ She refers to Hoexter who writes that after the decision of *Pharmaceutical Manufacturers*¹¹⁶ it is clear that there is only one system of law, and that this system is shaped by the Constitution. In Hoexter's view, this case establishes that all cases dealing with control of public power are constitutional cases, even if they are not cases falling within the Bill of Rights.¹¹⁷ To her, this means that cases brought under the PAJA can also be classified as 'constitutional' even though they may involve the indirect application of the Constitution to the Act. She points out that there are two reasons for this: not only does the Act 'give effect to' s 33 of the Constitution but it is also manifestly concerned with the control of public power. Thus in light of the *Pharmaceutical Manufacturers* case, the phrase 'appropriate relief' in s 38 of the Constitution must be read as encompassing the remedies provided by s 8 of PAJA. Similar to the remedies section in the Constitution, s 8 allows for a tribunal to grant 'any order that is just and equitable' and lists a number of specific remedies.¹¹⁸ Swart sees the idea of unity of the common law and constitutional law and of statutory law and the Constitution¹¹⁹ as attractive not only for the elegance and harmony it brings to the law but also for its consistency with the constitutional imperatives of supremacy and legality.¹²⁰ Given the wide scope and nature of the remedies in PAJA, she thinks it difficult to see how awarding a constitutional remedy would be irreconcilable with the wording of s 8(2).¹²¹

Swart concludes on a very hopeful and positive note:

'Now that the justiciability of socio-economic rights has gained acceptance and courts have gradually become less reluctant to intrude upon what has traditionally been understood as government terrain, the socio-economic debate should shift to the more practical question of crafting suitable remedies. *The notion that remedies such as damages are not ideal constitutional remedies because constitutional*

¹¹³ *MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA).

¹¹⁴ Swart (note 91) 226.

¹¹⁵ *Ibid* 237.

¹¹⁶ Note 105.

¹¹⁷ Cora Hoexter *The New Constitutional & Administrative Law* Vol 2 (2002) 278.

¹¹⁸ *Ibid* 280.

¹¹⁹ *Pharmaceutical Manufacturers* (note 105) para 50: 'There is only one system of law. It is shaped by the Constitution which, is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control. What would have been *ultra vires* under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality'.

¹²⁰ Swart (note 91) 238.

¹²¹ *Ibid*.

*remedies should be forward-looking and community oriented rather than individualistic and corrective is outdated.*¹²² (My emphasis)

One of the most substantial pieces of work on constitutional remedies generally is by Bishop.¹²³ As with Swart, Bishop advances a liberal and progressive approach to constitutional damages, similar to the position taken by the SCA in *Kate*. In his book Chapter, Bishop devotes some pages to constitutional damages. There is recognition that in addition to its preference for private remedies rather than constitutional remedies, the Constitutional Court has also expressed a clear preference for indirect application rather than direct application of the Bill of Rights to the common law.¹²⁴ Bishop then makes an interesting take that categorises constitutional damages into two: direct and indirect constitutional damages:

‘There are two categories of damages in constitutional matters. The first category consists of damages awarded in terms of the common law or a statute that gives effect to a constitutional right. I call these “indirect constitutional damages” because they do not flow directly from the Final Constitution. The second category — “direct constitutional damages” — flow from the Final Constitution alone. As I explain in more detail below, courts will, where possible, award indirect, rather than direct damages. Indeed, the courts will do so even if the award of indirect damages necessitates a development or re-interpretation of the law at issue.’¹²⁵

Both, he opinions, are rooted in the Constitution. The Constitution is not just the source of direct constitutional remedies; it also underwrites the creation and the award of indirect constitutional damages. Indirect constitution damages sourced in the Constitution generally occur where the Final Constitution is used to develop the common law or interpret a statute to provide a damages claim where no such claim was previously available. For the latter, Bishop cites *Carmichele v Minister of Safety and Security*¹²⁶ as the case that set the precedent for this kind of development.¹²⁷ It appears that what Bishop calls ‘indirect constitutional damages’ is what some have sought to term ‘constitutional delict’, a term which Neethling and Potgieter conclude that should rather be avoided for conceptual clarity.¹²⁸

Naturally, Bishop discusses *Fose*, stating that *Fose* does not prevent litigants from bringing private claims and constitutional claims together when the relief they seek goes beyond what private law can provide.¹²⁹ *Fose*, as he understands it, stands for the proposition that ‘[i]f a private remedy partially vindicates the constitutional right, then a litigant must rely on the private law for that part of the relief and may also rely on constitutional law for the relief

¹²² Ibid 239 citing Currie and De Waal *The New Constitutional and Administrative Law* Vol 1 (2001) 288.

¹²³ Michael Bishop ‘Constitutional Remedies’ in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed (Original Service 06-08) 9-1.

¹²⁴ Ibid 9-82.

¹²⁵ Ibid 9-151.

¹²⁶ 2001 (4) SA 938 (CC).

¹²⁷ Bishop (note 123) 9-152.

¹²⁸ Johann Neethling and Johan M Potgieter *Law of Delict* (2010) Lexis Nexis, Durban at 21.

¹²⁹ Bishop (note 123) 9-80.

necessary to vindicate the rest of the right'.¹³⁰ But for it to reflect practical application, he believes that principle warrants a slight modification as follows:

'If a private remedy fully vindicates a constitutional right, the litigant must rely on the private remedy. If the private remedy only partially vindicates the right, a litigant is entitled, but not obliged, to rely solely on constitutional law for all aspects of her relief. If she does so, the existence of a remedy under private law should not be a bar for granting the same relief under constitutional law'.¹³¹

According to him, 'this modest modification' reflects the position taken by the Supreme Court of Appeal in *Kate*.¹³² The *Kate* position departs slightly from that in *Fose*, where the rest of the judgment in *Fose* made quite clear that, generally constitutional damages will be inappropriate where the existing law — as developed and interpreted in light of the Constitution — provides a remedy that fully vindicates the right. But according to Bishop, the Supreme Court of Appeal in *Kate* has taken a view that permits direct damages in a somewhat wider set of circumstances.¹³³ The reasoning in *Kate*, he believes, is far superior to that proffered in *Fose*. This is because, while the vast majority of cases can be adequately addressed through indirect damages, 'a litigant should not have to fail at claiming indirect damages or prove that they will be ineffective to qualify for direct relief. Whether a court should award direct or indirect damages should depend on all the facts of the matter. The fact that a person framed a claim in terms of direct relief rather than indirect relief should not be used to deny them any relief at all. For what is ultimately at stake is the vindication of a constitutional right'.¹³⁴ Practically, Bishop's idea seems to be that what matters is the vindication that is sought, as opposed to the form in which the claim has been out. A claim should be supported on the facts, and it is those facts that would determine whether a constitutional damages claim is meritorious, or a delictual claim would have been more appropriate. He however sounds a caution:

'Although not a closed list, the Supreme Court of Appeal listed two factors that prompted it to grant direct constitutional damages. First, the constitutional infirmity was a direct breach of a specific normative right, not "merely a deviation from a constitutionally normative standard". Second, the breach of the right was endemic and required a clear assertion of the importance of the constitutional — as opposed to only the private — right. The first justification goes further than my revision suggests because it would permit a constitutional remedy where the reliance is on a specific right, even if the private law completely vindicates the right. I am not sure if Nugent JA intended for the first justification alone to be a sufficient condition. One good reason to reject that proposition is that it could lead to the development of parallel systems of law. For example, there could be one set of rules for victims of police brutality who relied on the law of delict and another for those who based their claim on a direct violation of FC s 12. That is undesirable. In my view, the first reason — a direct violation — is a necessary but insufficient justification for a constitutional remedy. It will need to be supplemented by other factors, such as the systemic breach at issue in *Kate*'.¹³⁵ (footnotes omitted)

¹³⁰ Bishop (note 123) 9-81.

¹³¹ *Ibid* 9-81.

¹³² *Ibid* 9-81.

¹³³ *Ibid* 9-156.

¹³⁴ *Ibid* 9-157.

¹³⁵ *Ibid* 9-82.

As to how a remedy that is awarded to an individual litigant as an ‘individual remedy’ could remedy systemic violation, Bishop had his to say:

‘I should stress again that individual remedies are not strictly separable from systemic remedies or remedies following findings of invalidity. All three types of remedies are rooted in similar textual sources, offer analogous forms of relief and often reinforce one another. In sum, all three remedies are interrelated and must be as part of the same basket of remedies available to a court. The three main remedies assayed under this heading — damages, declarations of rights and interdicts — are all available in most cases and the primary role of a court is to choose between them.’¹³⁶

In addition, Bishop says, ‘No formula or algorithm exists for courts charged with determining which remedy is appropriate. Indeed, the chosen remedy most often turns on the facts and the relief pursued by the person asserting a constitutional claim’.¹³⁷ As to subsidiarity, Bishop does not see it as a stumbling block to the award of direct constitutional damages. He argues that subsidiarity in constitutional remedies works fine in theory. It should not prevent any constitutional right from being vindicated: ‘If common-law remedies are not adequate, then litigants are always entitled to bring a pure constitutional claim.’¹³⁸

What can be seen from the works above is that there is convergence when it comes to recognising constitutional damages as a remedy permissible in terms of the Constitution. Similarly common is how these writers all look to *Fose* for guidance, often concluding that caution must be taken in seeking constitutional damages as they are seldom available. There is however no clear nor common understanding among the scholars as to the circumstances under which the remedy is to be granted, nor of the specific rights for which damages can be awarded. Most of the scholars thus speculate that it is only when no common law remedy is available should one take to constitutional damages. Funnah and Sibanda as well as Swart provide much more forceful arguments for the full acceptance of constitutional damages, and make suggestions on how these ought to be granted. The arguments raised in the above literature survey are discussed and debated in subsequent Chapters below.

The following section discusses the functions of constitutional damages. It must be stated that while with some of the functions there is consensus, there is still considerable debate on the other utilities as is evident in the literature survey above.

3.4 UTILITY OF CONSTITUTIONAL DAMAGES

As with all other remedies both in private and public law, the viability and appropriateness of a remedy is premised on its purpose. This is what the term ‘appropriate relief’ means. Firstly, constitutional damages serve as compensation for the pecuniary and non-pecuniary harm to an individual occasioned by the breach of an individual’s constitutional rights. This is not

¹³⁶ Ibid 9-150 to 151.

¹³⁷ Ibid 9-151.

¹³⁸ Ibid 9-80.

necessarily a loss-allocation exercise. This compensation is not confined to, nor defined by, restitution. In *Ngomana v CEO of the SA Social Security Agency*¹³⁹ the Western Cape High Court pointed out that '[t]he purpose of constitutional damages is not primarily to compensate for financial prejudice or patrimonial loss; it is rather a means by which the courts may seek by surrogate relief to give expression to the fulfilment or realisation of a claimant's abrogated constitutional rights by way of an award in monetary compensation'.¹⁴⁰ In the words of Chayes who discusses public law litigation remedies in general, the relief 'is not a terminal, compensatory transfer, but an effort to devise a program to contain future consequences in a way that accommodates the range of interests involved'.¹⁴¹ The decree, he correctly contends, seeks to adjust future behaviour, not to compensate for past wrong.¹⁴² It is therefore a remedy that is 'deliberately fashioned rather than logically deduced from the nature of the legal harm suffered [and] provides for a complex, on-going regime of performance rather than a simple, one-shot, one-way transfer.'¹⁴³ So actual financial loss is not a prerequisite although proof of such loss may lead to damages being granted.

Secondly, it is possible that constitutional damages may also be awarded as punitive or 'exemplary' damages in addition to other goals.¹⁴⁴ This is notwithstanding that in *Fose* the CC rejected the punitive function as a stand-alone reason to grant constitutional damages.¹⁴⁵ While it may not be desirable to grant these damages solely for punitive purposes, there can be no denying that even where constitutional damages are granted with other goals in mind the punitive utility is incidental. That may be a good thing.

Thirdly and closely related to the exemplary and punitive utility, constitutional damages serve as a deterrent for future breaches. Again, although the CC in *Fose* questioned whether constitutional damages actually achieve deterrence, this is not to say the relief is not deterrent. Not only is there no evidence to the effect that constitutional damages are not deterrent, but the natural consequences of a judicial pronouncement sounding in money causes one to be more cautious so as not to repeat their liability-attracting conduct. Hoexter endorses this view by drawing attention to the fact that constitutional damages are aimed at promoting respect for human rights and *detering* future violations of rights.¹⁴⁶

Fourth and most importantly, constitutional damages serve the purpose of vindicating constitutional rights.¹⁴⁷ Constitutional damages recognise that 'rights must be maintained,

¹³⁹ 2010 ZAWCHC 172.

¹⁴⁰ *Ibid* para 39.

¹⁴¹ Abram Chayes 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harv LR* 1281.

¹⁴² *Ibid*.

¹⁴³ *Ibid*.

¹⁴⁴ Cooper-Stephenson (note 2) 364.

¹⁴⁵ See Funnah and Sibanda (note 67) 36 for a discussion of the decision in *Fose*.

¹⁴⁶ Cora Hoexter *Administrative Law in South Africa* (2007) Juta, Cape Town 503-4.

¹⁴⁷ See s 7(1) of the Constitution.

and cannot be allowed to be whittled away by attrition'.¹⁴⁸ Vindication is the primary utility of constitutional damages. This is notwithstanding the fact that in the process of compensating in order to vindicate, restoration may be achieved. Although one may rightly argue that constitutional damages are inherently compensatory in nature as they are orders sounding in money, their unique dimension in form and function heralds what Harlow calls a 'shift from private law, concerned with security of the individual, to public law, concerned with welfare and social utility'.¹⁴⁹ Beyond the individual, this remedy has the benefit of what Harlow terms 'class justice'¹⁵⁰ - vindicating and securing the rights of those who have no easy access to the courts. This is because the infringement of human rights is a wrong committed not only against individuals but also against the social order.¹⁵¹ Thus by a court pronouncing to be unconstitutional certain conduct committed against a claimant, other people in the position of the claimant benefit by the deterrent effect of that pronouncement on would be perpetrators, and in the precedent set – effectively a warning to government officials and departments against infringing rights. Okpaluba states that the vindicatory approach serves more to emphasise the constitutional value attached to the right violated or sought to be protected.¹⁵² Here constitutional damages act as a useful and forceful 'affirmative' or 'positive' remedy¹⁵³ designed not only for individual interests, but community interests both for redressing the past and modelling the future.¹⁵⁴

The utility of constitutional damages cannot be disassociated from the functionality of public law remedies in general.¹⁵⁵ These are generally multi-faceted in utility. Ultimately, constitutional remedies in their totality serve the joint purpose of enforcing the Constitution and vindicating fundamental rights. The objectives of constitutional damages are a common denominator for all constitutional remedies. Nevertheless, constitutional damages have a competitive advantage: they are the only remedy that singularly achieves most of the goals of constitutional remedies, giving substance and meaning to rights of the individual and society.

3.5 LINES OF DISTINCTION BETWEEN CONSTITUTIONAL AND DELICTUAL DAMAGES

Although both delictual and constitutional damages are monetary in nature, there are important differences between the two.

¹⁴⁸ *Vancouver City v. Ward* 2010 SCC 27 para 25.

¹⁴⁹ Carol Harlow *Compensation and Government Torts* (1982) Sweet & Maxwell, London 38.

¹⁵⁰ *Ibid* 130.

¹⁵¹ Swart (note 91) 239.

¹⁵² Chuks Okpaluba 'Vindicatory approach to the award of constitutional and public law damages: contemporary Commonwealth developments' (2012) 45(2) *Comparative and International LJ of Southern Africa* 115.

¹⁵³ Cooper-Stephenson (note 2) 4. Also Swart (note 91) 218-19, who argues that affirmative remedies are much more effective at vindicating socio-economic rights especially.

¹⁵⁴ Cooper-Stephenson (note 2) 28-29.

¹⁵⁵ This comes out clearly in Chayes' articulation of the general aspects common to public law remedies in Chayes (note 141) 1281.

3.5.1 Sources and purposes of remedies

As a starting point, constitutional and delictual damages differ in their legal roots, purpose, and cause of action. Whilst private law damages are predominantly compensatory and restorative in nature, public law damages have a multi-faceted function as outlined above. Delict as a system of damages deals with civil wrongs and is derived from the law of obligations in Roman law.¹⁵⁶ It has been described as ‘a loss-allocation exercise’.¹⁵⁷ It focuses on wrongful loss-causing conduct with the chief aim of making good the loss. The common law does not recognise deterrence or prevention sole objectives in the award of damages. The law of delict is concerned with compensation, while punishment and deterrence are left to the criminal law. One finds these aspects in constitutional damages, whether as direct or incidental objectives. As has already been outlined, constitutional damages derive directly from the Constitution’s remedial clauses – ss 38 and 172(1). This is public as opposed to private relief, deriving from the fact that constitutional judicial power to decide a case includes the power to create a damages remedy.¹⁵⁸ Tortell correctly points out that this is the principal distinguishing feature between ordinary torts and ‘constitutional torts’, as they are called in the United States.¹⁵⁹ Tort remedies, he argues, arise from breaches of certain common law rights that individuals, based on the phenomenon of reciprocity, have against one another and in certain instances, against the government.¹⁶⁰ Constitutional torts on the other hand are based on breaches of constitutional or fundamental rights.

Constitutional and delictual damages have different substantive concerns. A delict occurs only when either a subjective right is infringed, or a legal duty is breached,¹⁶¹ and a subjective right is conceptually different from a fundamental right. Neethling *et al* recognise the difference between breach of a private interest and the infringement of a fundamental right, and that a victim of the breach of a fundamental right is entitled to approach a court for ‘appropriate relief’.¹⁶² The breach of a constitutional duty by the State or its functionary is not only wrongful in the delictual sense,¹⁶³ hence the remedies granted in response thereto assume a public law character. Conceptually therefore, the public law remedy aims beyond making good a private loss. The private law concept of damages on the other hand is not designed to vindicate the values underlying the Constitution nor to deter and prevent future

¹⁵⁶ See François Du Bois (ed) *Wille’s Principles of South African Law* (9th ed) (2007) Juta, Cape Town 38 and 1092. Today delict in South Africa in an amalgam which evolved from Roman-Dutch and English law. See also Max Loubser and Rob Midgley (eds) *The Law of Delict in South Africa* (2nd ed) (2012) Oxford University Press 4.

¹⁵⁷ Loubser and Midgley (note 156) 5.

¹⁵⁸ Walter Dellinger ‘Of Rights and Remedies: The Constitution as a Sword’ (1972) 85 *Harv LR* 1532, 1542.

¹⁵⁹ Tortell (note 1) 80.

¹⁶⁰ George Fletcher *Tort Liability for Human Rights Abuses* (2008) Hart Publishing, Oxford 85-103.

¹⁶¹ This is when a personal, private interest is infringed, or when a legal duty imposed on one to prevent infringement of a subjective right or to uphold such subjective right is infringed. See Johann Neethling, JM Potgieter and PJ Visser *Law of Delict* (6th ed) (2010) Lexis Nexis, Durban 6.

¹⁶² Neethling *et al* (note 161) 20.

¹⁶³ Currie and De Waal (note 12) 200.

infringements.¹⁶⁴ Rather, these damages are awarded using the principle of *restitutio in integrum*, a common law damages principle in which the objective is to return the claimant to the position he or she was in prior to the breach.¹⁶⁵ Constitutional vindication in the process is a by-product, or incidental. Admittedly, damages in general have a common law background as a matter of course. In statute, the State Liability Act¹⁶⁶ makes it clear that the State is liable for the delictual conduct of its servants. Nonetheless, the nature of the liability remains delictual at common law. Put differently, the statute simply seeks to add a further dimension to the common law. This does not imply that constitutional damages are not a unique species of damages nor that they fall under the common law.

Characterising constitutional damages as a public remedy is the norm globally, as will be illustrated in Chapter 5 below. In the United Kingdom, for instance, Lord Bingham in the House of Lords in *R (Greenfield) v Secretary of State for the Home Department*¹⁶⁷ went as far as stating that the Human Rights Act as a whole 'is not a tort statute. Its objects are different and broader'.¹⁶⁸ It is apparent that the court considers the remedy of breaches thereof to be a public law remedy or, at least, to have wider objectives than a private law remedy.¹⁶⁹

As a public remedy against the state, constitutional damages represent attempts to render governments, their officials and employees accountable, in damages, for the constitutional harm they cause.¹⁷⁰ As Currie and De Waal have advanced, there are certain situations where a declaration of invalidity or an interdict makes little sense and an award of damages is then the only form of relief that will 'vindicate the fundamental right and deter future infringements'.¹⁷¹ Further, the possibility of a substantial award of damages may encourage victims to come forward and litigate, in itself a vindication of the Constitution and a deterrent of further infringements.¹⁷²

What must be stressed is that infringement of a constitutional right does not equate to a delict, and the fact that damages may be awarded for the breach does not make it a delict. There are cases where the law of delict has been used to protect fundamental rights and that is certainly encouraged, but that is not the primary function, aim or prerogative of delict. Neethling and Potgieter assert that the possibility of the development of what they call 'constitutional delict' should be recognised on the understanding that 'a clear distinction should be made between a constitutional wrong and a delict, even though these two figures may overlap'.¹⁷³ Furthermore, they argue that the requirements for a delict and those of a

¹⁶⁴ De Vos and Waaren Freedman (note 4) 409.

¹⁶⁵ Juliet Philpott 'Damages Under the United Kingdom's Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990' (2007) 5(2) *NZJPL* 211, 217.

¹⁶⁶ Act 20 of 1957 (as amended) s 1.

¹⁶⁷ [2005] UKHL 14.

¹⁶⁸ *Ibid* para 19.

¹⁶⁹ Philpott (note 165) 216.

¹⁷⁰ Nahmod, Wells and Eaton (note 2) 1.

¹⁷¹ Currie and De Waal (note 12) 200.

¹⁷² *Ibid* 200-201.

¹⁷³ Neethling *et al* (note 161) 20.

constitutional wrong differ materially,¹⁷⁴ a position affirmed by the decision in *Steenkamp NO v Provincial Tender Board, Eastern Cape*.¹⁷⁵ They reiterate that unlike a delictual remedy aimed at compensation, a constitutional remedy – even in the form of damages – is aimed at affirming, enforcing, protecting and vindicating constitutional rights and at preventing or deterring future violations of the same.¹⁷⁶

3.5.2 Application of remedies

Another fundamental difference between constitutional and delictual damages is the way the remedies are applied. Whereas constitutional damages are discretionary, delictual damages are not. With delict, damages are the default relief and are claimed as of right harm or loss and liability are proven.¹⁷⁷ To the contrary, constitutional damages cannot be claimed as of right. This means the judge has the discretion to refuse to grant damages preferring an injunction, if it occurs to the judge that an injunction is a better remedy in the circumstances. Again, the point made by the Western Cape High Court in *Ngomana*¹⁷⁸ is instructive: an award of constitutional damages is discretionary for the reason that the purpose of the relief is not primarily to compensate for financial prejudice or patrimonial loss, but rather ‘a means by which the courts may seek by surrogate relief to give expression to the fulfilment or realisation of a claimant’s abrogated constitutional rights’.¹⁷⁹

Under common law damages, ‘the scope of the relief is derived more or less logically from the substantive violation under the general theory that the plaintiff will get compensation measured by the harm caused by the defendants breach of duty – in contract, by giving plaintiff the money he would have had absent the breach; in tort by paying the value of the damage caused.’¹⁸⁰ Again, this distinction between delictual and constitutional damages is not an isolated occurrence. The characteristic features of the public law model are very different from those of the traditional common law or private law model.¹⁸¹ Constitutional damages fall under what Chayes terms ‘public law litigation’, and have a different characterisation where the form of relief does not flow inescapably from the liability determination.¹⁸² This characterisation as it applies to damages is that they cannot be claimed as of right. I say this cognisant of the development in France and increasingly in the European Court of Human Rights to make the claiming of damages for breach of rights a right in itself, a movement which Quézel-Ambrunaz has termed the ‘fundamentalisation of the right to

¹⁷⁴ Ibid 21.

¹⁷⁵ 2007 (3) SA 121 (CC) paras 37-40 – the breach of a constitutional or statutory duty is not wrongful in the delictual sense for that reason alone.

¹⁷⁶ Ibid. Also *Dendy v University of Witwatersrand, Johannesburg* 2005 (5) SA 357 (W) 368-370.

¹⁷⁷ See Tom Bingham *The Rule of Law* (2010) Allen Lane, London 51.

¹⁷⁸ *Ngomana v CEO of the SA Social Security Agency* 2010 ZAWCHC 172.

¹⁷⁹ Ibid para 39.

¹⁸⁰ Chayes (note 141) 1281.

¹⁸¹ Ibid.

¹⁸² Ibid.

obtain damages'.¹⁸³ This is however not the general approach in commonwealth countries, certainly not in South Africa.¹⁸⁴

The discretion in constitutional damages stems from the fact that judicial review is a discretionary jurisdiction.¹⁸⁵ This is generally in keeping with the 'flexible and open-textured nature of the doctrines of public law'.¹⁸⁶ Public law remedies such as injunctions, declarations and similar relief are discretionary remedies.¹⁸⁷ This means that a court may, in its discretion, refuse to grant a remedy even if the claimant can demonstrate that a public authority has acted unlawfully.¹⁸⁸ This does not mean unbridled discretion: the court has the power to make a choice as to whether to grant a remedy but this power of choice must be exercised by taking account of all relevant matters and discounting irrelevant ones.¹⁸⁹ Relevant factors in the exercise of discretion include the conduct of the claimant and that of the defendant; delay; particular facts of the case; the injustice or prejudice suffered; the effectiveness and practicality of a remedy in the circumstances; and the interests of the claimant weighed against the need for good administration.¹⁹⁰ Public interest and efficacy must also be considered.¹⁹¹ This discretion must be exercised based on clear, consistent and defensible principles, lest the courts run the risk of arbitrariness, making it impossible to predict the attitude of the courts.¹⁹² There must be legal certainty even with the exercise of discretion.

Still with a discretionary approach, there may very well be cases where the discretion strongly points towards the granting of damages, limiting the latitude of the court in exercising discretion by requiring that that discretion be exercised in only one way – to grant damages. However, a discretionary approach is not without its flaws: 'the combination of very open-textured principles of judicial review and a relatively unstructured discretion at the remedial stage makes for a rather fragile set of public law rights'.¹⁹³ This is a complex discussion in its

¹⁸³ Christophe Quézel-Ambrunaz 'Compensation and Human Rights (From A French Perspective)' (2011) 4 *NUJS LR* 189.

¹⁸⁴ What is a right under South Africa law is the right to effective relief, as opposed to constitutional damages.

¹⁸⁵ Clive Lewis *Judicial Remedies in Public Law* (2009) Sweet & Maxwell 426 (11-001). See also Robin Cooke 'The Struggle for Simplicity' (1984) 2 *NZLR* 214, 239-240.

¹⁸⁶ J Beatson 'The Discretionary Nature of Public Remedies' (1991) 1991(1) *NZRLR* 81.

¹⁸⁷ *Ibid* 81 for a full discussion on the discretionary nature of public remedies. Beatson discusses whether, given that (i) a ground of judicial review has been established, (ii) by a person with standing, (iii) in proceedings by way of judicial review, the court can nevertheless deny a remedy, and if so when. See also Tom Bingham 'Should Public Law Remedies be Discretionary?' (1991) *Public Law* 64 and JL Caldwell 'Discretionary Remedies in Administrative Law' (1986) 6 *Otago LR* 245.

¹⁸⁸ Lewis (note 185) 426 (11-002), citing *R. (Edwards) v Environmental Agency* [2008] UKHL 22 para 63 and Bingham (note 187).

¹⁸⁹ Beatson (note 186) 81.

¹⁹⁰ Lewis (note 185) 426 (11-002). Beatson (note 186) 87-92 also outlines virtually similar factors as the ones that ought to be considered when a court is exercising discretion.

¹⁹¹ Beatson (note 186) 88 and 91.

¹⁹² Lewis (note 185) 426 (11-003).

¹⁹³ Beatson (note 186) 92.

own right but fortunately, it is unnecessary for purposes of the present discussion to explore this argument further.

Yet another important distinction between constitutional and delictual damages is that while delictual damages require six elements to be proven, that is conduct, wrongfulness, unlawfulness, fault, causation and harm, constitutional damages do not necessarily follow those criteria. The standards appropriate for awards of damages under the common law may not be appropriate for constitutional damages claims,¹⁹⁴ and a litigant does not have to establish all the elements of a delict for constitutional damages to be granted.¹⁹⁵ This means that insofar as constitutional damages are concerned, the South African law of damages which has focused largely on patrimonial loss has shifted considerably.¹⁹⁶

In the broader scheme, the delictual and constitutional damages dichotomy forms part of the wider distinction between public and private law remedies, a debate that itself is not exactly settled. One can find helpful this apt quote from the New Zealand High Court in *Manga v Attorney-General*¹⁹⁷ per Hammond J, where he engages in a significant discussion of the differences between public and private law remedies:

‘Cases based upon violations of the Bill of Rights are about the vindication of statutory policies which are not "just" private: they have overarching, public dimensions. The context of such a proceeding necessarily changes, in at least three ways. First, the case is not a winner-takes-all kind of case. Damages are an economic concept. Bill of Rights cases routinely involve a rearrangement of the social relations between the parties, and sometimes with third parties. The object is to promote mutual justice, and to protect the weak from the strong. Secondly, the future consequences of such a case are every bit as important as the past, and the particular transgression. Thirdly, there is a distinct interface with public administration, and indeed, the governance of a given jurisdiction [...]’¹⁹⁸

What emerges quite clearly is that a constitutional wrong and a delict together with their damages remedies ought not to be treated alike, and it is for this reason that Neethling and Potgieter conclude that the term constitutional ‘tort’ or ‘delict’ should rather be avoided for conceptual clarity.¹⁹⁹ This is an apt suggestion, and throughout this thesis damages granted for violation of constitutional rights are consistently referred to as ‘constitutional damages’.²⁰⁰

¹⁹⁴ Jonathan Klaaren ‘Judicial Remedies’ in Stu Woolman *et al* (eds) *Constitutional Law of South Africa* [Revision Service 2] (1998) 9-9 to 9-10.

¹⁹⁵ This aspect is discussed in detail in Chapter 8, where the ‘elements’ of a constitutional damages claim are considered.

¹⁹⁶ Klaaren (note 194) 9-9 to 9-10.

¹⁹⁷ *Manga v Attorney-General* [2000] 2 NZLR 65.

¹⁹⁸ *Ibid* at 81-82.

¹⁹⁹ Neethling *et al* (note 161) 21.

²⁰⁰ In Chapter 6 however, I speak of what I term ‘constitutionalised delict’, which is not another term for constitutional damages, but a term I use to refer to the common law of delict that has been developed by the courts pursuant to s 8 (3) of the Constitution, and law that has been used by the courts to reach decisions such as *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); *K v Minister of Safety and Security* 2005 (6) SA 419 (CC); *F v Minister of Safety and Security and Another* 2012 (1) SA 536 (CC) and similar fundamental rights

3.6 CONCLUSION

It is correct that delict is now also used to vindicate constitutional rights.²⁰¹ At the turn of the constitutional era the law of delict has been ‘constitutionalised’, meaning it has come to be read and applied in line with values as required by s 39(2) of the Constitution.²⁰² As Price puts it, human rights norms ushered in by the new constitutionalism have influenced ‘the judicial development of the private common law, [that is], the creation, alteration and abolishment of private common-law rules and principles by judges.’²⁰³ Where the common law has been found wanting, the outlet has been the development of the common law in terms of s 8(3) of the Constitution. It is also correct that in addition to its commendatory utility, delict also plays a normative role in prescribing a set of ethical rules and principles for social interaction.²⁰⁴ The golden question then is: what is it that constitutional damages bring as a remedy over and above the common law that cannot be achieved by interpreting the common law in line with constitutional values and developing the common law? The answers are to be found in the utility of constitutional damages discussed above, which unlike delict, achieve compensation, vindication, deterrence and sometimes punishment, all at once. This argument is advanced further in subsequent Chapters. Importantly as well, the discordance among South African scholars on many aspects of constitutional damages that has been revealed above mirrors largely the discordance among the courts themselves, as the next Chapter shows. The next Chapter proceeds to discuss the constitutional provisions giving birth to constitutional damages, legislated damages relief for constitutional violations, and how the courts have thus far dealt with this relief.

cases. Neethling and Potgieter are wary of using the terms ‘constitutional tort’ for conceptual clarity, vis, delict and constitutional damages. See Neethling *et al* (note 161) 21.

²⁰¹ Du Bois (note 140) 1092; Neethling *et al* (note 161) 16-17.

²⁰² Neethling *et al* (note 161) 16-17; Loubser and Midgley (note 156) 34-37.

²⁰³ Alistair Price ‘The Influence of Human Rights on Private Common Law’ (2012) 129 *SALJ* 345.

²⁰⁴ Loubser and Midgley (note 156).

CHAPTER 4

A CONSTITUTIONAL, STATUTORY AND JURISPRUDENTIAL ANALYSIS OF THE SOUTH AFRICAN LAW ON CONSTITUTIONAL DAMAGES - THE GOOD AND THE BAD

4.1 INTRODUCTION

In order to better understand the problems associated with constitutional damages in South Africa and suggest a practical framework, it is important to explore the legal foundations of the remedy as well as the judicial attitudes towards the remedy. In what follows, I examine the enabling provisions in the Constitution, the statutory provisions that have legislated constitutional damages, culminating in a discussion of the seminal cases that have shaped the discourse of the remedy. In the process, gaps and shortcomings are identified in the approach to the relief, exposing the problems that subsequent Chapters will seek to address.

4.2 THE CONSTITUTION

The source of constitutional damages in South Africa is the Constitution itself. There is no provision expressly mentioning constitutional damages as a remedy, but the broad scheme of the remedial provisions in the Constitution allows for courts to grant appropriate relief. Section 38 of the Constitution gives the courts broad and creative discretionary powers to develop existing remedies and fashion new ones should those in existence fall short. This was reiterated by Kriegler J in *Fose v Minister of Safety and Security*,¹ who went on to say that '[i]t is left to the Courts to decide what would be appropriate relief in any particular case [...] If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of all these important rights.'²

The phrase 'appropriate relief' is broad enough to include constitutional damages. There is nothing in the Constitution preventing monetary damages from being among the possible remedies that the courts may grant.³ The concept of appropriate relief entails that when a court is faced with a constitutional violation, it must pronounce relief that 'strikes effectively at the source of that infringement'.⁴ The goal ultimately is to do justice. There may well be instances where a mere declaration of rights is appropriate relief. But in some instances, such as in a case of severe and crippling torture by the police, a mere declaration of rights may well be worth little more than an insult to the victim, and such relief would be entirely inappropriate in those circumstances. Another example would be the *Modderklip* scenario⁵

¹ 1997 (3) SA 786 (CC) para 69.

² Ibid. Also *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para 38.

³ Iain Currie and Johan de Waal *The Bill of Rights Handbook* (6th ed) (2013) Juta, Cape Town 200; and Cora Hoexter *Administrative Law in South Africa* (2nd ed) (2012) Juta, Cape Town 568-574.

⁴ *Hoffman v South African Airways* 2001 (1) SA 1 (CC) para 45.

⁵ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC). The case is discussed in detail below.

where a landowner had practically lost his land. In those circumstances, a declaration of rights or an interdict was clearly inappropriate and ineffective for any corrective justice.

The notion of 'appropriate relief' is closely tied to the concept of 'effective relief'. Effective relief is relief that works in either stopping constitutional harm, reversing it, or vindicating the rights of the affected and the sanctity of the Bill of Rights. Closely linked to effective and appropriate relief is the principle that a court will not give an order that it cannot enforce, known as the 'principle of effectiveness'.⁶ Save for declaratory orders, an effective remedy in the form of an enforceable verdict must follow each case. The premise is that there must be an effective remedy for each right, as rights and remedies are complementary.⁷

Together with s 38, s 172(1) provides yet another blank cheque for the courts to come up with remedies that are 'just and equitable'. Again, the goal is resolute on achieving justice. 'Equitable' in this context speaks to remedies that match the infringement that has occurred. Much more heinous and reprehensible infringements call for stronger and sterner sanctions. This would qualify, if one likes, for a corollary to the principles of natural justice. There are, therefore, instances where in light of the nature of the infringement and resulting harm, physical or otherwise, monetary damages would constitute appropriate and just and equitable relief. For a court considering options for relief, the question then becomes: to what extent do constitutional damages constitute 'appropriate relief' under the circumstances?⁸ Invariably, it becomes a case-specific fact-pattern enquiry.

4.3 STATUTORY LAW

Since the adoption of the Interim Constitution in 1993, and subsequently the 1996 Constitution, monetary damages have come to be expressly mentioned as a remedy in a number of statutes enacted to give effect to rights in the Bill of Rights. One can come up with multiple examples of legislation falling into this category: the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)⁹ and the Employment Equity Act¹⁰ pursuant to s 9(4); the Labour Relations Act (LRA)¹¹ pursuant to ss 23(5) and (6); the Promotion of Administrative Justice Act (PAJA)¹² pursuant to s 33; the Promotion of Access to Information Act (PAIA)¹³ pursuant to s 32; and the Mineral and Petroleum Resources Development Act¹⁴

⁶ Currie and De Waal (note 3) 179 put it this way: 'Courts are more likely to be more hesitant to find a violation of a right in situations where there is no appropriate remedy for the violation.'

⁷ The concept is discussed by Centlivres CJ in *Minister of the Interior and Another v Harris and Others* 1952 (4) SA 769 (A) at 780H-781B and several subsequent cases.

⁸ See Kate O'Regan in 'Fashioning constitutional remedies in South Africa: some reflections' (2011) April *Advocate* 41.

⁹ Act 4 of 2000 (PEPUDA).

¹⁰ Act 55 of 1998.

¹¹ Act 66 of 1995.

¹² Act 3 of 2000.

¹³ Act 2 of 2000.

¹⁴ Act 28 of 2002. Arguably promulgated to give effect to s 24(b)(iii) and s 25(5), read with s 25(4)(a).

and the National Environment Management Act (NEMA)¹⁵ pursuant to s 24(2). Further citation can be made to legislation such as the Expropriation Act¹⁶ pursuant to s 25(2); Restitution of Land Rights Act¹⁷ pursuant to s 25(7); the Extension of Security of Tenure Act (ESTA)¹⁸ pursuant to s 25(6); and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE)¹⁹ pursuant to s 26(3).

A number of these statutes mention damages as relief for violation of the right that each was enacted to protect. Because these statutes were enacted specifically to give content and effect to specific rights in the Bill of Rights, their enforcement cannot be severed from constitutional vindication. For discussion purposes I will examine four of these statutes. These are the Promotion of Administrative Justice Act (PAJA),²⁰ the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),²¹ the Employment Equity Act (EEA),²² and the Labour Relations Act (LRA).²³ One could, of course, find more similar statutes, but these four have been chosen as illustrative case studies because the courts have quite extensively pronounced on the relevant provisions of at least three of them.

4.3.1 The PAJA

The PAJA was enacted in 2000 to give effect to s 33 of the Constitution on administrative justice. Section 8 of the Act deals with remedies for administrative law breaches. In relevant part, the section reads as follows:

'8 Remedies in proceedings for judicial review

(1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-

...

(c) setting aside the administrative action and-

...

(ii) in exceptional cases-

...

(bb) directing the administrator or any other party to the proceedings to pay compensation;

...'

This section allows a reviewing court or tribunal to, in exceptional cases, pay compensation. I join with Swart to opine that the damages envisaged in s 8(2) of PAJA are essentially constitutional damages.²⁴ It was made clear beyond doubt by the CC in *Allpay 2* that

¹⁵ Act 107 of 1998.

¹⁶ Act 63 of 1975.

¹⁷ Act 22 of 1994.

¹⁸ Act 62 of 1997.

¹⁹ Act 19 of 1998.

²⁰ Act 3 of 2000.

²¹ Act 4 of 2000.

²² Act 55 of 1998.

²³ Act 66 of 1995.

²⁴ Mia Swart 'Left out in the Cold? Crafting Constitutional Remedies for the poorest of the Poor' (2005) *SAJHR* 238, citing *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para 50.

compensation under s 8 of PAJA is not a private law remedy.²⁵ I accept however that not all public remedies are necessarily constitutional remedies in the sense that they stem directly from the Constitution. Nonetheless, the statement in *Allpay 2* is revealing and advances the argument towards the public nature of an administrative right violation.

However, in *Jayiya v MEC for Welfare, Eastern Cape*,²⁶ Conradie JA expressed the view that PAJA does not allow for the recovery of constitutional damages.²⁷ Instead, he believed that constitutional damages might appropriately be awarded in the absence of statutory remedies or adequate common law remedies, but '[w]here the lawgiver has legislated statutory mechanisms for securing constitutional rights, and provided, of course, that they are constitutionally unobjectionable, they must be used.'²⁸ While these obiter comments have not yet been dissected by another court, Conradie JA's views must be taken to task. This interpretation of the law was firmly rejected by Froneman J in *Kate*²⁹ as discussed below. Additionally, the remarks in *Jayiya* are disputed by what Langa CJ and O'Regan J said in a dissenting opinion in *Steenkamp NO v Provincial Tender Board, Eastern Cape*³⁰ where they opined that the s 8 of PAJA might result in the development of administrative law principles governing the payment of compensation to vindicate the constitutional right to administrative justice.³¹

Hoexter conducts an examination of the cases that have sought compensation under PAJA. Of interest is the case of *Minister of Defence v Dunn*.³² Therein, the SCA overturned the finding by the court *a quo* awarding compensation on the reasoning that there was no basis to set aside the administrative decision that was vacated. The SCA also concluded that, if it was a monetary award the applicant wanted, he should have proven some loss. The SCA found that compensation was not justifiable, even if the administrative action complained of were reviewable.³³ This approach of the SCA raises numerous questions about the approach to damages under PAJA, including whether actual pecuniary loss is required. The SCA seemed to suggest that loss is required, and in actual fact, this is the basis on which relief was refused. Following in the SCA's footsteps, in *Darson Construction (Pty) Ltd v City of Cape Town*³⁴ the Western Cape High Court found that the unsuccessful tenderer could be entitled to compensation *for out-of-pocket expenses*.³⁵ It, therefore, appears that the courts are interested in actual pecuniary loss in order to grant compensation under PAJA.

²⁵ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* 2014 (4) SA 179 (CC) para 72.

²⁶ 2004 (2) SA 611 (SCA).

²⁷ *Ibid* para 9.

²⁸ *Ibid*.

²⁹ *Kate v Member of the Executive Council for the Department of Welfare, Eastern Cape* [2005] 1 All SA 745 (SE).

³⁰ 2007 (3) SA 121 (CC).

³¹ *Ibid* para 97.

³² 2007 (6) SA 52 (SCA).

³³ Para 40.

³⁴ 2007 (4) SA 488 (C).

³⁵ See also *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) paras 38-39.

Although this string of cases seems to suggest that PAJA damages are not constitutional law damages, I contend that the courts in those cases misunderstood the PAJA compensation provision and engaged in unwarranted limitation thereof. The court misconstrue the PAJA provision as affording a private law remedy that requires proof of pecuniary loss before the section could be triggered to award damages. This is clearly at odds with the public law nature of the statutory provision which was enacted to give recourse for breach of a public law right in the Constitution. In fact, the CC has recently pronounced in *Allpay (2)* that compensation under PAJA is not a private law remedy.³⁶ Corroborating the views of Swart, which I share, that the damages envisaged in s 8(2) of PAJA are essentially constitutional damages,³⁷ d'Oliveira writing in *LAWSA* makes it clear that the term 'compensation' as used in s 8 is the administrative law equivalent of 'constitutional damages'.³⁸

Correctly so, Swart further argues for an alternative; in administrative cases, it seems that the court does not have to resort to s 8(2).³⁹ In *Mahambehlala v MEC for Welfare, Eastern Cape and Another*,⁴⁰ a case in which the applicant waited for nine months for her disability grant to be approved, Leach J turned to s 38 of the Constitution for a mandate to fashion 'appropriate relief'. The reason why he turned to the Constitution was because he did not think the common law provided a solution. He stated that the applicant would have been entitled to a mandamus obliging the administrator to make a decision, yet that would be ineffective a remedy.⁴¹ Leach J then ordered the respondents to pay the applicant, with interest, the amounts she would have been paid if her grant had been approved within the standard three months, under the banner of constitutional damages. Hoexter agrees with Swart's analysis. According to Hoexter the orders crafted in *Mahambehlala* as well as in a similar case, *Mbanga v MEC for Welfare, Eastern Cape and another*,⁴² suggest that there is no particular need for the statutory remedies created by s 8(2) as the court can still turn directly to s 38 of the Constitution, but they are nevertheless a welcome addition to the law. She speculates, correctly in my view, that grounds of review and remedies which are spelt out in statutory form would be more accessible than their common law or constitutional counterparts.⁴³ To this I would add Swart's convincing conclusion that even though the courts can essentially look directly to s 38 of the Constitution for relief:

[the] idea of unity of the common law and constitutional law *and* of statutory law and the Constitution is attractive not only for the elegance and harmony it brings to our law but also for its consistency with the constitutional imperatives of supremacy and legality. In light of the wide scope and nature of the

³⁶ *Allpay (2)* (note 25) para 72.

³⁷ Swart (note 24) 238.

³⁸ Jan Adriaan van Schoor d'Oliveira 'Administrative Justice' in *Law of South Africa (LAWSA)* (3rd ed) Volume 2, 67.

³⁹ Swart (note 24) 237.

⁴⁰ 2002 (1) SA 342 (SE)

⁴¹ *Ibid.*

⁴² 2002 (1) SA 359 (SE).

⁴³ Hoexter (note 3) 278, 282.

remedies in PAJA it is difficult to see how awarding a constitutional remedy would be irreconcilable with the wording of s 8 (2)'.⁴⁴

Whichever route one elects to follow, it is untenable to seek to deny the public character of the damages permitted by s 8(2) of the PAJA, as the courts in *Jayiya, Dunn and Darson Construction* sought to do. To hold otherwise would be, as Plasket argued, a narrow and incorrect interpretation of s 8 since it fails to give effect to its constitutional pedigree under ss 38 and 172 of the Constitution.⁴⁵ One cannot overlook the fact that since the advent of the constitutional dispensation, administrative justice – in its broadest sense - has become a constitutional imperative.⁴⁶

4.3.2 The PEPUDA, the EEA and the LRA

The PEPUDA was enacted to give effect to s 9 read with item 23(1) of Schedule 6 to the Constitution, 1996. The Act creates Equality Courts as the fora for adjudication of equality and discrimination disputes. In its remedial provisions, the Act provides for 'an appropriate order' that in s 21(d) includes, *inter alia*, 'an order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment in question'. This subsection expressly provides for damages to remedy the breach of the fundamental constitutional rights to equality and dignity. Although to date no court has yet dealt with this compensation provision, mention of the provision suffices to demonstrate the clear allowance of what are damages for breach of constitutional rights.

The statute enacted to give effect to the equality provisions of the Constitution in the workplace is the Employment Equity Act (EEA). This Act, unlike the PEPUDA, is litigated in the Labour Court, together with the LRA. Where an employment equity matter goes for arbitration and conciliation, s 48(2) of the Act allows for the commissioner to award payment of compensation *and* damages by the employer to an employee. Where the Labour Court is the forum, the Act provides in s 50 as follows:

'(1) Except where this Act provides otherwise, the Labour Court may make any appropriate order including-

...

- (d) awarding compensation in any circumstances contemplated in this Act;
- (e) awarding damages in any circumstances contemplated in this Act;

...

(2) If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances, including-

⁴⁴ Swart (note 24) 238, citing *Pharmaceutical Manufacturers* (note 24) at para 50: 'There is only one system of law. It is shaped by the Constitution which, is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control. What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality'.

⁴⁵ Clive Plasket 'Administrative Justice and Social Assistance' (2003) 120 *SALJ* 494, 504.

⁴⁶ *Steenkamp NO* (note 30) para 28.

- (a) payment of compensation by the employer to that employee;
- (b) payment of damages by the employer to that employee;

...'

In so far as s 50 is concerned, the case of *Piliso v Old Mutual Life Assurance Company (SA) Limited and Others*⁴⁷ is instructive. In this case a delictual claim for sexual harassment at work failed because no particular employee was identified as having been the perpetrator, as required by the vicarious liability on the employer contemplated in delict and in terms of s 60 of the Act. But the further alternative of constitutional damages was successful. In support of this claim, the applicant referred to the fact that s 50(1) of the EEA requires the court to make an order which is appropriate. It was suggested that, in the determination of 'appropriate relief', it requires the court to consider the various interests, including the need to redress the wrong caused by the infringement, the deterrence of future violations, the dispensing of justice which is fair to all those who might be affected, and the necessity of insuring that the order can be complied with.⁴⁸

Then there is the LRA, among whose objectives are 'to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution'.⁴⁹ Section 158 of the Act deals with the powers of the Labour Court and provides as follows:

- '(1) The Labour Court may,
 - (a) make any appropriate order, including
 - [...]
 - (v) an award of compensation in any circumstances contemplated in this Act;
 - (vi) an award of damages in any circumstances contemplated in this Act; and
 - [...];' (My emphasis)

It will be noted here that the above provision mentions the award of both 'compensation' and 'damages' separately. The implication is that in the context of the LRA, compensation and damages are to be taken to refer to different types of awards. As to the 'circumstances contemplated in this Act' that the provision speaks of, ss 193-5 provides for those circumstances, which include unfair dismissal and unfair labour practices.

A number of cases have considered the application of section 193. In *Republican Press (Pty) Ltd v Ceppwawu and Others*,⁵⁰ a case of unfair dismissal, the SCA found that the Act allows for any one of three remedies to be granted to a worker who has been unfairly dismissed: the employer may be ordered to reinstate the worker, or the employer may be ordered to re-employ the worker, or the employer may be ordered to pay compensation.⁵¹ The court found that the legislatively preferred remedy is the restoration of the worker to employment either by reinstatement or by re-employment, and either of those remedies must be granted except

⁴⁷ (C32/2005) [2006] ZALC 107.

⁴⁸ See *ibid* para 90.

⁴⁹ See s 1(a) of the Act.

⁵⁰ 2008 (1) SA 404 (SCA).

⁵¹ Para 17, citing s 193(1) of the Act.

in specified circumstances,⁵² in which case compensation may be ordered.⁵³ Importantly, the SCA found that the back-pay to which a worker ordinarily becomes entitled when an order for reinstatement is made is not to be equated with compensation,⁵⁴ agreeing with Davis AJA in *Kroukam v SA Airlink (Pty) Ltd*⁵⁵ that the remuneration that becomes due under the terms of the contract itself and does not constitute compensation as envisaged by s 194.⁵⁶

In *Food and Allied Workers Union v Ngcobo NO and Another*⁵⁷ the SCA affirmed the position that the LRA governs the right of a worker who is unfairly dismissed, to claim and recover compensation for his or her dismissal.⁵⁸ Other important cases that have dealt with s 194 are *Fedlife Assurance Ltd v Wolfaardt*⁵⁹ and *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*.⁶⁰ In the latter case, the CC restated that back-pay awarded at reinstatement is not the compensation envisaged by the Act.⁶¹

A most important provision is s 195. This section provides that 'An order or award of compensation made in terms of this Chapter is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.' This provision is crucial in that, just as with s 158(1), it makes it clear that the compensation involved here is not delictual or contractual, but additional compensation to these two other potential claims. In *Fedlife Assurance*⁶² the SCA dealt with compensation in terms of s 195 and affirmed the position that an order or award of compensation in consequence of an unfair dismissal is 'in addition to and not a substitute for any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment'.⁶³ Importantly, the SCA stated that there is no reason to restrict the plain – and conceivably broad – meaning of s 195.⁶⁴

In *Food and Allied Workers Union*,⁶⁵ the latest SCA case to comprehensively deal with the s 195, the SCA stated that the LRA clearly distinguishes between claims for compensation and

⁵² 193(2): 'The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless –

- (a) the employee does not wish to be reinstated or re-employed;
- (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
- (c) it is not reasonably practical for the employer to reinstate or re-employ the employee; or
- (d) the dismissal is unfair only because the employer did not follow a fair procedure.'

⁵³ Para 17, citing s 193(1) read with s 194.

⁵⁴ Para 19.

⁵⁵ (2005) 26 ILJ 2153 (LAC).

⁵⁶ Para 19, referring to Davis AJA's ruling in *Kroukam* para 55.

⁵⁷ 2013 (5) SA 378 (SCA).

⁵⁸ Para 3.

⁵⁹ 2002 (1) SA 49 (SCA).

⁶⁰ 2009 (1) SA 390 (CC).

⁶¹ Para 44.

⁶² Note 59 above.

⁶³ Para 19.

⁶⁴ *Ibid.*

⁶⁵ Note 57 above.

claims for damages.⁶⁶ The SCA stated that: 'It seems to be accepted that "compensation" is a form of recompense (satisfaction for some misdeed or offense) and comprises recompense for sentimental as well as patrimonial loss. It also seems to be accepted that an employee will be able to recover a *solatium* for the injury to his feelings that was caused by the manner in which he was dismissed.'⁶⁷ Further, the SCA stated that: 'The compensation for the wrong in failing to give effect to an employee's right to a fair procedure, according to Froneman DJP, is not based on patrimonial or actual loss but is in the nature of a *solatium* for the loss of the right and is punitive to the extent that an employer who breached the right must pay a penalty for causing the loss.'⁶⁸ The SCA concluded that the compensation envisaged by the section remains in the nature of a *solatium* for being subjected to unfair treatment, and while the quantum of the severance pay, the mitigation of loss and the other factors alluded to in the judgment may be relevant considerations, they do not necessarily preclude the payment of compensation.⁶⁹ This position was subsequently confirmed by the CC in *Equity Aviation*⁷⁰ per Nkabinde J. With respect, I find fault with Nkabinde J's ruling, however, where she states in a subsequent paragraph that: 'The remedies in section 193(1)(a) are [...] in the alternative and mutually exclusive.'⁷¹ This finding seems to be at odds with the clear stipulation of s 195 that compensation is payable in addition to the other monetary awards granted in terms of any other law. This debate, however, does not detract from the point to be made here, that the compensation envisaged is not delictual or contractual, but damages of a different nature. This compensation is not given a specific name in this provision and anywhere in the statute. It can only be compensation envisaged in the Constitution for breach of a constitutional right, that is, a statutory reiteration of constitutional damages. One can find no evidence to the contrary.

It will be seen that most of these statutes allow for the granting of any other 'appropriate remedy' or 'any appropriate order that is just and equitable in the circumstances', a reiteration of the Constitution's broad and flexible approach to constitutional remedies. Thus even for those statutes, where there may not be express mention of 'compensation', compensation may well constitute 'appropriate relief' depending on the facts and circumstances before a court. The point to be made is that, unless the context indicates otherwise, the damages payable under this class of statutes are not common law or private

⁶⁶ Para 6, citing that 'section 158(1) of the LRA empowers the Labour Court to award either and s 195 empowers the Labour Court to award, in addition to "compensation", any other amount to which the employee may be entitled in terms of any law or contract of employment'.

⁶⁷ Para 6, citing *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 ILJ 974 (LAC).

⁶⁸ Para 59, citing *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC) para 41 and *Highveld Steel & Vanadium Corporation Ltd v National Union of Metalworkers of SA & others* (2004) 25 ILJ 71 (LAC), the LAC considered the factors to be taken into account in determining whether to grant compensation for procedurally unfair retrenchments.

⁶⁹ Para 61.

⁷⁰ (Note 60) para 40.

⁷¹ Para 42. She cites *Republican Press* (note 50) at para 17 and *Grogan Dismissal, Discrimination and Unfair Labour Practices* (2nd ed) (2007) Juta, Cape Town.

law damages. One may argue that these are ‘statutory damages’ by virtue of them appearing in the statutes, but in the broader scheme of things, damages are either private or public, and these ‘statutory damages’ find themselves falling under public law damages. In this submission, I am fortified by the finding of the CC in *Allpay (2)*.⁷²

4.4 THE COURTS’ CURRENT APPROACH TO CONSTITUTIONAL DAMAGES

South African courts have thus far been seized with a sizeable number of cases on whether constitutional damages should be granted, and if so, under what circumstances.⁷³ While accepting that there is legal scope for constitutional damages to be granted, the courts seem to be saying that, in short, constitutional damages are a rare phenomenon and the litigant has a lot of persuasion to do to the bench before such award is made. Generally, the courts have not taken a pro-active approach in defining a framework to guide themselves and the litigants in seeking the relief.

It has already been shown that the Constitution simply allows for constitutional damages to be granted but provides no guidance as to how constitutional damages are to be granted, and this is true of all constitutional remedies.⁷⁴ It has been left to the judges therefore to ‘make the law’ on the granting of constitutional damages.⁷⁵ On this mandate, the courts have fallen short. In a number of cases rights holders have sought to assert their rights in the courts by seeking constitutional damages. At the forefront of these constitutional rights have been the right to protection of private property,⁷⁶ right to social assistance,⁷⁷ right to just administrative action,⁷⁸ right to freedom and security of the person,⁷⁹ and right to parental care.⁸⁰ In these cases, the courts have been called upon to decide not only if the rights under claim are worthy of constitutional damages, but also if the circumstances are befitting of such claims.

The general approach the courts seem to have taken is that where there is an existing delictual or statutory remedy that is applicable, then it is unnecessary to consider constitutional damages as a remedy,⁸¹ and in most cases, the courts have proceeded to grant such delictual

⁷² (Note 25) para 72.

⁷³ A number of key cases are discussed below.

⁷⁴ Iain Currie and Johan de Waal (eds) *The New Constitutional and Administrative Law* Volume 1 (2001) 287.

⁷⁵ See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 19: ‘It is left to the courts to decide what would be appropriate relief in any particular case’. This in turn means that the Constitution allows a permissible approach to remedies. See *Sanderson v Attorney-General (Eastern Cape)* 1998 (2) SA 38 (CC) para 38 and *S v Manamela* 2000 (3) SA 1 (CC) para 54 where the court held that even greater flexibility is allowed under the 1996 Constitution than under the interim Constitution.

⁷⁶ S 25 (*President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC)).

⁷⁷ S 27 (*MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA)).

⁷⁸ S 33 (*Mahambehlala v MEC for Welfare, Eastern Cape, and Another* 2002 (1) SA 342 (SE)).

⁷⁹ S 12 (*Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC)).

⁸⁰ S 28(1)(b) (*Minister of Police v Mboweni and Another* (657/2013) [2014] ZASCA 107).

⁸¹ See for example the remarks in *Steenkamp NO v Provincial Tender Board, EC* [2006] JOL 16488 (Ck) at para 34: ‘...The empowering legislation may also provide for an effective remedy. In *Knop Botha* JA said that on “the broader considerations of policy ... an aggrieved applicant does not need an action for damages to protect his

or other alternative remedies. To illustrate this, the SCA is *Olitzki Property Holdings v State Tender Board & Another*⁸² considered the question of whether ‘damages for lost profit are an appropriate remedy for the infringement of a fundamental constitutional right (‘constitutional damages’).⁸³ The court stated that:

‘The award, we were urged, would vindicate the purposes of the Constitution, and inhibit maladministration in public bodies. Those claims must on their own premises be assessed with an eye on their public purposes, and the fact that interdictory relief was available to the claimant, at an early stage in the dispute, must be relevant to assessing its position in asserting them.’⁸⁴

This attitude has permeated most of the constitutional damages cases facing the courts. In what follows, I discuss the seminal cases that have reached the courts, followed by a discussion on the attitudes and approach emanating from this jurisprudence.

4.4.1 *Fose v Minister of Safety and Security*⁸⁵ (‘Fose’)

The founding authority on constitutional damages in South Africa is *Fose*, before the Constitutional Court. The plaintiff was assaulted by members of the South African Police Service (SAPS) and claimed damages in delict. Over and above these common law damages, he claimed constitutional damages for the infringement of his constitutional right not to be tortured and subject to cruel, inhuman or degrading treatment and for infringements to his rights to dignity and privacy, and this was couched as to include ‘an element of punitive damages’.⁸⁶ The constitutional damages claim was raised in terms of s 7(4)(a) of the Interim Constitution, which was the equivalent of s 38 of the current 1996 Constitution. The respondent raised an exception arguing that such a claim was not good in law and did not disclose a cause of action, and this was accepted by the court *a quo*.⁸⁷

In the CC Ackermann J, for the majority, looked at Canadian jurisprudence for guidance where s 24(1) of the Canadian Charter of Rights and Freedoms provides for relief that is ‘appropriate and just in the circumstances’ where rights are violated and concluded that although certain of the lower Canadian courts had awarded constitutional damages, the Canadian Supreme Court had not yet done so.⁸⁸ In considering the United States authorities he pointed out that while the Supreme Court had recognised a claim for constitutional damages, this remedy had grown out of the peculiarities intrinsic to United States jurisprudence and provided little real guidance to a South Africa court. He reached a similar conclusion in relation to judgments of the European Court of Human Rights.⁸⁹

interests; he has readily at hand the appeal procedure provided for in the legislative framework”. This approach resonates in many judgments’.

⁸² 2001 (3) SA 1247 (SCA).

⁸³ *Ibid* para 1.

⁸⁴ *Ibid* para 39.

⁸⁵ Note 75.

⁸⁶ *Ibid* para 13.

⁸⁷ *Fose v Minister of Safety and Security* 1996 (2) BCLR 232 (W).

⁸⁸ *Fose* (note 75) para 39.

⁸⁹ *Ibid* para 15.

While accepting that, strictly speaking, there is no delict of ‘torture’ in its own name in South African law, Ackermann J pointed out that the common law does recognise different degrees of assault and that where plaintiffs prove that they have been tortured, the particular malevolence associated with such unlawful acts ‘can be accommodated within the common law by an appropriate (and if needs be, punitive) order for the payment of damages.’⁹⁰ So in order for the law to protect those constitutional rights that seem to fall out of the scope of common law, it was Ackermann J’s finding that ‘[t]he South African common law of delict is flexible and under section 35(3) of the interim Constitution should be developed by the courts with “due regard to the spirit, purport and objects” of Chapter 3.’⁹¹ The court also found that in the circumstances of this case punitive damages would be inappropriate.

Significantly, Ackermann J however proceeded to note as follows:

‘Notwithstanding these differences it seems to me that there is no reason in principle why “appropriate relief” should not include an award of damages, where such an award is necessary to protect and enforce Chapter 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the legislature’s intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the Supreme law. When it would be appropriate to do so, and what the measure of damages should be, will depend on the circumstances of each case and the particular right which has been infringed.’⁹²

What has to be decided, he said, is whether on the allegations made in the pleadings the plaintiff would be entitled to constitutional damages.⁹³ Despite having said this however, Ackermann J ventures into self-contradiction. Ackerman J, despite stating earlier that constitutional damages are a possible remedy, went on to seemingly withdrawing from his earlier statements:

‘I have considerable doubts whether, even in the case of the infringement of a right which does not cause damage to the plaintiff, an award of constitutional damages in order to vindicate the right would be appropriate for purposes of s 7(4). The subsection provides that a declaration of rights is included in the concept of appropriate relief and the Court may well conclude that a declaratory order combined with a suitable order as to costs would be a sufficiently appropriate remedy to vindicate a plaintiff’s right even in the absence of an award of damages. It is unnecessary, however, to decide this issue in the present case. [...]’⁹⁴

This discordance that was picked by Kriegler J in his separate concurring judgment:

‘On one point, I respectfully suggest, Ackermann J is uncharacteristically ambivalent. As I understand the reasoning in paras [69]-[73] of his judgment, my learned Colleague in principle condemns punitive damages as a potential remedy for infringements of constitutional rights but at the same time seeks to found the current rejection on the particular facts of this case. For reasons that I hope to make plain shortly, I agree that we should unequivocally reject punitive damages as a remedy in this case. I do

⁹⁰ Ibid para 16.

⁹¹ Ibid para 58.

⁹² Ibid para 60.

⁹³ Ibid para 61.

⁹⁴ *Fose* (note 75) para 68.

believe, however, that we should refrain from any broad rejection of any particular remedies in other circumstances ...⁹⁵

Kriegler J further makes reference to the separate concurring opinion of Didcott J in the judgment when he held the view that punitive or exemplary damages are not claimable from the state for breaches of constitutional rights, leaving open however the case of other infringers of such rights. 'Notwithstanding the circumscribed ambit of the rejection of punitive/exemplary damages,' Kriegler J opined, 'I believe that we need not and should not go as far as Didcott J in rejecting for all time the possibility that a case may arise where punitive or exemplary damages are "appropriate" redress for infringement of constitutionally protected rights.'⁹⁶ The import of this is that the decision in *Fose* should not be read as denying the remedy of constitutional damages, but rather as having denied the remedy on the facts of the case before it. One cannot therefore rely on *Fose* as authority is denying constitutional damages as good at law.

While the court took precaution to intricately balance the need for state liability and the legal basis for that liability, the court missed an opportunity to judicially articulate parameters of state liability for human rights violations, parameters not rooted in the Roman Dutch law but in the Constitution the country has adopted for itself. In so doing the court 'passed the buck', deciding instead that it was 'prudent not to anticipate a question of constitutional law in advance of the necessity of deciding it'.⁹⁷ In the court's words:

*'It needs to be emphasised again that the issue we are called upon to decide is a narrow one. We are not required to answer the question raised by the exception in the broad terms in which it was framed, nor as it was presented in plaintiff's argument; namely, whether an action for damages in the nature of constitutional damages exists in law and whether an order for payment of damages qualifies as appropriate relief for purposes of section 7(4)(a) of the interim Constitution in respect of a threat to or infringement of any of the rights in Chapter 3. We are concerned with the much narrower task of answering these questions only in relation to the rights allegedly infringed in the present case and then only in respect of the separate claim for constitutional damages ...'*⁹⁸ (my emphasis)

It is clear that Ackermann J's criticism is directed towards 'punitive' damages as opposed to constitutional damages. The wrong unstated assumption on which he seemed to ground his reasoning and approach was that punishment is the sole existential utility of constitutional damages. Alternatively, the court was simply addressing this utility or motivation for the reason that the court narrowed down the discussion to the circumstances of this case. This is clear from the wording of Ackermann J's conclusion holding that: '[W]e ought not, in the present case, to hold that there is any place for punitive constitutional damages. I can see no reason at all for perpetuating an historical anomaly which fails to observe the distinctive functions of the civil and the criminal law and which sanctions the imposition of a penalty

⁹⁵ Ibid para 91.

⁹⁶ Ibid para 92.

⁹⁷ Ibid para 21.

⁹⁸ Ibid para 20.

without any of the safeguards afforded in a criminal prosecution.⁹⁹ This is also amplified by Didcott J's separate concurring judgment when he said:

'The claim assailed at present must be characterised and treated, in my opinion, as one for punitive or exemplary damages in the sense of those sought not to compensate the plaintiff for any loss or other harm suffered by him or her, but solely to punish or make an example of the wrongdoer for extremely egregious misbehaviour on his or her part. That we are concerned with such a claim alone is, to my mind, clear. ... In substance it was a claim for punitive or exemplary damages and nothing else. ...'¹⁰⁰

The court did not dwell much on the vindication utility of the remedy save to opine that an award of substantial delictual damages in itself will be a powerful vindication of the constitutional rights in question, requiring no further vindication by way of an additional award of constitutional damages.¹⁰¹ On the whole, the court stayed clear of making substantive pronouncements on the circumstances under which constitutional damages may be awarded, and for what rights. Conveniently, the court chose to narrow down the issue to punitive damages. However, a little more instructive jurisprudence emerged after *Fose*.

4.4.2 *Mahambehlala v MEC for Welfare, Eastern Cape, and Another ('Mahambehlala')*¹⁰² and *Mbanga v MEC for Welfare, Eastern Cape, and another ('Mbanga')*¹⁰³

Both *Mahambehlala* and *Mbanga* were Eastern Cape High Court matters in which constitutional damages were granted as just and equitable relief under s 33(1) read with ss 38 and 172(1)(b) of the Constitution, and pursuant to the principle formulated in *Fose*, for unconscionable delays in the processing and payment of welfare grants.

In *Mahambehlala*, the applicant waited for nine months for her disability grant to be approved, when it ought reasonably to have taken no more than three. An order was sought to compel the respondents to consider the plaintiff's application. Leach J turned to s 38 of the Constitution because he did not think the common law provided a solution. The court took the view that the negligent delay 'resulted in an unlawful and unreasonable infringement of [Mahambehlala's] fundamental right to just administrative action as set out in s 33(1) of the Constitution',¹⁰⁴ and ordered the respondents to pay the applicant the amounts she would have been paid had her grant had been approved after three months, with interest.

Leach J saw no prospects of the applicant getting the relief she needed in the form of back payments of the grants under common law. Nor did he believe that a mandamus obliging the administrator to make a decision, to which the applicant was entitled, would be sufficient relief. Leach J held that appropriate relief under s 38 is not restricted to existing common law remedies:

⁹⁹ Ibid para 70.

¹⁰⁰ Ibid para 79.

¹⁰¹ Ibid para 67.

¹⁰² 2002 (1) SA 342 (SE).

¹⁰³ 2002(1) SA 359 (SE).

¹⁰⁴ At 353D-E.

'In my opinion, in the light of these considerations, the applicant's common-law remedies are insufficient to be regarded as appropriate relief as envisaged by s 38 of the Constitution. ... I am of the view that it is incumbent upon this Court to attempt to fashion what may loosely be referred to as "constitutional relief" to cater for the fact that the common-law relief to which the applicant would be entitled is insufficient to address the effects of the delay of her social grant for five months and that it is unrealistic to expect her to institute a separate action to claim damages.'¹⁰⁵

Leach J endorsed the notion that there is a transformative element to constitutional relief. He cited Froneman J's remarks in *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another*¹⁰⁶ and stated that 'a remedy for administrative justice should be determined against the background of a large proportion of the people living in this province [Eastern Cape] being poor, access to legal assistance being limited and the necessary financial assistance to take an unhelpful and unresponsive public administration to court being problematic.'¹⁰⁷ In order to vindicate the Constitution, he added, one should have regard to the basic values and principles enshrined therein.¹⁰⁸

Leach J was compelled to address some 'principles' affecting the granting of constitutional relief: 'In essaying the determination of appropriate relief it is important to bear in mind that, although constitutional remedies will often be forward-looking to ensure that the future exercise of public power is in accordance with the principle of legality [...] they may also be backward-looking'.¹⁰⁹ For that reason, he believed that 'it would be just and equitable for an aggrieved person in the position of the applicant to be placed in the same position in which she would have been had her fundamental right to lawful and reasonable administrative action not been unreasonably delayed'.¹¹⁰

The above comments also give direction in valuation of quantum. Leach J awarded damages equivalent to the amount the applicant ought to have received had the grant application been approved within three months after application, and interest on that amount up until date of payment. This interest at the prescribed rate of 15,5% per annum was not granted according to common-law principles given that no claim on interest could be established at common law.¹¹¹ Rather, together, this relief was framed as 'constitutional relief'.¹¹² This was a practical approach to quantification.

A similar order was made in *Mbanga*,¹¹³ a case with materially similar circumstances to *Mahambehlala*. Two and a half years lapsed after application of a grant, prompting an application for an injunction. The applicant's grant was eventually awarded a month before the matter came before the court. The only issue for the court to decide was whether the

¹⁰⁵ *Mahambehlala* (note 102) 354I-J and 355A-B.

¹⁰⁶ 2001 (2) SA 609 (E) at 1329H-I.

¹⁰⁷ At 355G-H.

¹⁰⁸ At 355-356.

¹⁰⁹ At 355-366J-A.

¹¹⁰ At 356D.

¹¹¹ At 357A-I.

¹¹² *Mahambehlala* (note 102) 356G

¹¹³ Note 103.

applicant was entitled to interest on the monthly arrears that became due at the date the application should have been granted. The court found the delay of 32 months in considering the application to be unreasonable, as was agreed to by the parties.

The decision in *Mahambehlala* was applied, and the court found that the applicant was entitled to 'constitutional relief' for infringement of the right to social assistance and just administrative action under s 33(1) read with s 38 of the Constitution.¹¹⁴ The court held that the applicant had to be placed in the same position he would have been had his application been dealt with within a reasonable time.¹¹⁵ The total amount payable was therefore the quantum of the back payment from the date the application should have been approved plus interest at the prescribed rate of 15.5% per annum, which the court termed 'constitutional relief' as the common law did not provide for such relief.¹¹⁶

4.4.3 *Jayiya v Member of the Executive Council for Welfare, Eastern Cape, and Another ('Jayiya')*¹¹⁷

Following on the lines of *Mahambehlala* and *Mbanga*, the applicant in *Jayiya* had experienced excessive delays in having a permanent disability grant considered. The High Court granted 'constitutional damages' of a lump sum payment of amounts that would have been payable to the applicant had a decision been made timeously, together with interest. On appeal in the SCA, Conradie JA acknowledged that the impetus for the claim was the decision of Leach J in *Mahambehlala*.¹¹⁸ Conradie JA disapproved of Leach J's decision, suggesting that the type of relief that Leach J granted would not be possible in terms of the PAJA. Conradie JA pointed out that the PAJA was passed by Parliament to give effect to the constitutional guarantee of just administrative action, thus the appellant should have sought her remedy in the then recently enacted Act. PAJA, he argued, did not provide for the kind of relief that had been afforded to the appellant, that is, the back pay and interest. Instead, Conradie JA argued that it provides in s 8(1) (c)(ii)(bb) that a court may in proceedings for judicial review, exceptionally direct an administrator to pay compensation.¹¹⁹

Conradie JA held the view that constitutional damages might appropriately be awarded in the absence of statutory remedies or adequate common law remedies, but '[w]here the lawgiver has legislated statutory mechanisms for securing constitutional rights, and provided, of course, that they are constitutionally unobjectionable, they must be used.'¹²⁰ This view is one that ought to be taken to task, as was ably done by Plasket, who argued that Conradie JA's view was based on a narrow and incorrect interpretation of s 8 since it failed to give effect to

¹¹⁴ At 370G-H.

¹¹⁵ At 368I - 369B/C.

¹¹⁶ At 370G-H.

¹¹⁷ 2004 (2) SA 611 (SCA).

¹¹⁸ 2002 (1) SA 342 (SE).

¹¹⁹ *Jayiya* (note 117) para 13.

¹²⁰ *Ibid* para 9.

its constitutional pedigree under ss 38 and 172 of the Constitution and the opening phrase of s 8(1) of PAJA which states that: ‘The court or tribunal, in proceedings for judicial review in terms of s 6(1), may grant any order that is just and equitable [...]’¹²¹ Plasket, correctly in my view, argues that the specific remedies mentioned in s 8(1) do not constitute a closed list as Conradie JA appears to suggest.¹²²

Subsequent to a temporary grant being awarded, the appellant lodged an administrative appeal to get a permanent disability grant, and she was successful. Fortunately for her, the Department paid her all the amounts due to her as per the original order of the High Court, except for costs. An intelligent guess is that the Department took this route on the basis of the earlier rulings in *Mahambehlala* and *Mbanga* notwithstanding the divergent views of the SCA in this case. Despite this development, *Jayiya* is a retrogressive judgment denying relief to the appellant, notwithstanding that the court had itself described the Department as a ‘terminally lethargic Welfare Department’ for all its delays and maladministration.¹²³

4.4.4 *Piliso v Old Mutual Life Assurance Company (SA) Limited and Others*¹²⁴

In *Piliso* the Labour Court had occasion to consider a claim for constitutional damages pursuant to a violation of the Employment Equity Act (‘EEA’).¹²⁵ Ms Piliso was sexually harassed in the workplace with offensive inscriptions made on her photographs at work, photographs of which were then seen by workmates. The applicant did not know who it was who had perpetrated the sexual harassment, but the respondents admitted that sexual harassment of the applicant had occurred. In the alternative to an EEA claim, Ms Piliso claimed in delict on the basis that the first respondent failed in its duty to ensure that its workplace was safe. In the further alternative, Ms Piliso claimed for constitutional damages by virtue of the violation of her constitutional rights.

The Labour Court dismissed the main claim and the delictual claim on the basis that no particular employee was identified as having been the perpetrator, a requirement of the vicarious liability provided under s 60 of the EEA.¹²⁶ However, the further alternative of constitutional damages was successful, with the applicant receiving an award of R45 000. The applicant had referred to the fact that s 50(1) of the EEA requires the court to make an order which is appropriate. The court cited Conradie JA in *Jayiya*¹²⁷ and made an award for constitutional damages on the basis that the employer’s conduct in response to the sexual

¹²¹ Plasket (note 45) 504.

¹²² Ibid.

¹²³ *Jayiya* (note 117) para 7.

¹²⁴ [2006] ZALC 107.

¹²⁵ Act 55 of 1998.

¹²⁶ *Piliso* (note 124) paras 33-34.

¹²⁷ Ibid para 32 citing *Jayiya* (note 117) at 618A: “‘Constitutional damages’ in the sense discussed in *Fose* [...] at 826 (SA) para [69] might be awarded as appropriate relief where no statutory remedies have been given or no adequate common-law remedies exist. Where the lawgiver has legislated statutory mechanisms for securing constitutional rights, and provided, of course, that they are constitutionally unobjectionable, they must be used. ...’

harassment fell short of the standards required by the legal convictions of the community viewed objectively and reasonably,¹²⁸ and violated the minimum fair labour practices required where an employee has been traumatised by sexual harassment, even by an unknown perpetrator. Thus if the employee cannot obtain relief through any statutory or common law remedies, and his or her constitutional right to fair labour practices is found to have been violated, then such employee may approach the court 'in appropriate circumstances' for relief in terms of ss 23(1) and 38 of the Constitution.¹²⁹ In any event, the court proceeded, the conduct constituted *crimen injuria*, and the police ought to as well have been called in to assist, yet this was clearly not thought to be necessary by the employer.¹³⁰ The court stated that: 'The award I make herein should also serve as a deterrent for future violations'.¹³¹

4.4.5 MEC for the Department of Welfare v Kate ('Kate')¹³²

Perhaps the second most important decision on constitutional damages after *Fose* is *Kate*. In this case Froneman J in the Eastern Cape High Court firmly rejected Conradie JA's approach in *Jayiya* and awarded constitutional damages in a disability grant matter.¹³³ On appeal to the SCA, a unanimous five-member bench upheld Froneman J's stance. It had taken forty months for Mrs Kate's disability grant application to be approved, depriving her during that period of her constitutional right to receive a social grant.¹³⁴ The unlawfulness of the conduct of the Eastern Cape Department of Welfare was not contentious.¹³⁵ What was contentious was whether an award of monetary damages was an appropriate remedy for the admitted constitutional breach,¹³⁶ specifically interest during the period from the date the application was made to the date that Kate was notified of approval. During that period interest did not accrue to Kate on ordinary principles because the debt was not yet payable.¹³⁷

The Department of Welfare argued that Kate had delictual remedies that were sufficiently restorative of any loss that was caused to her and that a remedy of constitutional damages was not required.¹³⁸ In answer to this submission, the court raised the following:

'The question that submission raises is not so much whether the remedy that is now proposed is an appropriate one to remedy Kate's loss but rather whether a constitutional remedy should be granted at all. No doubt the infusion of constitutional normative values into delictual principles itself plays a role in protecting constitutional rights, albeit indirectly. And no doubt delictual principles are capable of being extended to encompass state liability for the breach of constitutional obligations. *But the relief*

¹²⁸ *Piliso* (note 124) para 76.

¹²⁹ *Ibid* para 80.

¹³⁰ *Ibid* para 83.

¹³¹ *Ibid* para 93.

¹³² 2006 (4) SA 478 (SCA).

¹³³ *Kate v Member of the Executive Council for the Department of Welfare, Eastern Cape* [2005] 1 All SA 745 (SE).

¹³⁴ *Kate* (note 132) para 17.

¹³⁵ *Ibid* para 29.

¹³⁶ *Kate* (note 132) para 23.

¹³⁷ *Ibid* para 17.

¹³⁸ *Ibid* para 26.

that is permitted by s 38 of the Constitution is not a remedy of last resort, to be looked to only when there is no alternative – and indirect – means of asserting and vindicating constitutional rights. While that possibility is a consideration to be borne in mind in determining whether to grant or to withhold a direct s 38 remedy it is by no means decisive, for there will be cases in which the direct assertion and vindication of constitutional rights is required. ... In my view the breach in the present case warrants being vindicated directly for two reasons in particular. First, I see no reason why a direct breach of a substantive constitutional right (as opposed to merely a deviation from a constitutionally normative standard) should be remedied indirectly. Secondly, the endemic breach of the rights that are now in issue justifies – indeed, it calls out for – the clear assertion of their independent existence.’¹³⁹ (My emphasis).

The SCA per Nugent JA, rejected the use of constitutional damages as a remedy of last resort. A mandamus would not have been the best remedy in this case given the prompt action required if the wrong was to be averted before any loss occurred. In addition, the court took the view that the rights in issue were directed towards the very poorest in the South African society, who have little or nothing to sustain them and who can be expected to have little or no knowledge of where their rights lie nor the resources readily available to secure them.¹⁴⁰ This is in line with Froneman J’s remarks in *Ngxuzo*¹⁴¹ that a remedy for administrative justice should be determined against the background of a large proportion of the people living in this province being poor, access to legal assistance being limited and the necessary financial assistance to take an unhelpful and unresponsive public administration to court being problematic. The court awarded constitutional damages in the form of interest on accrued amounts at the prescribed rate of 15, 5% per annum, affirming the High Court’s approach in *Mahambehlala* and *Mbanga*.

4.4.6 *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (*‘Modderklip’*)¹⁴²

Eight years after *Fose*, the CC had occasion to revisit the question of constitutional damages on the subject of illegal occupation of land and evictions. Over 36 000 people had illegally occupied Modderklip farm and the respondent obtained an eviction order for which the Sheriff insisted on payment of R1,8 million to execute ‘because it required the assistance of private contractors’. The state refused to contribute to the costs of eviction and Modderklip’s appeal for assistance to the President and the Ministers of Safety and Security; Agriculture and Land Affairs and of Housing was futile.¹⁴³ Modderklip continued to actively search for ways to resolve the problem, including offering to sell to the municipality the portion of the farm that was unlawfully occupied at a negotiable price of R10 000 per hectare.¹⁴⁴ The police refused to enforce the eviction order, regarding the matter as a private civil dispute between Modderklip and the occupiers.

¹³⁹ Ibid para 27, footnotes omitted.

¹⁴⁰ Ibid para 31.

¹⁴¹ Note 106 above at 1329H – I.

¹⁴² 2005 (5) SA 3 (CC).

¹⁴³ Ibid para 9.

¹⁴⁴ Ibid para 6.

With Modderklip now holding an eviction order that it could not enforce, the Pretoria High Court granted a structural interdict, ordering the government to produce a plan to end the unlawful occupation and find alternative accommodation for the squatters.¹⁴⁵ Among other things, it declared that Modderklip's property rights under s 25(1) of the Constitution had been violated by the illegal occupation and the failure of the occupiers to comply with the eviction order. It also held that the state had breached its obligations to take reasonable steps within its available resources to realise the right of the occupiers to have access to adequate housing and land. According to the High Court, this failure by the state effectively amounted to the unlawful expropriation of Modderklip's property and also infringed Modderklip's right to equality by requiring it to bear the burden of providing accommodation to the occupiers, a function that should have been undertaken by the state.¹⁴⁶

On appeal by the state, the SCA agreed in general with the findings of the High Court, and declared that the rights of both the landowner (right to property) and the squatters (rights to housing) had been impaired, and that the squatters were entitled to remain on the land until alternative accommodation was made available by the local government, and that the land owner was entitled to constitutional damages calculated in terms of the Expropriation Act¹⁴⁷ for the loss of use of the land during the period for which the land had been occupied.¹⁴⁸ The SCA cited *Fose*, and stated that the courts 'have a duty to mould an order that will provide effective relief to those affected by a constitutional breach.' Fundamentally, it pointed out that:

'...[C]onstitutional remedies will differ by circumstance. The only appropriate relief that, in the particular circumstances of the case, would appear to be justified is that of "constitutional" damages, i.e. damages due to the breach of a constitutionally entrenched right. No other remedy is apparent. Return of the land is not feasible. There is in any event no indication that the land, which was being used for cultivating hay, was otherwise occupied by the lessees or inhabited by anyone else. Ordering the State to pay damages to Modderklip has the advantage that the Gabon occupiers can remain where they are while Modderklip will be recompensed for that which it has lost and the State has gained by not having to provide alternative land. The State may, obviously, expropriate the land, in which event Modderklip will no longer suffer any loss and compensation will not be payable (except for the past use of the land). A declaratory order to this effect ought to do justice to the case. Modderklip will not receive more than what it has lost, the State has already received value for what it has to pay and the immediate social problem is solved while the medium and long term problems can be solved as and when the State can afford it.'¹⁴⁹

This pragmatic order was upheld by the CC per Langa ACJ.¹⁵⁰ The CC held that Modderklip had not been idle nor did it neglect to assert its rights of ownership from the outset. It had immediately engaged the municipality and the other organs of state in search of a humane

¹⁴⁵ *Modderklip Boerdery (Edms) Bpk v President of the RSA* 2003 (6) BCLR 638 (T).

¹⁴⁶ *Modderklip* (note 142) para 15.

¹⁴⁷ Act 63 of 1975.

¹⁴⁸ *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)* 2004 (6) SA 40 (SCA).

¹⁴⁹ *Ibid* para 43 (footnotes omitted).

¹⁵⁰ *Modderklip* (note 142) para 65.

way out of the impasse. The municipality, for its part, refused to involve itself or to cooperate with Modderklip in the search for solutions, while negative and unhelpful conduct of the state throughout was consistent with the view articulated on its behalf in court that the responsibility for the implementation of the evictions rested solely on Modderklip.¹⁵¹ The state denied its duty to provide accommodation to the affected arguing that providing housing to the affected people would amount to 'queue-jumping' which to them was unacceptable and 'would be disastrous for the existing programmes [...] leaving the land reform and housing programs in chaos.'¹⁵² Yet, as the SCA argued (per Harms JA), the occupation had not occurred with the intent of obtaining precedence over any other person, but rather because people had nowhere to go.¹⁵³ The CC found that Modderklip could not be blamed for any delay in instituting eviction proceedings and for the failure to consummate the eviction order.¹⁵⁴ As the court accepted, Modderklip 'found itself in a checkmate position, having followed the correct legal procedures and having obtained a court order, only to find that the organs of state were either unwilling or unable to assist in enforcing it.'¹⁵⁵ Yet it was obvious that only the state held the key to the solution of Modderklip's problem.¹⁵⁶ The state never gave any acceptable explanation for its failure to assist Modderklip to extricate itself, nor on why Modderklip's offer for the state to purchase a portion of Modderklip's farm was not taken up.¹⁵⁷

Langa ACJ rejected a declaratory order as ineffective for the goals at hand,¹⁵⁸ and expressed no opinion on whether the state can be ordered by a court to expropriate land, regardless of the will of the owner.¹⁵⁹ He found that the award of constitutional damages made by the SCA was the most appropriate remedy in the circumstances,¹⁶⁰ and held that should the state decide to expropriate the land on Modderklip's farm, the sum to be awarded as compensation would be set off against compensation to be given for the expropriation.¹⁶¹ Regarding quantum, the court found that the difficulty of quantifying the compensation was met by resorting to the mechanism provided in s 12 of the Expropriation Act.¹⁶²

¹⁵¹ Ibid para 31.

¹⁵² Ibid para 24.

¹⁵³ Ibid para 25.

¹⁵⁴ Ibid para 38.

¹⁵⁵ Ibid para 44.

¹⁵⁶ Ibid para 42.

¹⁵⁷ Ibid para 50.

¹⁵⁸ Ibid para 60.

¹⁵⁹ Ibid paras 62-64.

¹⁶⁰ In granting the relief, the court referred to the decision in *Fose* para 60 where Ackermann J stated, '[I]t seems to me that there is no reason in principle why 'appropriate relief' should not include an award of damages, where such an award is necessary to protect and enforce chap 3 rights. ...'

¹⁶¹ *Modderklip* (note 142) para 65.

¹⁶² Ibid para 59.

4.4.7 *Minister of Police v Mboweni and Another ('Mboweni')*¹⁶³

In *Mboweni* constitutional damages were sought in the SCA for loss of support and parental care after a Mr Mahlali suffered fatal injuries from assault by fellow inmates while in police custody. The police neither detected the assault nor did anything to prevent it or protect the victim. No grounds were found for his arrest and detention, and on release he died five days later after being taken to a doctor.¹⁶⁴ Ms Mboweni and the second respondent were both mothers of children of the deceased, and on behalf of their daughters sued in delict for loss of support, and sought constitutional damages because their daughters' 'right to parental care as provided for in s 28(1)(b) of the Constitution was impaired upon' when their father died as a result of 'the unconstitutional conduct' of the members of the police.¹⁶⁵ In respect of the delictual claim, judgment was given for the amounts as agreed to by the parties.¹⁶⁶

In the High Court Mothele J allowed the claim 'for proven constitutional damages arising out of the unlawful deprivation of their father's parental care' and referred the quantum of those damages to trial.¹⁶⁷ On appeal by the Minister, Wallis JA was of the view that while the CC in *Fose* accepted that there may be circumstances in which damages are a just and equitable remedy for the breach of a constitutional right, the cases of *Modderklip* and *Kate* wherein the relief was granted differed entirely from the matter at hand. To uphold the judgment of the court below would thus break new ground.¹⁶⁸

The High Court had made its decision on the basis of an agreed statement of facts, and the SCA took issue with what it perceived as inadequate relevant facts, thus failure to comply with the requirements of rule 33(2)(a) of the Uniform Rules of Court: 'The parties and the court below approached the matter as if there was a clear-cut issue of law capable of resolution with the barest minimum of factual matter being placed before the court. That was an error. [...] Here there were no facts dealing with the question of the loss of parental care.'¹⁶⁹ According to Wallis JA, the statement of facts provided virtually no detail in regard to the children's claims, other than to claim that the children had been robbed of parental care as the deceased provided parental care to his two daughters.¹⁷⁰ Wallis JA thought that the information that should have been placed before the court included whether the father was actually taking care of the children, since in every case whether the parent who has died provided parental care in terms of the Constitution would depend on the relationship between the parent who has died and the children in respect of whom the claim is being made.¹⁷¹ According to Wallis JA, the provided statement of facts also lacked information on

¹⁶³ *Minister of Police v Mboweni and Another* 2014 (6) SA 256 (SCA).

¹⁶⁴ *Ibid* para 1.

¹⁶⁵ *Ibid* para 2.

¹⁶⁶ *Ibid*.

¹⁶⁷ *Mboweni* (note 163) para 3.

¹⁶⁸ *Ibid* para 4.

¹⁶⁹ *Ibid* para 5.

¹⁷⁰ *Mboweni* (note 163) para 9.

¹⁷¹ *Ibid* para 13.

whether the inaction of the police in failing to safeguard and care for Mr Mahlati while in police custody, constituted a wrongful act in relation to the children. For these reasons, Wallis JA was not convinced that the trial court judge was in a position to assess whether there had in fact been any loss of parental care.¹⁷²

Wallis JA did not end there: 'Even if those issues could be and had been determined in favour of the respondents there remained the further issue of whether constitutional damages were the appropriate constitutional remedy for that breach.'¹⁷³ Again, Wallis JA reflected the prevailing judicial attitude of first resorting to common law remedies:

'The court below did not consider whether a remedy by way of a claim for damages for loss of support was an appropriate remedy for any breach of the children's rights in this case. Its approach was that the Constitutional Court in *Fose* had recognised the possibility of a claim for constitutional damages as an appropriate remedy for a breach of a constitutional right and the only issue was whether such damages should be awarded for a breach of the right in s 28(1)(b) of the Constitution. That approach was incorrect. *The court should first have considered the adequacy of the existing remedy. If it was inadequate then it should have considered whether the deficiency could be remedied by a development of the common law to accommodate a claim more extensive than one for pecuniary loss.* Ackermann J pointed out in *Fose* that the common law of delict is flexible and falls to be developed with due regard to the spirit, purport and objects of the Bill of Rights. ...'¹⁷⁴ (My emphasis)

Wallis JA reasoned that the court below failed to address issues of a factual and a legal character that were central to the decision, and for those reasons the judgment of the court below could not stand.¹⁷⁵ The action was referred back to the High Court for trial in accordance with the findings of the judgment.¹⁷⁶ Important is that while the SCA upheld the appeal, the court did not deny the claim as unsound nor did it refuse the relief. Instead, the court called for proper information to be presented before the court before a ruling could be made. This is therefore not a decision that necessarily contributed negatively to the constitutional damages jurisprudence per se, save to restate the unfortunate approach that resort had to be had to common law relief first.

4.4.8 Other cases

In *Ngomana v CEO of the SA Social Security Agency*¹⁷⁷ the Cape High Court provided some pointers on the nature of the constitutional damages relief: '[T]he award of constitutional damages is discretionary'.¹⁷⁸ In so far as the court understood the utility of the remedy, it opined as follows: 'The purpose of constitutional damages is not primarily to compensate for financial prejudice or patrimonial loss; it is rather a means by which the courts may seek by surrogate relief to give expression to the fulfilment or realisation of a claimant's abrogated constitutional rights by way of an award in monetary compensation. ...'¹⁷⁹

¹⁷² Ibid para 15.

¹⁷³ Ibid para 20.

¹⁷⁴ Ibid para 22.

¹⁷⁵ Ibid para 26.

¹⁷⁶ Ibid para 27.

¹⁷⁷ 2010 ZAWCHC 172.

¹⁷⁸ Ibid para 39.

¹⁷⁹ Ibid.

In *Government of the Republic of South Africa and Others v Von Abo*¹⁸⁰ the SCA reversed the decision of the High Court that awarded damages to the plaintiff for breach of his property rights by the Zimbabwean Government during the land reform process. However, the SCA cited *Fose* and other cases and stated that ‘Section 38 of the Constitution empowers a court to grant appropriate relief when it concludes that a breach of rights under the Bill of Rights has been established’ and that ‘a monetary award of damages for a constitutional breach could in appropriate circumstances be made.’¹⁸¹ Of procedural relevance, the court suggested that the issue of causation will be relevant in determining the appropriateness of constitutional relief.¹⁸² The SCA seemed to suggest that proof of causation and loss are prerequisites.

In *Sanderson v Attorney-General, Eastern Cape*¹⁸³ the CC mentioned the award of damages after acquittal as possible ‘appropriate’ relief when delays in prosecution result in prejudice to the accused.¹⁸⁴ The court provided no further elaboration on this aspect, but this compensation is certainly not delictual but constitutional relief for violation of a right.

In *Snyman v Van Tonder*,¹⁸⁵ the plaintiff claimed for constitutional damages for a solatium for infringement by the defendant of certain of the plaintiff’s basic rights. The court held that ‘[w]hether a remedy in constitutional damages is appropriately available in a case depends on the given circumstances. The existence and character of the circumstances allegedly giving rise to a cognisable claim for such damages would have to appear in the particulars of claim in any action in which such damages were claimed’.¹⁸⁶ The court took the view that legal policy determines whether or not a claim for such damages is cognisable in the circumstances.¹⁸⁷ The court cited with approval Joubert et al (eds)’s submission in LAWSA that: ‘A constitutional remedy does not aim to compensate and such an award should be considered in only the most exceptional circumstances, when compelling reasons so dictate, and only if there is no other compensatory remedy available in law. In delict, an award for damages is the primary remedy; in constitutional law, an award for damages is a secondary remedy, to be made only in appropriate cases when other remedies would not be effective’.¹⁸⁸ The court proceeded under the view that if the infringements complained of are compensable in a delictual action, compensatory damages should be sought in delict.¹⁸⁹ The court then upheld the defendant’s exception to the plaintiff’s particulars of claim on the basis that a

¹⁸⁰ 2011 (5) SA 262 (SCA).

¹⁸¹ Para 32, citing *Minister of Health & others v Treatment Action Campaign & others (No 1)* 2002 (5) SA 703 (CC); *Modderklip* (note 148); *Kate* (note 132).

¹⁸² Para 33.

¹⁸³ 1998 (2) SA 38 (CC).

¹⁸⁴ Para 39

¹⁸⁵ [2017] ZAWCHC 60.

¹⁸⁶ Para 4.

¹⁸⁷ Para 5.

¹⁸⁸ Para 5 (citing 3rd ed, Vol 15, Law of South Africa (LAWSA), *Delict*, para 6, 10).

¹⁸⁹ Para 6.

prohibitory interdict and delictual compensation should have been sought.¹⁹⁰ This case advances the exceptional remedies and remedy of last resort mantra. What is notable however is that this is a case of horizontal application of the Bill of Rights, with a private citizen suing another.

In *Pinkie v Commissioner of the South African Police and Another*,¹⁹¹ in a claim for constitutional damages for police dereliction of duty, the court found that the cases of *Fose*, *Modderklip* and *Kate* 'demonstrate that the question of remedy can only arise after the relevant right has been properly identified and the pleaded or admitted facts show that the right has been infringed'.¹⁹² The court concluded that the plaintiff must identify and plead the relevant constitutional right infringed by the defendants.¹⁹³ The court proceeded to state that even then, that does not necessarily establish the right to claim damages as a further issue is whether the actions or inaction of the police constituted a wrongful act in relation to the plaintiff.¹⁹⁴

Yet another case involving children was *Mbhele v MEC for Health for the Gauteng Province*,¹⁹⁵ in which constitutional damages were claimed based on the right to rear a child. The SCA awarded damages in delict for the Department of Health's failure to take reasonable care to prevent stillbirth, but found a claim of constitutional damages to be unsustainable as, inter alia, a child can only recover damages for pre-natal injuries if subsequently born alive.¹⁹⁶

A case similar to *Modderklip* came before the High Court in *Fischer*.¹⁹⁷ Applicant sought an eviction against a large number of illegal occupiers on its farm. On constitutional damages, the court held the view that '[w]hile the facts of *Modderklip* are broadly similar to those in the instant case, it supports constitutional damages as a form of relief, but offers no real authority on other forms of relief'.¹⁹⁸ The court also addressed the question of appropriate relief citing *Fose*, and stating that should there be no existing appropriate relief, the court is obliged to forge new and creative remedies in order to ensure effective relief where a constitutional right has been infringed.¹⁹⁹ In so doing, it said, the historical, social and economic situation cannot be ignored.²⁰⁰

¹⁹⁰ Para 8.

¹⁹¹ [2017] ZAGPPHC 939.

¹⁹² Para 6.

¹⁹³ Para 7.

¹⁹⁴ Ibid.

¹⁹⁵ [2016] ZASCA 166.

¹⁹⁶ The court based this on the dictum in *Pinchin & another, NO v Santam Insurance Co. Ltd* 1963 (2) SA 254 (W) 260B.

¹⁹⁷ *Fischer v Persons listed on Annexure X and two other cases* 2018 (2) SA 228 (WCC).

¹⁹⁸ Para 42.

¹⁹⁹ Para 160.

²⁰⁰ Para 161.

4.5 OBSERVATIONS AND CRITICISMS OF THE COURTS' APPROACH

The jurisprudence of the courts, more specifically that of the CC, has not been very encouraging.²⁰¹ From the above is seen an array of views, from cases that raise doubt and questions about the very nature of the relief; to those that have rejected the remedy under specific circumstances; to those that have granted the remedy; and to those that have expressed no opinion regarding the application of damages in other rights that have not been tested before the courts.

The 'founding' case on this relief, *Fose*,²⁰² recognised that in principle monetary damages are capable of being awarded for a constitutional breach.²⁰³ The CC emphasised that its decision was not on whether an order for the payment of damages qualifies as appropriate relief in respect of a threat to or infringement of any of the rights in the Bill of Rights, but was concerned only with the much narrower task of deciding whether an award of damages was appropriate in relation to the particular breach that was in issue, and for the specific punitive reason for which the remedy was sought.²⁰⁴ The court narrowed down its enquiry, the goal being seemingly to avoid any form of statements that could be seen as guidelines on the application of the remedy in other circumstances and on other rights. If one looks at *Mboweni*, for instance, the SCA was quick to mention that while the CC in *Fose* accepted that there may be circumstances in which damages are a just and equitable remedy for the breach of a constitutional right, the relief had only been granted in *Modderklip* and *Kate*, both of which differed entirely from the matter in *Mboweni*, such that to award the damages in that case would break new ground.²⁰⁵ This was recognition of the limited and very specific circumstances in which constitutional damages have thus far been awarded. The SCA in *Mboweni* was hesitant to break new ground.

One is not too off the mark to argue that insofar as giving elaboration to the relief and how it ought to operate, and the circumstances in which it should be granted, several courts have found refuge in passing the buck. This was the case with *Fose*. In *Mboweni*, Wallis JA chose instead to dispose the matter on procedural grounds, deciding that the stated case did not provide adequate facts upon which a decision could be made.

One observation is the inconsistency with which courts have understood and applied constitutional damages. A quite prevalent view espoused is that a litigant and court must first look to alternative remedies and then consider constitutional damages only as a remedy of last resort. This is a question that arose in *Fose* and was subsequently supported in cases such as *Jayiya* and *Mboweni*.²⁰⁶ In this class of cases is also found the view that preference lies in

²⁰¹ Ian Currie and Johan de Waal (eds) *The New Constitutional and Administrative Law* Volume 1, Constitutional law (1st ed) (2001) Juta, Cape Town 297.

²⁰² 1997 (3) SA 786 (CC).

²⁰³ Ibid para 69.

²⁰⁴ Ibid para 20.

²⁰⁵ *Mboweni* (note 163) para 4.

²⁰⁶ Ibid para 22.

developing the common law where common law remedies are inadequate, as opposed to granting constitutional relief. If one accepts these approaches, there is a danger in abdicating the utility of constitutional remedies to common law remedies. This erroneously assumes that the goal meant to be achieved by a constitutional remedy will necessarily be achieved by a common law remedy. Such an approach tends to undermine the importance of the rights concerned and stands to elevate common law remedies as the key 'fossilised' remedies to be preferred at all times. Such an approach deprives the right holder of the constitutional promise, as there is a constant retreat to Roman Dutch law for answers, giving pre-eminence to common law remedies despite the emergence of a new constitutional culture. We are therefore seeing elements of judicial conservatism that carries with it the risk of limiting the reach of constitutional relief to litigants.

However, *Kate* raised a crucial counter-argument,²⁰⁷ which is that the fact that delictual damages can be used indirectly to vindicate constitutional rights as was done in *Carmichele*²⁰⁸ and *Van Duivenboden*²⁰⁹ among others, must not mean that constitutional remedies have no place as direct vindication. The interpretation of constitutional damages as a remedy of last resort was firmly rejected by Nugent JA in *Kate*.²¹⁰

In *Jayiya*,²¹¹ Conradie JA was of the view that the appellant in *Mahambehlala* should have sought her remedy in PAJA rather than in the Constitution,²¹² and in his view PAJA does not allow for the recovery of constitutional damages.²¹³ Whilst these obiter comments have not yet been dealt with by another court, Conradie JA's views must be taken to task. *Minister of Defence v Dunn*²¹⁴ and *Darson Construction (Pty) Ltd v City of Cape Town*²¹⁵ go further to suggest that proof of pecuniary loss is a pre-requisite for a damages claim under PAJA, as *Von Abo*²¹⁶ also seemed to intimate. These remarks and those made in *Jayiya* are disputed by what Langa CJ and O'Regan J said in a dissenting opinion in *Steenkamp NO*²¹⁷ where they found that s 8 of PAJA might result in the development of administrative law principles governing the payment of compensation to vindicate the constitutional right to administrative justice.²¹⁸ *Mahambehlala* and *Mbanga* essentially granted constitutional damages in what are squarely administrative law circumstances governed by PAJA. Again, it was made clear beyond doubt

²⁰⁷ *Kate* (note 132) para 27.

²⁰⁸ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

²⁰⁹ *Minister of Safety and Security v Van Duivenboden* [2002] 3 All SA 741 (SCA).

²¹⁰ *Kate* (note 132) para 27.

²¹¹ 2004 (2) SA 611 (SCA).

²¹² PAJA came into operation on 30 November 2000. Whether it was applicable to events that had occurred before then was not pertinently considered in *Jayiya*.

²¹³ *Jayiya* (note 117) para 9.

²¹⁴ 2007 (6) SA 52 (SCA).

²¹⁵ 2007 (4) SA 488 (C).

²¹⁶ *Supra* (SCA).

²¹⁷ *Steenkamp NO* (note 30).

²¹⁸ *Ibid* para 97.

by the CC in *Allpay 2* that compensation under s 8 of PAJA is not a private law remedy,²¹⁹ meaning that they are public law damages.

The issue of whether constitutional damages are a remedy of last resort is therefore an aspect that falls to be addressed in this thesis, including the wisdom of allowing constitutional damages claims in cases where delictual remedies may apply. Within the Bill of Rights itself, it is not clear whether generally a breach of any of the rights contained therein can substantiate a constitutional damages claim, or some are excluded from the purview of the relief. As with *Fose*, the court in *Kate* declined to answer the question stating that it was taking a narrow approach to the facts at hand.²²⁰ Again, we see caution in the way the courts have dealt with the subject.

In *Modderklip*, the SCA reasoned that the structural interdict granted by the High Court as well as the broadly formulated declaratory order were not the best orders under the circumstances.²²¹ So was expropriation. This was the case with *Mahambehlala* and *Mbanga* wherein a mandamus was not seen to be useful. These cases are therefore a demonstration of how handy and valuable constitutional damages become as a matter of pragmatism. It is important to note that although these three cases used constitutional damages out of necessity, none of them spoke of constitutional damages as being a remedy of last resort.

In summary therefore, two points can be taken from the jurisprudential analysis. There are contesting views among the courts. In one camp, the approach the courts have taken is that where there is a possible existing remedy in delict, that should be pursued rather than constitutional damages, and where such common law remedies fall short they must be developed. In this camp the discourse has primarily been one of avoidance, with convenient sweeping aside of the constitutional damage case to make it one of delict, and then refuse to pronounce on how constitutional damages work in precedent-setting fashion. In the other camp, are the proponents of direct vindication of constitutional rights through direct invocation of constitutional relief where circumstances call for such, notwithstanding the possible applicability of other common law relief. But again, avoidance and narrowed down approaches is a feature in this camp, clearly avoiding creating a framework for the relief.

Both these sides, unfortunately, expose problems in the judicial approach. In view of the inconsistent approaches, one is not too far off the mark to say that a certain negative energy is emitted by most courts where constitutional damages are concerned, and many courts have missed the opportunity to vindicate constitutional rights in a manner that speaks to the wider status *quo* of people who find their rights at the mercy of government and its functionaries but are unable themselves to seek redress through the courts due to issues of

²¹⁹ *Allpay (No 2)* (note 25) para 72.

²²⁰ *Kate* (note 132) para 25.

²²¹ *Modderklip SCA* (note 148) para 39.

access to justice. What emerges therefore is a pressing need to streamline the approaches of the various courts to forge consistency in approach and understanding of the remedy.

4.6 CONCLUSION

In this Chapter the constitutional foundations of constitutional damages have been explored, as have been those instances in which this relief has been legislated in various statutes that give scope and content to rights in the Bill of Rights. I have then proceeded to look at the judicial approach, and have examined a line of cases that have addressed constitutional damages, all post 1993. Through this, the development of the remedy in the new constitutional dispensation has been traced, and the weak points exposed. A clear problem statement has been established on which the following Chapters will build and seek to address. There is seemingly the absence of a strong will by the judiciary, especially the Constitutional Court, in making pronouncements that will set good precedent in the way of a framework for the awarding of constitutional damages.

What is clear is that the debate on the interface between private law and public law remedies is still raging, and is yet to be fully resolved.²²² Constitutional damages find themselves caught up in this debate as the concept of ‘damages’ is one which can now be found in both private and public law remedies. The judiciary has decidedly taken a reactive as opposed to a proactive stance to this subject, and in those cases where the judiciary addresses the subject relatively, there is cold feet in extending the frontiers of legal protection to the powerless through constitutional damages. It is with this in mind that the following Chapters proceed to suggest approaches that the courts can take in awarding constitutional damages. To set the pace, the next Chapter looks at how constitutional damages have been treated in comparative jurisdictions.

²²² As Moseneke DCJ indicated in *Steenkamp NO* (note 30) at para 1, it is a complex debate.

CHAPTER 5

COMPARATIVE PERSPECTIVES IN CONSTITUTIONAL DAMAGES

5.1 INTRODUCTION

Constitutional damages are not a South African invention. They have been awarded both in the common law and civil law traditions across the world, albeit with different nomenclature. The United States of America (US), Canada, France, India, Trinidad and Tobago, Sri Lanka, New Zealand and Botswana have all awarded constitutional damages. One can thus look at these jurisdictions for insights and best practices in modelling a local framework. This Chapter examines the recognition of constitutional damages in other jurisdictions, and the courts' approach and circumstances under which the relief has been granted.

The comparators discussed have been selected, firstly and primarily, for the wealth of jurisprudence developed on the subject. This is the case with Canada, the US, India, Trinidad and Tobago, New Zealand and Sri Lanka. Secondly, comparators have been chosen on the basis that the countries share the common law tradition with South Africa, and have developed constitutional protection of rights. Canada, India, New Zealand and the US all place a high premium on constitutional protection of rights. India in particular is important as it is a developing country with an almost similar transformative constitutional culture as South Africa. Botswana is added to this list for its recent important case that was decided on the subject. Finally, France is included for fullness of the picture as a representative of the civil law tradition.

As a preliminary point, I heed the caution of Goliath J in *Tlouamma and others v Speaker of the National Assembly and others*¹ that insofar as use of comparative law in constitutional law is concerned, one must be cautious of uncritical reliance on legal doctrines from foreign jurisdictions that bear constitutionally dissimilar features to South Africa, and that 'foreign jurisprudence must be viewed through the prism of the Bill of Rights and our constitutional values'.² I must therefore add that the following assessment does not seek to engage in wholesale consumerism of comparative legal doctrine, but to understand approaches and progress and challenges on the subject in comparable jurisdictions. The Chapter ends with a brief analysis of the positions in the comparative jurisdictions, and brief remarks on the position of international law on constitutional damages.

¹ 2016 (1) SA 534 (WCC).

² Ibid para 133, citing *City of Cape Town v South African National Roads Authority Limited and Others* 2015 (3) SA 386 (SCA) para 31 and *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) para 31.

5.2 CANADA AND CHARTER DAMAGES

Canada is a leading jurisdiction on constitutional damages. Constitutional damages are awarded for violations of rights in terms of s 24(1) of the Canadian Charter of Rights and Freedoms,³ earning them the name ‘Charter damages’.

5.2.1 Jurisprudence

Whilst phrases such as ‘new endeavour’ and ‘an area that has not matured yet’ have been used in reference to Charter damages as recently as 2010,⁴ the earliest known case in which constitutional damages were awarded is *Crossman v R*⁵ in 1984. Various appellate courts in Canada have found that an action for constitutional damages is an appropriate and just remedy.⁶ Contrary to South Africa as seen particularly in *Fose*, exemplary or punitive damages have been awarded in several cases in the form of Charter damages.⁷ In *Collin v Lussier* (1983)⁸ and *Lord v Allison* (1986)⁹ punitive damages were awarded in addition to compensatory damages. This culminated in a Supreme Court decision in 2010: *Vancouver (City) v Ward*.¹⁰ It will be recalled that in *Fose*¹¹ one of the objections put forward by the CC against reliance on Canadian law for authority was that while the Canadian High Courts had pronounced in favour of constitutional damages, the Supreme Court was yet to do so.¹² *Ward* changed this.

Ward was a case of mistaken identity in which the Supreme Court upheld a s 24(1) claim against unreasonable search and seizure, guaranteed in s 8 of the Charter.¹³ *Ward* was wrongfully arrested because he fitted the vague description of a person who was suspected of trying to throw a pie at the former Prime Minister. The police seized his car and strip-

³ (1984) (4th) 588.

⁴ *Vancouver (City) v Ward* 2010 SCC 27, [2010] 2 S.C.R. 28 paras 21, 33 and 43.

⁵ [1984] 1 FC 681 (TD). See also Pilkington ‘Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms’ (1984) 62(4) *Canadian Bar Rev* 517.

⁶ In *Patenaude v Roy* (1994) 123 DLR (4th) 78 (Que CA) exemplary damages of \$50 000 were awarded where police officers used excessive and unnecessary force in executing a search warrant. The appeal court increased the amount of damages to \$100 000. In *McKinney v University of Guelph* (1990) 67 DLR (4th) 545 621, Wilson J reasoned that ‘the remedial scope of s 24(1) was not intended to be limited to that available at common law’. See also *Guimond v Quebec (Attorney General)* (1996) 138 DLR (4th) 647 (SCC) para 15; *Mackin v New Brunswick (Minister of Finance)*; *Rice v New Brunswick* (2002) 209 DLR (4th) 564 (SCC) para 79; *Dulude v Canada* [2001] 1 FC 545; *Dix v Canada (Attorney General)* (2002) 7 Alta LR (4th) 205; *Chrispen v Kalinowski* (1997) 148 DLR (4th) 720 (Sask QB); and *Persaud v Donaldson* (1995) 130 DLR (4th) 701 and *Vespoli v The Queen* (1984) 12 CRR 185 (Fed CA).

⁷ The Constitutional Court in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 40 attempted to sidestep adopting the Canadian approach as follows: ‘Exemplary or punitive damages as Charter remedies have been awarded in several cases. This must, however, be seen in the light of the fact that Canada’s private law system of torts which, in common with that of other common law countries, recognises exemplary or punitive damages in appropriate circumstances in ordinary tort claims, but goes somewhat further even than courts in the United Kingdom.’

⁸ (1983) 6 CRR 89, 107.

⁹ 3 BCLR (2d) 300 (SC).

¹⁰ Note 4 above.

¹¹ *Fose* (note 7).

¹² *Ibid* para 15.

¹³ Part I of the *Constitution Act 1982*.

searched him. In the court *a quo*, the decision was primarily focused on the issue of whether *mala fides* was required in order for damages to be awarded for a Charter violation. It had been argued that the police lacked *mala fides* and thus damages should not be awarded to Ward. The Court of Appeal upheld the trial judge's ruling that bad faith, abuse of power, or tortious conduct were not necessary requirements for awarding Charter damages.¹⁴ The Supreme Court did not directly deal with this issue, but its decision implied that *mala fides* is not a requirement. McLachlin CJ for the unanimous Supreme Court found that anyone whose rights have been violated may approach a court for any '*appropriate and just*' remedy in terms of s 24(1) of the Charter. The Supreme Court found that the language of s 24(1) is broad enough to include the remedy of constitutional damages.¹⁵ To this end, Canada's s 24(1) of the Charter converges with South Africa's s 38 of the Constitution.

The Supreme Court set out a two-staged enquiry. The first step is to establish that a Charter right has been breached, and the second step is to show why damages are a just and appropriate remedy, 'having regard to whether they would fulfil one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches.'¹⁶ McLachlin CJ stated that:

'Damages for breach of a claimant's Charter rights may meet these conditions. They may meaningfully vindicate the claimant's rights and freedoms. They employ a means well-recognized within our legal framework. They are appropriate to the function and powers of a court. And, depending on the circumstances and the amount awarded, they can be fair not only to the claimant whose rights were breached, but to the state which is required to pay them.'¹⁷

Correctly so, the court opined that the evolution of s 24 of the Charter to meet the challenges and circumstances of cases brought before the courts seeking for appropriate relief, might require novel and creative features when compared to traditional and historical remedial practice because '*tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand*'.¹⁸

The Supreme Court found that Charter damages are not private law damages, and cited New Zealand's jurisprudence¹⁹ as authority for the proposition that an action for public law damages 'is not a private law action in the nature of a tort claim for which the state is vicariously liable but [a distinct] public law action directly against the state for which the state is primarily liable'.²⁰ The court found that the nature of the remedy is to require the state or

¹⁴ *Vancouver (City) v Ward* (2009) 89 BCLR (4th) 217 (BCCA) per Low JA, Finch CJ, concurring, Saunders JA, dissenting.

¹⁵ Note 4 para 21.

¹⁶ *Ibid*.

¹⁷ *Ibid* para 21. See also *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003] 3 SCR 3 paras 55-58 (per Iacobacci and Arbour JJ).

¹⁸ *Doucet-Boudreau* (note 17) para 59.

¹⁹ *Dunlea v Attorney-General*, [2000] NZCA 84, [2000] 3 N.Z.L.R. 136 para 81, a case dealing with New Zealand's Bill of Rights Act 1990.

²⁰ *Ward* (note 4) para 22.

society as a whole to compensate an individual for breaches of their constitutional rights, and such an action subsist against the state as opposed to individual actors.²¹ Distinctively, actions against individual actors should be pursued in accordance with existing causes of action, that is, at common law and in statute, although the underlying policy considerations that are engaged when awarding private law damages against state actors may be relevant when awarding public law damages directly against the state.²² To illustrate how distinct the Charter damages claim is to the tort action, Ward had sued the officers for assault as well as the City and the Province for negligence, but the fact that the plaintiff's claims in tort were dismissed did not defeat his Charter damages claim, nor did it change the fact that his s 8 Charter right to be secure against unreasonable search and seizure was violated. Again, no tort action was available for that violation and a mere declaration of rights would not have made good the violation. Importantly, it was recognised that granting Charter damages was 'a new endeavour' and for that reason an approach to when damages are appropriate and just should develop incrementally.²³ The Court however did not stop there.

5.2.2 Four-step test for establishing a Charter damages claim

As to how Charter damages are to be adjudicated and awarded, the Supreme Court came up with a four-step test.²⁴ First, the claimant must establish that a Charter right has been violated. Second, the claimant must show why damages are an appropriate and just remedy to the extent that they serve a useful function or purpose, whether compensation, vindication of the right, deterrence, or a combination of any of these. The court found that pecuniary or physical loss is not a prerequisite.

The third step involves a shift in onus, with the government rebutting the damages award through presenting countervailing factors that defeat the functionality of damages or renders them inappropriate or unjust. This includes the availability of other remedies that would adequately satisfy the need for compensation, vindication and/or deterrence.²⁵ Charter damages will also be barred where a concurrent action in tort or private law *would result in double recovery*.²⁶ Claimants need not show that they have exhausted all other recourses. Rather, it is for the state to show that other remedies including private law remedies or another Charter remedy are available in the particular case that will sufficiently address the Charter breach. The court however was clear in expressing that this must be distinguished from a case where the claimant does not have a concurrent tort action. In such a scenario, *the mere existence of a potential tort claim would not preclude a claimant from claiming Charter damages*, and it is so because '[t]ort law and the Charter are distinct legal avenues'.²⁷

²¹ Ibid.

²² Ibid.

²³ Ibid para 21.

²⁴ Ibid paras 4 and 74.

²⁵ Ibid para 33.

²⁶ Ibid para 36.

²⁷ Ibid para 35.

Another example of a countervailing consideration would be the potential for constitutional damages to thwart effective governance.²⁸ This factor is best illustrated in *Mackin v. New Brunswick (Minister of Finance)*,²⁹ wherein the Supreme Court denied public law damages for government action taken under a statute which was subsequently declared invalid, holding that an exception would have been when the government conduct was ‘clearly wrong, in bad faith or an abuse of power’. The rationale was that government officials would be hindered in executing their duties for fear of being held liable whenever a statute is subsequently declared invalid. Incidentally, this factor speaks to the point of *mala fides* as a non-requirement for liability. Although in *Ward* the Supreme Court did not directly address *mala fides*, this countervailing factor indirectly does so.

Should the government fail to rebut the damages claim, the court moves on to the fourth and final step, which is the assessment of quantum. The guiding principle, again, is that the amount awarded should be just and appropriate. The Supreme Court endorsed four general considerations previously established in the case of *Doucet-Boudreau v Nova Scotia (Minister of Education)*³⁰ which are that an appropriate and just remedy will: ‘(1) meaningfully vindicate the rights and freedoms of the claimants; (2) employ means that are legitimate within the framework of our constitutional democracy; (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and (4) be fair to the party against whom the order is made.’³¹ Again, the Supreme Court moved for a goal-oriented, functional approach even in the assessment of quantum, applying the phrase ‘appropriate and just’ *mutatis mutandis* to the consideration of quantum.³² Thus where compensation is the function of the claimed damages, the damages must restore the claimant to his original position as this would be making good pecuniary loss.³³ But non-pecuniary loss is also permitted, and in such a case the goal would not be restorative but vindication and deterrence, and the appropriate determination is an exercise in rationality and proportionality.³⁴ Generally, the more egregious the breach and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be.³⁵ This is because to be ‘appropriate and just’ an award of damages must represent a meaningful response to the seriousness of the breach and the objectives of s 24(1) damages.³⁶

Finally, the court emphasized that in considering quantum, the court must focus on the breach of Charter rights as an independent wrong, worthy of compensation in its own right.

²⁸ Ibid paras 38 and 42.

²⁹ 2002 SCC 13.

³⁰ 2003 SCC 62.

³¹ *Ward* (note 4) paras 20-21.

³² Ibid para 46.

³³ Ibid para 48.

³⁴ Ibid para 51.

³⁵ Ibid para 52.

³⁶ The court held at para 52 that: ‘The seriousness of the breach must be evaluated with regard to the impact of the breach on the claimant and the seriousness of the state misconduct’.

Thus in doing so, damages under s 24(1) should not duplicate damages awarded under private law causes of action, where compensation of personal loss is at issue.³⁷ It is also within the court's discretion to take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programmes, and the need to avoid diverting large sums of funds from public programs to private interests.³⁸ It has, however, been Canada's position as was held in the ground-breaking decision of *R v Schachter*,³⁹ that the courts should not be precluded from rendering judgments with direct budgetary consequences for the state as long as those consequences are appropriate.

Of importance, the case of *Ward* laid a firm foundation for claims for Charter damages as an alternative cause of action to tort damages, and '[b]eing a unanimous judgment, *Ward* has removed that initial lack of consensus as to the principles governing the assessment of damages for breach of Charter rights in Canada.'⁴⁰ Interestingly, the Canadian Supreme Court referred with approval to Didcott J's observation in *Fose*⁴¹ that vindication as a utility of damages focuses on the harm the infringement causes society, and that violations of constitutionally protected rights harm not only their particular victims but society as a whole.⁴²

This position in *Ward* has been widely affirmed in scholarly review in Canada.⁴³ Comparatively, *Ward* is perhaps the most progressive and detailed of all superior court cases on constitutional damages worldwide. Since *Ward*, other Charter damages cases have come before the Canadian Supreme Court, the latest being the 2017 case of *Ernst v Alberta Energy Regulator*.⁴⁴ In another case, *Henry v British Columbia (Attorney General)*,⁴⁵ the British Columbia Supreme Court cited *Ward* and awarded \$7.5 million in Charter damages, including for deterrence, to the claimant for the violation of his *Charter* rights resulting in his wrongful conviction and imprisonment for 27 years. This was in addition to a separate award for compensation for past loss of income and special damages.

³⁷ *Ward* (note 4) para 55.

³⁸ *Ibid* para 53.

³⁹ [1992] 2 SCR 679.

⁴⁰ Chuks Okpaluba 'The Development of Charter Damages Jurisprudence in Canada: Guidelines from the Supreme Court' (2012) 1 *Stell LR* 63.

⁴¹ 1997 (3) SA 786 (CC).

⁴² *Ward* (note 4) para 28.

⁴³ See Pilkington (note 5) 519 and the numerous references therein.

⁴⁴ 2017 SCC 1.

⁴⁵ 2016 BC 1038.

5.3 THE UNITED STATES OF AMERICA AND THE BIVENS CLAIMS

The United States has a developed jurisprudence in what is referred to as ‘constitutional torts’, pursuant to *Section 1983 of Title 42* of the United States Code.⁴⁶ As far back as 1946 the court had ruled in *Bell v. Hood*⁴⁷ that an action for damages arising out of alleged Fourth and Fifth Amendment violations should not be dismissed for want of federal jurisdiction.⁴⁸ This allows for state (as opposed to federal) officials to be held liable. In its original formulation the remedy was described as a ‘civil action for deprivation of rights’, which was developed to create ‘a species of tort liability’ in favour of persons deprived of federally secured rights.⁴⁹ It was seen as ‘an avenue through which individuals can directly appeal to the Constitution as a source of right to remedy government-inflicted injury.’⁵⁰ According to Park, the term ‘constitutional tort action’ encompasses all claims for damages brought against government officials for violating an individual's federal constitutional rights.⁵¹

Currently, constitutional torts are code-named the *Bivens* actions, so named after the founding and most authoritative case on this remedy for federal state agents – *Bivens v Six Unknown Federal Narcotics Agents*⁵² before the Supreme Court. It is this case that allowed federal state officials to be liable for constitutional damages. As Nichol puts it, Title 42, Section 1983 of the US Code creates an action at law for constitutional violations sustained at the hands of persons acting ‘under color’ of local or state authority⁵³ and that there is, however, no counterpart to section 1983 for federal officials. *Bivens* becomes important in respect of federal officials: it ruled that federal officials can be sued for damages. The court found that injuries consequent to an illegal search by federal officials would give rise to a cause of action for compensatory relief.⁵⁴ In a subsequent case, *Gomez v Toledo*,⁵⁵ an important statement was made by the court: ‘[a] damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees’.

It was seven years after *Bivens* in *Carey v Phipus*⁵⁶ that the Supreme Court handed down a decision concerning the types of damages recoverable for an infringement of constitutional rights. In that case the court ruled that while presumed compensatory damages may not be

⁴⁶ See Marshall Shapo ‘Constitutional Torts: *Monroe v Pape*, The Frontiers and Beyond’ (1965-1966) 60 *Northwestern LR* 277, 323-4; Eisenberg and Schwab ‘The Reality of Constitutional Tort Litigation’ (1986-1987) 72 *Cornell LR* 641, 643-4; John M Greabe ‘A Better Path for Constitutional Tort Law’ (2008-2009) *Constitutional Commentary* 25189, 193; Michael W Dolan ‘Constitutional Torts and the Federal Tort Claims Act’ (1980) 14(2) *Uni of Richmond LR* 281, 283.

⁴⁷ 327 U.S. 678 (1946).

⁴⁸ See Gene R Nichol ‘Bivens, Chilicky, and Constitutional Damages Claims’ (1989) 75(6) *Virginia LR* 1118.

⁴⁹ See *Smith v Wade* 103 S. Ct. 1628 (1983) and also *Carey v Phipus* 435 U.S. 247 (1978).

⁵⁰ James J Park ‘Constitutional Tort Action as Individual Remedy’ (2003) 38 *Harv Civil Rights-Civil Liberties LR* 393, 395.

⁵¹ *Ibid.*

⁵² 403 U.S. 388 (1971).

⁵³ Nichol (note 48) 1118.

⁵⁴ *Bivens* (note 52) 395.

⁵⁵ *Gomez v Toledo* 446 US 635, 639 (1980).

⁵⁶ 435 U.S. 247 (1978).

awarded in a Section 1983 action for a violation of procedural due process, nominal and proven compensatory damages are appropriate to redress such a grievance.⁵⁷ Precedence was thus set and became applicable in the *Bivens* actions that a successful plaintiff will be entitled to recover nominal and proven compensatory damages.⁵⁸

As with South Africa and other jurisdictions, constitutional torts in the US pertain only to government as the defendant.⁵⁹ The peculiarity is that in the US, it is government officials in their official capacity that are liable, and not the state itself. The involvement of the government as a tortfeasor is necessary to found a constitutional tort action,⁶⁰ premised on the notion that only the government necessarily acting through living agents can violate the Constitution and that individuals as individuals lack the legal capacity to violate the Constitution.⁶¹ As to the reasons for this approach, Brennan J writing for the majority in *Bivens* made the following remarks: 'An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own'.⁶² From this, the public nature of the tortfeasor is seen as a distinct feature of constitutional tort law.⁶³

As with most jurisdictions the US has grappled with the distinction between constitutional torts and ordinary torts. In *Paul v Davis*⁶⁴ the Supreme Court tried to draw a bright line between the two. Park suggests the following:

'Under one formulation, a common law tort is simply "a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages." More concretely, common law torts typically involve four elements: (1) a common law duty from one individual to others; (2) that is breached through action or inaction; (3) that causes; (4) injury to another individual. Constitutional torts track the same four elements except that the duty originates from the Constitution instead of the common law.'⁶⁵

Thus while constitutional torts and ordinary torts are recognised and treated as distinct causes of action, there is an inclination in the US to use some of the elements of ordinary torts in constitutional torts enquiries. Nominally, damages actions for violations of constitutional rights do not require proof of fault, except as dictated by the definition of the underlying right.⁶⁶ The cause of action is not itself fault based, even though the underlying right may have a fault component.⁶⁷ At a point of convergence however, Jefferies Jr asserts that 'both constitutional tort law and ordinary tort law are an uneasy amalgam of regulation and

⁵⁷ Jean C Love 'Damages: A Remedy for the Violation of Constitutional Rights' (1979) 67 *Cal LR* 1242, 1243.

⁵⁸ *Ibid* 1281.

⁵⁹ See Park (note 50) 398.

⁶⁰ Theodore Y Blumoff 'Some Moral Implications of Finding No State Action' (1994) 70 *Notre Dame LR* 95, 97.

⁶¹ Greabe (note 46) 194.

⁶² *Bivens* (note 52) 392.

⁶³ Eisenberg and Schwab 'The Reality of Constitutional Tort Litigation' (1986-1987) 72 *Cornell LR* 641, 644.

⁶⁴ 424 U.S. 693 (1976).

⁶⁵ Park (note 50) 398 (footnotes omitted).

⁶⁶ Jefferies Jr 'Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts' (1989) 75(8) *Virginia LR* 1467.

⁶⁷ *Ibid*.

compensation. That is, both regimes share an instrumental concern to inhibit undesirable conduct and a non-instrumental desire to compensate injured persons. In constitutional tort law, at least, the regulatory aspect predominates.⁶⁸ The US has thus adopted a goal-oriented approach to remedies.⁶⁹ Nichol states that constitutional history demonstrates that federal courts have adjusted the remedial mechanisms available to them in a broad-based effort to correct the 'offending' condition, and judges have employed a full panoply of both legal and equitable tools to assure the vindication of constitutional interests.⁷⁰

Subsequently, *Carlson v Green*⁷¹ made use of the *Bivens* methodology and held that the Eighth Amendment's proscription of cruel and unusual punishments provides the basis for a federal damages claim, despite the existence of a possible alternative remedy under the Federal Tort Claims Act.⁷² This means that despite an overlap in the protection of rights in tort law and constitutional law, one can elect to pursue their claim in constitutional law, and the claimant reserves the right to elect to pursue his claim in tort as an alternative.⁷³

The principle of subsidiarity is seen at play in the US expressly in circumstances where the constitutional claim will fail if Congress, by providing an alternative remedy or by clear legislative directive, has indicated that judicial power should not be exercised.⁷⁴ This position gives credence to the present legal position in South Africa as demonstrated in Chapter 6 below, that the principle of subsidiarity would only apply where legislation enacted by Parliament specifically deals with a constitutional right and its remedies.⁷⁵

An argument still rages in the US between judicial authority and judicial deference on the subject of constitutional damages.⁷⁶ There is a string of rulings - which Nichol labels as strange for rulings applying a constitutional mandate - that openly embrace and employ the curious 'special factors' rationale.⁷⁷ This is the notion, which initially South African judges seemed drawn to, that constitutional damages will be granted in exceptional circumstances and such circumstances are dictated by the presence of 'special factors'. This string of cases in the US has seen the refusal of damages claims despite assertion of *prima facie* constitutional violations 'on the strength of largely unelucidated declarations of special circumstance'.⁷⁸ There is no enumeration of what those 'special circumstances' are, or at the very least

⁶⁸ Ibid 1462.

⁶⁹ See *Gomez v Toledo* 446 US 635, 639 (1980).

⁷⁰ Nichol (note 48) 1140.

⁷¹ 446 U.S. 14 (1980).

⁷² Ibid 19-23.

⁷³ See also Jeffries Jr (note 66) 1461-1462.

⁷⁴ Nichol (note 48) 1120. This principle was stated in *Bell v Hood*, 327 U.S. 678, 684 (1946).

⁷⁵ See discussion on the principle of subsidiarity or avoidance in Chapter 6.

⁷⁶ For a discussion of this, see Nichol (note 48) 1122-1125.

⁷⁷ Nichol (note 48) 1124.

⁷⁸ Ibid. Examples of such cases are *Schweiker v Chilick* 208 S. Ct. 2460 (1988) and *Bush v Lucas* 462 U.S. 367 (1983).

providing a guiding description of such.⁷⁹ In Nichol's view, '[a]t its most ambitious, this discretionary rationale would cast a considerable shadow over the practice of constitutional review.'⁸⁰ Fortunately, this approach has not taken root in South Africa.

For determination of quantum, the Supreme Court gave guidance in *Memphis Community School District v Stachura*.⁸¹ Where a plaintiff seeks damages for violation of constitutional rights, it held that the level of damages must be determined according to principles derived from common law. This it did while commenting that it is vital for a court to always keep in mind that damages based on the 'value' of the constitutional rights were an 'unwieldy tool' for ensuring compliance with the Constitution.⁸² Thus the court rejected an approach based on the 'value' of the right.

On the whole, Nichol argues that enforcement of the Constitution through the recognition of remedial damages awards is not only an appropriate exercise of judicial power, but also an indispensable component of constitutional oversight.⁸³ A few decisions by various courts, however, have made the *Bivens* claim unsettled by going back and forth, including on doctrinal issues. *Bivens* in Nichol's view is clearly legitimate, but what such other courts are doing is not.⁸⁴ These shortcomings in the courts' doctrine, Nichol adds, result primarily from judicial ambivalence about the validity of the entire *Bivens* enterprise.⁸⁵ Nichol concludes that an award of compensation for the deprivation or substantial impairment of constitutional interest is an appropriate remedy that falls comfortably within the US's judicial traditions.⁸⁶

5.4 TRINIDAD AND TOBAGO AND THE MAHARAJ CASE

According to Okpaluba,⁸⁷ the concept of constitutional damages in Commonwealth constitutional jurisprudence owes its origin to the Privy Council (PC)'s seminal unlawful imprisonment judgment in *Maharaj v Attorney-General of Trinidad and Tobago (Maharaj 2)*⁸⁸ which established that damages could be recovered as 'appropriate relief' to enforce a right in the Bill of Rights.⁸⁹ In *Maharaj 2*,⁹⁰ the PC understood a constitutional tort to be 'a claim in public law for compensation', referring to constitutional damages as a cause of action that

⁷⁹ 'Under Chilicky's regime, not only are courts given far too much discretion to deny relief, but too little direct attention is shown to the factors that should bar a constitutional damages claim – adequacy of alternative remedies and articulated principles of separation of power.' Nichol (note 48) 1153.

⁸⁰ Nichol (note 48) 1124.

⁸¹ 477 US 299 (1969).

⁸² See *Oatile v The Attorney General* 2010 (1) BLR 404 (HC) at 415H per Dingake J discussing this case.

⁸³ *Ibid* 1121.

⁸⁴ *Ibid* 1129.

⁸⁵ *Ibid*.

⁸⁶ *Ibid* 1141.

⁸⁷ Chuks Okpaluba 'Constitutional damages, procedural due process and the Maharaj legacy: A comparative review of recent Commonwealth decisions (part 1)' (2011) 26(1) *SAPL* 256.

⁸⁸ [1979] AC 385 (PC).

⁸⁹ Okpaluba (note 87) 256.

⁹⁰ Note 88 above, 407.

was 'totally new'.⁹¹ The PC held this remedy not to be a liability in tort at all but a liability in the public law of the state, which was newly created by s 6(1) and (2) of the Constitution.⁹² Constitutional damages in Trinidad and Tobago have since then always been treated as distinct from civil law remedies, but as an independent public law cause of action. Per the PC, the state is directly and not vicariously liable.⁹³ Interestingly, the PC reserved its opinion as to whether compensation against the Crown to redress infringement of a constitutional right can ever include an exemplary or punitive award.⁹⁴

The PC emphatically stated that s 6 of the Constitution which empowered the High Court to 'make such orders, issue such writs, and give such directions as [it] may consider appropriate for the purpose of enforcing or securing the enforcement' of the fundamental rights was intended to create a new cause of action for the contravention of fundamental rights including the recovery of monetary compensation.⁹⁵ Since 'redress' in this context bore its ordinary meaning of reparation or compensation, including monetary compensation, it followed that damages could be claimed.⁹⁶ We thus see here similarities to s 38 in the South African Constitution insofar as both provisions make no specific mention to constitutional damages.

On quantification, Lord Diplock clarified that such compensation would include any loss of earnings consequent on the unlawful imprisonment of the appellant, and recompense for the inconvenience and distress he suffered during incarceration.⁹⁷ The PC sought to award constitutional damages to compensate for pecuniary loss, but also for non-pecuniary harm. Interestingly, Trinidad and Tobago allows for a claimant to make claim for 'compensatory damages' and 'vindictory damages'. At times, 'exemplary damages' are added. The 'compensatory' damages would be to cater for pecuniary loss. Subsequent to *Maharaj 2*, this was done by the Privy Council in *Subiah v The Attorney General of Trinidad and Tobago*,⁹⁸ with Lord Bingham noting that when deciding whether to award vindictory damages, the answer 'is likely to be influenced by the quantum of the compensatory award, as also by the gravity of the constitutional violation in question to the extent that this is not already reflected in the compensatory award'. This was also done by the Court of Appeal in *Robert Perekebena Naidike v The Attorney General*.⁹⁹ In the latter, the court awarded vindictory damages over and above compensation, and Jamadar JA in his separate concurring judgment referred to vindictory damages as 'an additional award, beyond compensation, to reflect specifically the vindication of the constitutional violation where the award for compensation

⁹¹ Page 407.

⁹² *Maharaj 2* (note 88) 399F-G.

⁹³ 679j.

⁹⁴ *Maharaj 2* (note 88) 400.

⁹⁵ 677b-c.

⁹⁶ 679a and d.

⁹⁷ *Maharaj v Attorney General of Trinidad and Tobago* [1978] 2 All ER 670 (PC) 680a-c and d.

⁹⁸ PC 3 Nov 2008.

⁹⁹ Civil Appeal No. 86 of 2007.

may not fully achieve this'.¹⁰⁰ It appears that the issue of double compensation does not arise in Trinidad and Tobago and one is not confined to claiming only delictual pecuniary damages.

5.5 NEW ZEALAND AND THE BAIGENT REMEDY

In New Zealand monetary damages for violation of fundamental rights are known as the 'Baigent remedy' following the founding case of *Simpson v Attorney-General* (Baigent's case).¹⁰¹ Additional terms that have been used to identify the remedy include 'Baigent compensation', 'public law compensation' or 'New Zealand Bill of Rights Act (NZBORA) compensation'. The remedy has been understood as 'an action in the nature of tort for a monetary remedy'.¹⁰² The broader terms 'public law action' and 'public law remedy' have also been used,¹⁰³ and the *Baigent* case has been accepted as having established a new cause of action and remedy to compensation for a breach of the NZBORA 1990.¹⁰⁴ This is in spite of the silence of the NZBORA on the type of remedies that can be awarded. The focus of awards is broader and the objective is not only to compensate for the particular breach but also to affirm the right in question and to deter future breaches.¹⁰⁵

5.5.1 *Simpson v Attorney-General*

In this founding case the Court of Appeal upheld damages against the police for an unreasonable search in breach of the NZBORA. Until then, no case had ever been brought seeking damages for breach of the NZBORA. The Crown's defence was that it had immunity from prosecution under s 6(5) of the Crown Proceedings Act of 1956, alternatively, the plaintiffs were not entitled to any remedy other than a declaration of non-compliance.

In response to the question of immunity, the Court held that neither the particular statutory immunities in favour of the police nor s 6(5) of the Crown Proceedings Act protect action taken *mala fides*. Significantly, the court decided that a breach of the NZBORA gives rise to a new civil cause of action for monetary compensation in public law which lies directly against the Crown. The court felt that a mere declaration would be 'toothless' and awarded damages. In its reasoning, the court placed great weight in Trinidad and Tobago's *Maharaj 2*. Unlike in Trinidad and Tobago and Canada, the NZBORA does not have a remedial provision empowering the courts to provide appropriate redress for infringement of the protected rights. To this the court made a statement of note: the Supreme Court of Ireland has asserted the power to grant appropriate remedies (including awards of compensation) for violation of

¹⁰⁰ Para 42.

¹⁰¹ [1994] NZLR 667.

¹⁰² *Ibid* per Gault J. Also *Taunoa v Attorney-General* [2007] NZSC 70, 231.

¹⁰³ *Ibid* per Casey J.

¹⁰⁴ *Dunlea* (note 19).

¹⁰⁵ Juliet Philpott 'Damages Under the United Kingdom's Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990' (2007) 5(2) *NZJPIL* 211, 216.

constitutional rights despite the absence of an express remedies provision on the ground that the framers of a supreme law guaranteeing fundamental rights must have intended to confer a general power of enforcement on the courts.¹⁰⁶ It was the majority's belief that Parliament would not have intended the NZBORA to be 'little more than sounding brass or tinkling cymbal',¹⁰⁷ particularly as the NZBORA was enacted to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights (ICCPR).¹⁰⁸ As regards the development of existing relief to remedy breaches, the court held the belief that there would be problems in adapting traditional common law remedies such as negligence and trespass to encompass all the rights and freedoms in the NZBORA in order to give appropriate redress for their infringement.¹⁰⁹ In the result, in certain cases an award of monetary compensation will constitute an (and on occasion, the only) effective remedy,¹¹⁰ although the remedy to be awarded will be determined by the court on the facts of each case.¹¹¹

There is a further point which illustrates the activism and creativity with which the Court of Appeal approached this case, as Smillie was to later note:

'[T]he New Zealand Bill of Rights Act 1990 is not an entrenched supreme law like the Constitutions of Ireland and the United States. It was enacted as an ordinary statute, capable of repeal or amendment by a simple majority vote in Parliament. In fact, the Act does not even carry the force of an ordinary statute. Section 4 instructs the courts that even prior enactments are not to be held to be impliedly repealed or revoked, or in any way invalid, ineffective or inapplicable by reason of inconsistency with the Bill of Rights Act.'¹¹²

All but one member of the bench were not deterred. The response of the court to this is in four stages, as paraphrased from Smillie's articulate summary¹¹³:

1. The rights and freedoms affirmed by the Bill are basic human rights which are 'fundamental to a civilised society'. The courts are therefore justified in adopting a 'straightforward and generous', 'liberal, purposive', 'rights-centred' approach to interpretation of the Bill.
2. Judicially enforceable remedies are necessary in order to ensure that the affirmed rights are protected and promoted. This is reinforced by reference to the International Covenant, Article 2(3) of which requires each state party to ensure that persons whose rights are violated 'shall have an effective remedy'. Traditional common law remedies would often prove ineffective because the Bill does not impose 'duties' capable of founding a tort action for breach of statutory duty, and some of the rights receive no recognition at all under existing private law doctrine. In any event, common law remedies 'will often be so uncertain or ringed about with Crown immunity as to render them of little or no value'.

¹⁰⁶ Explained in *Ibid.* The Ireland decision the court was referring to is *Byrne v Ireland* [1972] IR 241.

¹⁰⁷ *Simpson* (note 101) at 693 per Hardie Boys J and at 691 per Casey J. Philpott (note 105) 214 notes that earlier judgments had emphasized that a generous interpretation of the NZBORA was required to give individuals the full effect of their fundamental rights and freedoms.

¹⁰⁸ New Zealand Bill of Rights Act 1990, Long Title. See *Simpson* (note 101) at 699 per Hardie Boys J; and see also *R v Grayson and Taylor* [1997] 1 NZLR 399, 409 (CA) Judgment of the Court.

¹⁰⁹ *Ibid.*

¹¹⁰ *Simpson* (note 101) at 676 per Cooke P; 692 per Casey J; 703 per Hardie Boys J and 718 per McKay J.

¹¹¹ *Ibid.* at 692 per Casey J and 718 per McKay J.

¹¹² John A Smillie 'The Allure of Rights Talk: Baigent's Case in the Court of Appeal' (1994) *Otago LR* 191.

¹¹³ *Ibid.* 191-192.

While the courts could always make a declaration that rights have been infringed, such a remedy would be 'toothless', and reduce the Bill to 'no more than legislative windowdressing'. The rights affirmed by the Bill are 'intended to have substance and to be effective'.

3. The omission of an express remedies provision was 'probably not of much consequence'. It did not indicate an intention by Parliament to confine the courts to existing common law remedies. The best interpretation was that Parliament was content to leave it to the courts to provide appropriate remedies for breach of the protected rights and 'inclusion of a statement to that effect in the Act was unnecessary'.

4. The 'fundamental' nature and international dimension of the affirmed rights are more important than the legal form in which they are declared. Consequently, the reasoning of foreign courts interpreting entrenched constitutional guarantees of human rights is fully applicable to the New Zealand Bill of Rights Act.

Although Smillie seems to suggest that the court overreached by suggesting that Parliament, despite deliberately enacting the Bill as an ordinary statute, nevertheless intended it to carry a higher constitutional status,¹¹⁴ the court essentially engaged in creative and liberal interpretation to protect rights. Smillie herself in fact does recognise that ultimately the decision of the majority in *Simpson* rests on a simple assertion that the courts are the ultimate guardians of human rights and they must enforce those rights regardless of Parliament's intention, accepting Sir Robin Cooke's assertion that some common law rights 'lie so deep that not even Parliament could override them'.¹¹⁵

As to quantum, Cooke P said that in addition to any physical damage intangible harm such as distress and injured feelings may be compensated for, and the gravity of the breach and the need to emphasise the importance of the affirmed rights and to deter breaches are also proper considerations.¹¹⁶ Extravagant awards are to be avoided, and global awards under the Bill of Rights should be awarded if one has another claim at common law for which they are successful so as to avoid double compensation.¹¹⁷

What the court did in *Simpson*, was to abandon the traditional principle that the civil liability of the Crown is governed by the same law as applies to private citizens, and created a special regime of public civil liability.¹¹⁸ Where a plaintiff has an existing cause of action but feels the remedy is insufficient, they are also able to sue under this ground *additionally*. There is therefore no mutual exclusivity in remedies. Admittedly, as Smillie argues, the scope of this is highly uncertain.¹¹⁹ The majority in *Simpson* concluded that an action for damages under the NZBORA was not a private law action in the nature of a tort claim for which the state was

¹¹⁴ See *ibid* from 192.

¹¹⁵ Smillie (note 112) 197, citing *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398; John L Caldwell 'Judicial Sovereignty - A New View' (1984) 1 NZLJ 357, and Sir Robin Cooke 'Fundamentals' (1988) NZLJ 158, 163-164.

¹¹⁶ *Simpson* (note 101) at 677-8.

¹¹⁷ *Ibid*.

¹¹⁸ Smillie (note 112) 188.

¹¹⁹ *Ibid*.

vicariously liable.¹²⁰ To this end, *Simpson* followed the same approach as Trinidad and Tobago of recognising the existence of the action as a public law action, despite the fact that the NZBORA makes no express provision of monetary damages.

5.5.2 Decisions since *Simpson*

Simpson was met with criticism for its judicial activism. Nonetheless, the legal reform it introduced succeeded. The decision was applied by the Court of Appeal in subsequent cases, including one decided on the same day, *Auckland Unemployed Workers' Rights Centre Inc v Attorney-General*.¹²¹ Through these cases, constitutional damages have become a recognised separate cause of action and have been awarded by various courts in New Zealand. The position is such that the civil action for breach of the Bill of Rights is a novel form of 'public liability of the state' which can be maintained only against the Crown. This action is not available against the individual State agents or private citizens responsible for the breach: their liability remains confined to tort and subject to common law limitations and statutory immunities.

Simpson was later vindicated by the Supreme Court in *Taunoa v Attorney General*,¹²² wherein the court was unanimous in holding that damages rather than declarations were the appropriate remedy for the breaches of the right to human dignity arising out of the maltreatment and inhumane conditions in which the appellant prisoners were held.¹²³ Regarding quantum, Blanchard J in a separate concurring judgment held that once a court decides to award NZBORA damages, it should not proceed on the basis of any equivalence with the quantum of awards in tort. The sum chosen must, however, be enough to provide an incentive to the defendant and other State agencies not to repeat the infringing conduct and also to ensure that the plaintiff does not reasonably feel that the award trivialised the breach.¹²⁴

As with the Canadian case of *Ward*,¹²⁵ a four-staged albeit different enquiry was resorted to by Henry J in his judgment concurring with those of Tipping and Blanchard JJ in *Taunoa*.¹²⁶ According to him, the appeal required the court to particularly consider: (a) the approach the courts should take when determining whether, in the circumstances of a case, s 9 of the NZBORA has been breached; (b) whether s 9 was breached in respect of the prisoners or any

¹²⁰ *Simpson* (note 101) 677. See also to similar effect, *Auckland Unemployed Workers' Rights Centre Inc v Attorney General* [1994] 3 NZLR 720, per Cooke P and Casey J 724-725, per Hardie Boys and McKay JJ 729 and 730 respectively.

¹²¹ Note 120.

¹²² [2008] 1 NZLR 429 (SCNZ).

¹²³ See Okpaluba (note 40) 59 for a discussion.

¹²⁴ *Ibid* 258.

¹²⁵ *Ward* (note 4).

¹²⁶ [2008] 1 NZLR 429 (SCNZ) para 382.

of them; (c) the approach the court should take regarding an award of damages for a Bill of Rights Act breach; and (d) whether the awards made by the courts below were appropriate.

Most recently in *Currie v Clayton*¹²⁷ the Court of Appeal reiterated *Simpson's* finding that: 'The liability of the Crown is not vicarious. Rather, it is a direct liability of the Crown - the state - in public law as a guarantor of the rights and freedoms contained in the NZBORA'.¹²⁸ Accordingly, the court proceeded, it exists independently from, and is unaffected by, any specific statutory immunities available to individuals, such as s 6(5) of the Crown Proceedings Act.¹²⁹ In that case, the court proceeded to restate some fundamental principles as follows:¹³⁰

- Baigent damages are an 'exceptional remedy',¹³¹ only available in 'egregious cases'.¹³²
- It is not obvious that the Crown should be liable for all breaches of the NZBORA, especially when the Crown cannot control the actions of various state sector bodies, for example those with financial autonomy.¹³³
- Compensation will normally only be appropriate where the rights cannot be vindicated by means other than the award of compensation, for example where the breach of the right has resulted in some sort of irreparable harm.¹³⁴
- Those who have been through the criminal process and have had their NZBORA rights vindicated through remedies such as exclusion of evidence or a stay of prosecution will find it difficult to obtain a further remedy of compensation.¹³⁵

Other cases have tended to follow an eliminatory approach in confining the application of constitutional damages. In *Brown v Attorney General*,¹³⁶ William Young J expressed the view that New Zealand courts should not award compensation as a remedy for unfair trial process. Among his several reasons was that such complaints should rather be raised with either the trial judge or on appeal, and that for the courts to recognise claims for compensation in relation to unfair trial process would create a fiscal burden on the taxpayer which Parliament can hardly be seen to have authorised. The same decision was reached in *Combined*

¹²⁷ CA341/2013 [2014] NZCA 511.

¹²⁸ Para 80, citing Baigent's case at 677 per Cooke P; Stephen Todd (ed) *The Law of Torts in New Zealand* (2013) (6th ed) Brookers, Wellington 1021 at [19.3.02]; and Grant Huscroft 'Civil Remedies for Breach of the Bill of Rights' in Paul Rishworth et al *The New Zealand Bill of Rights* (2003) Oxford University Press, Melbourne 811, 815.

¹²⁹ Para 80.

¹³⁰ Paras 81-82.

¹³¹ *Brown v Attorney-General* [2003] 3 NZLR 335 (HC) para 118; Philip A Joseph *Constitutional & Administrative Law in New Zealand* (4th ed) (2014) Brookers, Wellington, 27.3.4(2).

¹³² *Binstead v Northern Regional Domestic Violence (Programmes) Approval Panel* [2002] NZAR 685 (HC) para 35.

¹³³ 'Law Commission Crown Liability and Judicial Immunity: A Response to Baigent's case and Harvey v Derrick' (NZLC R37, 1997) at 29-35; Huscroft (note 128) 820.

¹³⁴ Huscroft (note 128) 816-817; Todd (ed) (note 128) [19.3.02].

¹³⁵ *Taunoa* (note 122) at 256 mentions exclusion of evidence; Andrew Butler and Petra Butler *The New Zealand Bill of Rights: a commentary* (2005) LexisNexis, Wellington at [27.7.3] also mention stay of prosecution.

¹³⁶ [2005] 2 NZLR 405 (CA).

*Beneficiaries Union Incorporated v Auckland City COGS Committee*¹³⁷ and *McKean v Attorney General*.¹³⁸ In *Minister of Immigration v Udompun*,¹³⁹ the Court of Appeal opined that there was force in the proposition that compensation should not be available for breaches of natural justice as a matter of course, as it should not lightly be assumed that the NZBORA has overtaken the existing law on administrative law damages to this extent – including other remedies such as setting aside the decision and a declarator.¹⁴⁰ Where an effective remedy already exists, the court stated, the Bill of Rights Act compensation will not be needed,¹⁴¹ and the court cited this principle as having been applied by the European Court of Human Rights and as being required by s 8(3) of the United Kingdom Human Rights Act 1998.¹⁴²

In *Attorney General v Chapman*,¹⁴³ a divided Supreme Court restricted the application of damages to only acts done by the executive or legislative branches, thereby excluding damages for breaches by the judiciary. In doing so, the three majority judges overturned a unanimous Court of Appeal judgment to the contrary,¹⁴⁴ and the trend of both judicial and academic authority since *Baigent*.

The courts in New Zealand do not consider constitutional damages to be a case in which to dabble into the dichotomy between private and public law.¹⁴⁵ It has therefore never been a requirement that in awarding public law damages the plaintiff must first seek redress under ordinary tort law. This public law remedy of constitutional damages has been treated as different from that granted between two private citizens, and it is one particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities.¹⁴⁶ This is the exact opposite of what has obtained in South Africa, where the hurdle has been to differentiate constitutional damages from delictual damages, as the courts have gravitated towards delictual damages as a first resort. New Zealand courts have cautioned against moving towards a ‘constitutional tort-based approach’ owing to conceptual and practical difficulties, since damages in tort are generally recoverable as of right, whereas public law remedies are discretionary.¹⁴⁷ Whether constitutional damages would be appropriate is for the court to determine.¹⁴⁸ Further, principles such as causation, remoteness

¹³⁷ [2008] NZCA 423 paras 11 and 56-58.

¹³⁸ 93 [2009] NZCA 553.

¹³⁹ [2005] 3 NZLR 204 (CA).

¹⁴⁰ *Ibid* para 168.

¹⁴¹ See *Simpson* (note 101) at 676 (per Cooke P), at 692 (per Casey J), at 703 (per Hardie Boys J) and at 718 (per McKay J) and the comments of the same court in *Wilding v Attorney-General* [2003] 3 NZLR 787 para 14.

¹⁴² *Minister of Immigration v Udompun* para 169.

¹⁴³ [2012] 1 NZLR 462.

¹⁴⁴ *Attorney General v Chapman* [2010] 2 NZLR 317.

¹⁴⁵ Okpaluba (note 40) 59 citing *Taunoa* (note 122) 108.

¹⁴⁶ *Taunoa* (note 122) 307.

¹⁴⁷ Smillie (note 112) 199.

¹⁴⁸ *Simpson* (note 101) per at 692.

and mitigation which take precedence in tort law may not fit well with cases where fundamental rights have been breached.¹⁴⁹

Philpott¹⁵⁰ concludes that remedies for a breach of the NZBORA are in part forward-looking; the future consequences of a breach may be as important as the impact of the violation on the claimant. In addition, the focus is not just on the claimant, but on the community's interest in continued respect for the right.¹⁵¹ Reinstating respect for the right and ensuring that public bodies conduct their affairs in accordance with the NZBORA, Philpott argues, are important objectives as is ensuring that the claimant is duly compensated for his or her loss.¹⁵² Nonetheless, one is also correct to some extent to say that New Zealand treats damages as a remedy of 'last resort', pursuant to statements made by the courts including in *Anufrijeva v Southwark London Borough Council*¹⁵³ and in *Udompun v Attorney-General*.¹⁵⁴ In the latter, Glazebrook J writing for the Court of Appeal stated that '[w]here there already is an effective remedy, [NZBORA] compensation is not needed [...]'.¹⁵⁵ Yet, as Philpott puts it,¹⁵⁶ 'It was precisely the fact that common law remedies may not adequately protect NZBORA rights that led the Court in Baigent's Case to conclude that a specific remedy for breach of the NZBORA was necessary'.

As to valuation of quantum, both pecuniary and non-pecuniary damages are open for consideration, and the mechanism of valuation was not exactly prescribed by the court in *Simpson*. Cooke P nonetheless provided some guidance: '[I]n addition to any physical damage, intangible harm such as distress and injured feelings may be compensated for; the gravity of the breach and the need to emphasise the importance of the affirmed rights and to deter breaches are also proper considerations; but extravagant awards are to be avoided'.¹⁵⁷ This suggests that a compensatory award under the Bill of Rights action may embrace all the heads of damages available in tort, and reference to a deterrent function suggests that an exemplary component may also be appropriate.¹⁵⁸ Cooke P proceeds as follows: 'I am disposed to think that any Bill of Rights award will be usually best made globally, with no breakdown into the different elements taken into account',¹⁵⁹ noting further that when concurrent actions in tort also prove successful, it is appropriate 'to make a global award under the Bill of Rights and nominal or concurrent awards on any other successful causes of action'.¹⁶⁰ It seems that the

¹⁴⁹ See discussion in *Taunoa* (note 122) para 258.

¹⁵⁰ Philpott (note 105) 218.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ [2004] QB 1124, 1155.

¹⁵⁴ [2005] 3 NZLR 204 (CA) per Glazebrook J for the Court.

¹⁵⁵ *Ibid* para 241.

¹⁵⁶ Philpott (note 105) 221.

¹⁵⁷ *Simpson* (note 101) 678.

¹⁵⁸ Smillie (note 112) 200.

¹⁵⁹ *Simpson* (note 101) 678.

¹⁶⁰ *Ibid.*

quantum of such 'global' awards may be quite substantial, but the court was express to state that in any event there must be no 'double recovery'. In practice however, the courts have aligned to the idea that 'extravagant awards are to be avoided'.¹⁶¹ In *Manga v Attorney-General*,¹⁶² Hammond J suggested that the judiciary should award remedies 'with restraint' to enhance public confidence, democratic decision-making and public morality. Nonetheless, and correctly so, Philpott questions this approach, submitting that it is difficult to reconcile a direction for modest awards with the objectives, adopted in New Zealand at least, of affirming the value of the right in question and deterring future breaches. The danger is that if public authorities receive only a small penalty for seriously infringing the NZBORA, their respect for fundamental rights will be minimal.¹⁶³

5.6 INDIA, SRI LANKA, BOTSWANA AND ZIMBABWE

As far back as the 1980s constitutional torts were recognised in India for the infringement of a constitutional right.¹⁶⁴ Following two initial setbacks where constitutional damages were denied without any meaningful explanation,¹⁶⁵ the recognition and development of constitutional tort actions became more pronounced and significant.¹⁶⁶ The remedy for constitutional torts has been fashioned from Article 32 of the Constitution¹⁶⁷ which is the Constitution's permissive remedies clause. This is despite the fact that the clause contains no express reference to monetary damages. In its genesis, the action was confronted with the defence of sovereign immunity. However, in *Nilabati Behera v State of Orissa and Ors*¹⁶⁸ the Supreme Court dismissed the defence as inapplicable and alien to the concept of guaranteeing fundamental rights. Verma J pointed out that for this public law remedy to serve its proper function, the court was obliged to forge new tools in order to do complete justice.¹⁶⁹

In Sri Lanka, the Supreme Court in *Saman v Leeladasa and Another*¹⁷⁰ in its application of Article 126 of the Sri Lankan Constitution,¹⁷¹ recognised that constitutional damages as redress for the violation of a fundamental right are a new public law remedy imposed directly on the state by the Constitution and not one in delict based on vicarious liability. The Sri Lankan jurisprudence emphasises that where compensation is awarded for the breach of a fundamental right it is by way of a solatium for the hurt caused and 'not as a punishment for

¹⁶¹ *Simpson* (note 101) 678 per Cooke P.

¹⁶² [2000] 2 NZLR 65, para 82 (HC).

¹⁶³ Philpott (note 105) 233, citing *Udompun* (note 154) 242, 245 per Glazebrook J for the Court.

¹⁶⁴ See *Khatri v Bihar* (1981) 1 SCC 627, *Nilabati Behera v State of Orissa* [1993] AIR 1960 (SC) 1969. Further, Jain *Indian Constitutional Law* (4th ed) (1987) 599-601, citing *Rudul Sar v Bihar* AIR 1983 SC 1086.

¹⁶⁵ *Kochar v Union of India* AIR 1983 SC 1107; *Chaturvedi v MP* 1983 (2) Cr LJ 1928 (SC).

¹⁶⁶ See a discussion of the Indian cases in this regard in Lisa Tortell *Human Rights Law in Perspective: Monetary Remedies for Breach of Human Rights: A Comparative Study* (2006) Hart Publishing, Oxford 46-55.

¹⁶⁷ The Constitution of India, 1949.

¹⁶⁸ [1993] AIR 1960 (SC) 1969 466.

¹⁶⁹ *Ibid* para 19.

¹⁷⁰ [1989] 1 Sri LR 1 (SC).

¹⁷¹ Constitution of the Democratic Socialist Republic of Sri Lanka, 1972 (as amended).

duty disregarded or authority abused.¹⁷² This was express rejection of a punitive rationale for damages. The idea of using a constitutional damages remedy as a deterrent against the state was similarly rejected, not only as being futile but also because it ‘ultimately shifts the burden to the taxpayer’.¹⁷³

Closer to home in Botswana, the case of *Oatile v Attorney General*¹⁷⁴ in the High Court, and subsequently before the Court of Appeal in *Attorney General v Oatile*¹⁷⁵ provide useful perspective. Dingake J sitting in the High Court awarded constitutional damages and the Court of Appeal upheld the relief but reduced quantum. Dingake J suggests that the South African courts have been timid in approaching the remedy, a conclusion that I also reach in Chapter 4. This was the first time the question of constitutional damages was being raised before the courts in Botswana, and the court felt at large to approach the case ‘with some kind of trepidation and a heightened sense of constitutional duty’.¹⁷⁶ The matter pertained to violation of the right to fair trial within reasonable period of time as per s 10(1) of the Constitution of Botswana. The plaintiff was tried and acquitted 12 years after arrest, and the State offered no explanation for this delay.

The High Court considered that the word ‘redress’ in the remedial clause of the Constitution - s 18(1), is neither defined nor qualified, and is sufficiently wide or elastic to include ‘a right to constitutional damages’, having regard to the well-known canons of constitutional interpretation such as affording a constitutional provision a generous and liberal interpretation.¹⁷⁷ Dingake J however does not explain further what he meant by ‘a right to constitutional damages’ insofar as the court’s exercise of discretion is concerned. As to the circumstances under which constitutional damages may be awarded, Dingake J held the view that each case will turn on its own circumstances.¹⁷⁸

Dingake J recognised that there may be some situations where common law remedies may be regarded as sufficient or broad enough to provide all relief that would be appropriate for breach of constitutional rights.¹⁷⁹ However, he proceeded, where the court finds the common law remedies inadequate, it must fashion appropriate remedies to develop the common law or to provide a remedy in damages for breach of fundamental rights and freedoms of individuals.¹⁸⁰ Reminiscent of *Fose*, Dingake J opined that such an approach would be critical for purposes of protecting all individuals who may be aggrieved, especially the disadvantaged people, who are the most frequent victims of non-compliance with the constitutional

¹⁷² *Saman* (note 170) 42.

¹⁷³ *Ibid* 44.

¹⁷⁴ 2010 (1) BLR 44 HC.

¹⁷⁵ 2011 (2) BLR 29 CA.

¹⁷⁶ *Ibid*.

¹⁷⁷ 412C.

¹⁷⁸ 413C.

¹⁷⁹ *Ibid*.

¹⁸⁰ 413D.

injunction to be brought to trial within reasonable time, a phenomenon which he states is becoming endemic in Botswana.¹⁸¹

The High Court understood constitutional damages as being ‘a specific public law constitutional damages remedy’, which is ‘separate and distinct from any common law remedy’ that the claimant may be entitled to.¹⁸² Following on the New Zealand and Trinidad and Tobago jurisprudence, Dingake J held the view that the primary purpose of delict is to regulate relationships between private parties - to provide compensation for harm caused to a private party by the wrongful action of another, whilst s 18 of the Constitution of Botswana aims at giving concrete effect to the Bill of Rights. He thus concluded: ‘It is my considered view therefore that the mere fact that an aggrieved party may have a claim in delict, over an unconstitutional conduct, does not limit the right of a litigant to approach the court for constitutional damages’.¹⁸³ Dingake J opined that whilst deterrence and exemplary damages should not be ruled out in principle, the real focus should be compensating the victim, by which he meant vindicating the victim’s rights.¹⁸⁴ Where a public authority exhibits reckless or callous disregard of an individual’s fundamental human rights, punitive damages may be granted.¹⁸⁵ The court held the view that any inevitable overlap between common law and constitutional remedies may be resolved by judicial discretion on a case by case basis.¹⁸⁶ By so stating, Dingake J refrained from pronouncing constitutional damages as a remedy of last resort, but leaves it to judicial discretion.

In assessing quantum, the court applied the UK case of *Merson v Cartwright and Another*,¹⁸⁷ and Dingake J proposed that the court may use the analogy of delict when dealing with injured feelings, distress and mental anguish.¹⁸⁸ He proceeded to adopt that methodology, accepting however that the amount to be awarded is within the discretion of the judge.¹⁸⁹

The Court of Appeal agreed with Dingake J’s fundamental holding, but curiously considered it unnecessary to classify constitutional damages as either public or private, choosing instead that it is neither, and it is ‘an action in its own right’.¹⁹⁰ The Court of Appeal rejected further categorising constitutional damages as exemplarity or punitive, arguing that punitive damages are inappropriate, departing from the court a quo’s position that they may be appropriate in certain circumstances. The Court of Appeal preferred instead the ‘once and for all rule’ where concurrent actions lie in delict and constitutional law so as to avoid double

¹⁸¹ 413E.

¹⁸² 411F.

¹⁸³ 418H-419A.

¹⁸⁴ 421A.

¹⁸⁵ Ibid.

¹⁸⁶ 413F.

¹⁸⁷ [2005] UKPC 38 at para 18.

¹⁸⁸ 423G citing J M Burchell, J J Gauntlett, M M Corbett and D P Honey *The Quantum of Damages in Bodily and Fatal Injury Cases* Juta, Cape Town, Vol 1 at p 4.

¹⁸⁹ Ibid.

¹⁹⁰ (2011) 2 BLR 209 CA at 222.

compensation. In reducing Dingake J's award, the Court of Appeal argued that the approach to awards of damages generally and in particular to awards against the state, will depend on the socio-economic circumstances and on the conditions prevailing in the relevant country.¹⁹¹

In Zimbabwe the 2013 Constitution expressly provides for constitutional damages, albeit without a framework on how and when they may be granted.¹⁹² The *locus standi* clause, s 85(1), which is framed along the same lines as s 38 of the South African Constitution, allows for monetary damages as included under the 'appropriate relief' the courts may grant. This gives impetus to the legal standing of constitutional damages as a cause of action in its own right in constitutional law. It remains to be seen how constitutional damages jurisprudence will develop in Zimbabwe, suffice to mention that there is no challenge as to the soundness of public law damages as a matter of principle and law. The challenge when the appropriate case arises, will be on establishing a framework to guide the courts and litigants in the approach to this relief.

5.7 FRANCE

In the civil law tradition, France awards damages as a way of enforcing human rights violations.¹⁹³ As with all the jurisdictions discussed above, this position developed from confirmation of the legality of such an award in a judicial determination, in the case of France in a 2007 ruling of the *Conseil d'Etat* (Council of State).¹⁹⁴ In that pioneering case the state was compelled to compensate for damage caused by the enactment of a statute which was contrary to international covenants ratified by France,¹⁹⁵ a position that goes a step further than holding the state liable for damages caused by administrative acts in implementing national statutes.¹⁹⁶ This is because in 1990, the *Conseil d'Etat* expressly recognised the supra-legislative value of the European Convention on Human Rights (ECHR),¹⁹⁷ making the protection of ECHR rights more effective in the context of domestic legal proceedings.¹⁹⁸ What the 2007 decision then did was to clarify the consequences attached to state liability in case of a violation of an international convention by a national statute. Breach of rights guaranteed under the ECHR in itself is a ground for compensation.¹⁹⁹

¹⁹¹ Ibid.

¹⁹² Constitution of Zimbabwe Amendment (No. 20) Act 2013.

¹⁹³ See Christophe Quézel-Ambrunaz 'Compensation and Human Rights (From A French Perspective)' (2011) 4 *NUJSLR* 189, 190.

¹⁹⁴ CE. Ass. February 8, 2007, Gardedieu, Application No. 279522.

¹⁹⁵ Marie-Luce Paris 'Europeanization and Constitutionalization: The Challenging Impact of a Double Transformative Process on French Law' (2010) 29 (1) *Yearbook of European Law* Oxford University Press 21-64.

¹⁹⁶ Ibid.

¹⁹⁷ CE Ass 21 December 1990 (Confédération nationale des associations familiales catholiques: commercialisation of the abortive pill) Application No 105743.

¹⁹⁸ Paris (note 195).

¹⁹⁹ See Quézel-Ambrunaz (note 193) 192, citing CE. Ass. June 28, 2002, 239575.

The underlining reasoning and justification of constitutional damages in France identifies with the reasoning and justification advanced elsewhere. Firstly, it is recognised that obtaining an amount of money, even a large one, cannot be expected to be adequate compensation for the huge pain that a victim suffers as a result of breaches of fundamental liberties. Notwithstanding, getting something may be better than nothing – at least to the extent that it pronounces on the condemnation of the breaches and recognised the victimhood of the victim.²⁰⁰ The view is that in the case of breaches committed by the State or by citizens, an award of damages appears to be the best means to enforce human rights.²⁰¹ More interesting in light of the approach such as of New Zealand where modest compensation has been preferred, the French perspective seems to be different:

[T]he economic analysis of law furnishes an ambiguous answer that the State will be incentivised to prevent the violation of human rights only if the cost of compensation for any violation is higher than the cost of prevention of such violations. [...] By this approach, the higher the damages are, the better the enforcement of human rights is.²⁰²

Secondly, France advances the argument that it is politically indecent for a State to be found liable for violation of human rights. To this end, the ruling itself, without regard to the amount of damages, may help in the enforcement of human rights.²⁰³ This is similar to a sentiment that was shared by the House of Lords in *M v Home Office*²⁰⁴ albeit dealing with contempt of court by a Minister of State.

Importantly, Quézel-Ambrunaz addresses the elements of a damages case. According to the *Cour de cassation* (Court of Cassation), he says, mere proof of violation of privacy entitles the victim to obtain compensation.²⁰⁵ Whereas in an action for civil liability the plaintiff must prove fault or other basis for liability, the damage caused and the causation, according to this ruling he cites the proof of the fault alone is sufficient and damage and causation are presumed because of the nature of the right infringed. Regarding quantum, the character of the right in question attached to the violated interest inform the judges approach towards proof of damage,²⁰⁶ bearing in mind that French tort law does not apply a hierarchy among the protected rights and full compensation of any legal injury is the rule and the defences are the same whichever interest is violated.²⁰⁷

Constitutional damages in France stretch the boundaries of this remedy for one more reason: there is now a move to make damages a human right. The debate has moved on from existential arguments to considerations of whether the right to obtain damages is itself a fundamental human right, a phenomenon which Quézel-Ambrunaz calls ‘fundamentalisation

²⁰⁰ Quézel-Ambrunaz (note 193) 193.

²⁰¹ Ibid 192.

²⁰² Ibid 193.

²⁰³ Ibid.

²⁰⁴ [1994] 1 AC 377; [1993] UKHL 5.

²⁰⁵ Citing Cass. Civ. 1, November 5, 1996, Bull. I,378.

²⁰⁶ Ibid 193-4.

²⁰⁷ Ibid.

of compensation'.²⁰⁸ The argument for fundamentalisation is anchored on the premises that: 'the infringement of a human right warrants the payment of compensation;' that '[c]ompensation is inextricably linked to human rights'; that 'the right to obtain compensation is part of a triptych of equality, liberty and property'; and that 'the "fundamentalisation" of the award of damages is a way offered to victims to secure their compensation'.²⁰⁹ From a French perspective, it is more the right of the victim to obtain compensation than the duty of the wrongdoer to pay the damages which is protected.²¹⁰ Quézel-Ambrunaz prefers not to answer the question whether this fundamentalisation of compensation or the development of compensation for breaches of human rights, is the way forward for other countries.²¹¹ This thesis does not advance that argument either, but poses it as a question for further research. Although Quézel-Ambrunaz makes the point that 'an award of damages may appear to be an opportunity for enforcement of human rights, *including in horizontal relationships*',²¹² the courts in France have not extended the application of constitutional damages to horizontal relationships and none of the jurisdictions discussed in this Chapter have done so.

5.8 MONETARY DAMAGES FOR VIOLATION OF FUNDAMENTAL HUMAN RIGHTS IN INTERNATIONAL LAW

Given that human rights in general have found wider acceptance and stronger domestic recognition primarily through the influence of international law, an assessment of the global picture on constitutional damages cannot be complete without looking at the position in international law. I deal with international law here simply to highlight the existence and treatment of the remedy in international law, and by no means is this to suggest the equality in status between international law remedies and domestic constitutional law remedies.

The payment of damages for violations of human rights is seldom enshrined in international texts on human rights, except for some breaches such as unlawful detention.²¹³ Some of those texts, however, such as Article 8 of the Universal Declaration of Human Rights (UDHR) and Article 2 of the International Covenant on Civil and Political Rights (ICCPR) mention the exigency of an 'effective remedy'. We thus find certain clauses that do not necessarily specify the kind of remedies that a court could award, but clauses that are broad and permissive similar to ss 38 and 172 of the South African Constitution.

In Europe, claims for damages seem to have become the foremost means to enforce human rights before the European Court of Human Rights (ECtHR). Though Article 41 of the European Convention on Human Rights (ECHR) provides that satisfaction is subsidiary,²¹⁴ Article 13

²⁰⁸ Quézel-Ambrunaz (note 193) 190.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid* 200-202.

²¹¹ *Ibid* 202.

²¹² *Ibid* 200-202.

²¹³ See the International Covenant on Civil and Political Rights, Article 9.

²¹⁴ Quézel-Ambrunaz (note 193) 191.

provides that the victim of a rights breach is entitled to an effective remedy. In one forced eviction case, *Connors v United Kingdom*,²¹⁵ the court awarded substantial non-pecuniary damages. In the United Kingdom when the courts are determining whether to award damages and the amount to be awarded, the courts are directed in terms of s 8(4) of the Human Rights Act 1998 to take into account principles applied by the ECtHR when making awards under Article 41 of the Convention.

Closer to home, the African Commission on Human Rights has awarded non-pecuniary damages for violation of human rights in *Social and Economic Rights Action Center (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria*.²¹⁶ In this precedent-setting socio-economic rights case Roach correctly observes that the 'dualistic approach' was followed, with the Commission awarding a remedy aimed at compensation for past violations but also at ensuring compliance in the future.²¹⁷ Roach argues that '[s]uch awards can help make socio-economic rights meaningful and counter concerns that they are second-class rights in relation to political and civil rights'.²¹⁸

What we can extract from international law is that monetary damages are a legitimate and above-board remedy for violation of human rights. We get very little however on process and approach.

5.9 SOME OBSERVATIONS AND A COMMENT ON SOVEREIGN IMMUNITY AS A DEFENCE

Constitutional damages in their nascent days in a number of jurisdictions constitutional damages were met with the defence of sovereign or state immunity. The South African CC highlighted this in *Fose*.²¹⁹ Owing to its development in a 'tentative fashion',²²⁰ several variations and degrees of immunity are manifest in several legal systems, particularly in the US where distinctions between constitutional and tort violations end up determining the variant of immunity to be imposed.²²¹ This notwithstanding, gradually the idea took hold that it is a fundamental feature of the rule of law that government officials are in the same position as any individual committing a legal wrong, and crown or sovereign immunity cannot be used to mask impunity.²²²

²¹⁵ [2004] 40 EHRR 9.

²¹⁶ (2001) AHRLR 60 (ACHPR 2001) No. 155/96.

²¹⁷ Kent Roach 'The Challenges of Crafting Remedies for Violations of Socio-economic Rights' 46 in Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* Cambridge University Press (2008).

²¹⁸ Ibid.

²¹⁹ Supra para 27.

²²⁰ Christina B Whitman 'Constitutional Torts' (1980) 17(1) *Michigan LR* 5, 64.

²²¹ Dolan (note 46) 287-8. For an examination of the doctrine of sovereign immunity, see George W Pugh 'Historical Approach to the Doctrine of Sovereign Immunity' (1952-1953) 13 *Louisiana LR* 476, 476.

²²² From Mia Swart 'Left out in the Cold? Crafting Constitutional Remedies for the poorest of the Poor' (2005) *SAJHR* 215, 226, citing Kent Roach *Constitutional Remedies in Canada* (1994) 2-18.

In the US immunity was initially seen as a defence,²²³ and some cases found government officials to have qualified immunity in instances of constitutional violations and absolute immunity at tort law.²²⁴ This was until the notion of a constitutional tort was accepted and vindicated by the Supreme Court in *Bivens*.²²⁵ This, however, only applies to individual government officials. With regard to the government itself, the Supreme Court made it abundantly clear in *Bivens* that however desirable a direct remedy against the government might be as a substitute for individual official liability, the sovereign still remains immune to suit.²²⁶ The *Bivens* remedy was therefore possible '[b]y authorising causes of action against individual persons in their capacities as private jural entities separate and apart from their public capacities as agents through whom the government acts'.²²⁷

In Canada cases such as *Chaput v Romain*²²⁸ before the Supreme Court affirmed the idea that damages would only be available for flagrant abuses by individual officials, until *Ward* recognised Charter damages against the state. In India, as in New Zealand, the state is not immune from liability for constitutional violations.²²⁹ In New Zealand, the defence of immunity was raised in *Simpson* but did not succeed. Cooke P found that although enactments such as s 6(5) of the Crown Proceedings Act 1950, and the sections in the Crimes Act of 1961 and the Police Act of 1958 contain exemptions from certain liabilities, none of them is directed at Bill of Rights liability.²³⁰ Similarly, Ireland disallows sovereign immunity as a defence.²³¹ In *Attorney General v Chapman*,²³² the New Zealand Supreme Court restricted the application of damages to only acts done by the executive or legislative branches, thereby excluding damages for breaches by the judiciary. There is nothing strange in this given that judicial immunity is a well-established principle worldwide,²³³ and is necessary for the functioning of the judiciary.

²²³ See e.g. *Nixon v Fitzgerald* 4, 5 7 U.S. 731 (1982) (holding that presidential immunity shields President from liability for alleged violation of administration official's first amendment rights).

²²⁴ Dolan (note 46) 287-8.

²²⁵ 403 US 388 (1971). See Nichol (note 48) 1119 for comment on how *Bivens* opened the doors for constitutional damages.

²²⁶ *Bivens* (note 52) 410.

²²⁷ Greabe (note 46) 195; see Whitman (note 220) 57.

²²⁸ [1955] SCR 834.

²²⁹ *Behera v State of Orissa* AIR 1993 SC 1960 at 1969; Lisa Tortell *Human Rights Law in Perspective: Monetary Remedies for Breach of Human Rights: A Comparative Study* (2006) Hart Publishing, Oxford 107.

²³⁰ *Simpson* (101) per Cooke P.

²³¹ See *State (Quinn) v Ryan* [1965] IR 70; *Kearney v Minister of Justice, Ireland, and the Attorney-General* [1986] IR 116.

²³² [2011] NZSC 110.

²³³ See South Africa: *Claassen v Minister of Justice and Constitutional Development and Another* 2010 (6) SA 399 (WCC) para 22; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) paras 17-19; and *May v Udwin* 1981 (1) SA 1 (A) at 14-19; England: *McC v Mullan and Others* [1984] 3 All ER 908 (HL); Australia: *Fingleton v R* (2005) 216 ALR 474; United States: *Mireles v Waco*, 502 US 9 (1991). The only exception has been when the judge's conduct was malicious or in bad faith.

In the US, given that constitutional torts are claimed against government officials in their individual capacity, the concept of vicarious liability appears to either be non-existent or of limited effect.²³⁴ However, the government often does indemnify its employees in the event that they are eventually found liable in their individual capacity.²³⁵ In Trinidad and Tobago, the state assumes direct liability. This is evident from the following finding by the Privy Council: 'This is not vicarious liability; it is a liability of the state itself. It is not a liability in tort at all; it is a liability in the public law of the state, not of the judge himself, which has been newly created by section 6 (1) and (2) of the Constitution.'²³⁶ The position in New Zealand is much the same as in Trinidad and Tobago. Thomas J held:

'As an action for damages under the Bill of Rights is not a private law action in the nature of a tort claim for which the state is vicariously liable but a public law action directly against the state for which the state is primarily liable [...] the state is liable to compensate the plaintiffs for the breaches of the Bill of Rights which occurred.'²³⁷

In India, however, the state assumes vicarious liability.²³⁸

In the South African context, constitutional supremacy should mean that state officials are not above the law and that arguments of state immunity are now archaic and can no longer hold under the current constitutional order. The state assumes liability both directly and vicariously, as vicarious liability is an established manner of apportioning fault. Instructive to this discourse is Froneman J's analysis of attribution of liability in *F v Minister of Safety and Security*,²³⁹ although he was dealing with a delictual case. In a concurring opinion he found that the Minister should be held directly rather than vicariously liable on the grounds that the actions of state officials are in effect the state's own actions, and that the normative considerations for determining liability may be appropriately assessed under the wrongfulness inquiry in a direct delictual action. Constitutional law cannot be spared of this. At least in theory, constitutional liability by means of damages is invariably liability directly against the state. Practically, however, it makes no substantive difference whether such liability is couched as direct or vicarious, save for the fact that it appears a stronger formulation to frame it as direct state liability for the conduct of government officials.

Yet the fact that sovereign immunity is now foreign to South Africa may prompt another argument for critics of constitutional damages to argue that there is no longer a bar from using the law of delict to claim from the state, hence constitutional damages may be unnecessary. The downfall of this argument is that the development of constitutional damages is not singularly premised on lack of avenues to hold government accountable. Rather, it is to meet a specific purpose of constitutional vindication. In no country has

²³⁴ Tortell (note 229) 110.

²³⁵ Ibid.

²³⁶ *Maharaj 2* (note 88) 399.

²³⁷ *Dunlea* (note 19) para 81.

²³⁸ *SAHELI, A Women's Resources Centre v Commissioner of Police, Delhi AIR 1990 SC 513 at 516.*

²³⁹ 2012 (1) SA 536 (CC).

constitutional damages evolved necessarily as a way to sidestep sovereign immunity. In those countries where sovereign immunity exists, the Bills of Rights have invariably been spared of such defences.

5.10 CONCLUSION

As per Dingake J's conclusion in *Oatile*, the net effect of a majority of the decisions discussed above is that constitutional damages are now almost universally accepted as viable constitutional redress.²⁴⁰ From the preceding analysis one can note distinct jurisdictional approaches to constitutional damages. The clearest distinct approaches, as was also established by Okpaluba, are the *Maharaj (2)/Baigent* case approach adopting a strict, if more regimented approach, and the *Ward* approach 'which maintains a middle course allowing for the resort to the private law threshold in appropriate circumstances'.²⁴¹ The current South African approach measured against these alternative approaches, comes across as primarily one which does not strictly distinguish between constitutional and private law damages, but nonetheless places more emphasis on the common law as a means of vindicating fundamental rights breaches.²⁴²

One sees that although constitutional damages are decades old in some jurisdictions, the remedy is relatively new and developing in most legal systems. Most have nevertheless embraced the remedy and have moved on to the second phase of defining a framework. It is to this stage that South African courts must move, and this thesis seeks to aid to the process. The following chapters proceed to demonstrate how a functional, goal-oriented framework is a more attractive approach for South Africa.

²⁴⁰ See *Oatile* (note 174) 420E.

²⁴¹ Okpaluba (note 40) 74.

²⁴² *Ibid.*

CHAPTER 6

SUBSIDIARITY, THE CO-EXISTENCE OF CONSTITUTIONAL AND COMMON-LAW DAMAGES, AND JUDICIAL DISCRETION

'[The evolution of s 24 of the Canadian Charter of Rights] may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand.' - **Iacobucci and Arbour JJ in *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003] 3 SCR 3 para 59.**

6.1 INTRODUCTION

If the invasion of a constitutional right could be treated by delictual remedies, as was done in *Carmichele v Minister of Safety and Security*,¹ *K v Minister of Safety and Security*,² *Van Eeden v Minister of Safety & Security*,³ *Zealand v Minister of Justice and Constitutional Development*,⁴ and *F v Minister of Safety and Security*,⁵ among a long list of cases, then where do constitutional damages come in? Would constitutional damages be a 'gap-filler' in the remedial matrix? Would they be an additional remedy to an existing one, or would the litigant be given a choice between delictual and constitutional damages?

It is to these questions that this Chapter turns. Building on the unique nature of constitutional damages, this Chapter proceeds to explore the circumstances under which they could be awarded. Throughout the Chapter, the common themes are a clear differentiation of constitutional damages from delict, and a motivation for the full acceptance of constitutional damages as viable and necessary relief for constitutional wrongs.

6.2 CO-EXISTENCE OF COMMON LAW AND CONSTITUTIONAL DAMAGES

6.2.1 Can the existence of delictual redress negate constitutional damages?

The co-existence of constitutional damages with delictual damages is one of the most contentious issues in the constitutional damages debate. The argument by critics of constitutional damages is that they are unnecessary given that delictual damages can do the job. This is a problematic submission, as I will demonstrate.

Firstly, the rights in the Bill of Rights are such that some lend themselves to redress under delict, while some do not. For the latter, there may be no prospects of damages at all if one

¹ 2001 (4) SA 938 (CC). The state paid damages for the negligent conduct of duty by a senior public prosecutor and the police in releasing on bail a young man prone to sexual violence, who then proceeded to assault plaintiff.

² 2005 (6) SA 419 (CC).

³ 2003 (1) SA 389 (SCA). The state was held delictually liable for the rape of a 19-year-old girl who was sexually assaulted, raped and robbed by a known dangerous criminal and serial rapist who had escaped from police custody through an unlocked gate.

⁴ 2008 4 SA 458 (CC). This case involved unlawful detention of an awaiting-trial prisoner.

⁵ 2012 (1) SA 536 (CC). The Minister of Police was held vicariously liable for the damages suffered by a 13-year-old when she was assaulted and raped by a policeman who was on standby duty.

were to obliterate constitutional damages. This means that the question of co-existence of remedies becomes relevant only in respect of those rights that overlap and can be remedied in both delict and constitutional law.

Secondly, there is no denying that the Constitution has had a profound impact on the South African law of delict. Delict has taken a transformative route, in many ways positioning itself as a protector of constitutional rights. This has happened in two ways. Firstly, there are rights that the common law has always protected, such as the right to privacy and bodily integrity, rights which are now constitutional rights. Secondly, the scope of delictual protection has expanded to cover rights that were not solely of common law making, but emerged as important largely due to their provision in the Bill of Rights. Notwithstanding, a case has been made for the different dimension that constitutional damages bring to the law. Constitutional rights having now assumed an elevated importance, the vindication of these rights now carries an importance and urgency that need no amplification serve to say that the Bill of Rights is a cornerstone to the country's democracy. The importance of constitutional rights was articulated in *Kate*.⁶

Common law falls short in its currency to replace the Constitution. Indeed the liability of public authorities under common law remedies has without a doubt expanded in the wake of the new constitutional era.⁷ There are instances when delict does provide appropriate relief to a litigant for the violation of their constitutional right. As Moseneke DCJ pointed out in *Law Society of South Africa and Others v Minister of Transport and Another*,⁸ in an appropriate case a private-law delictual remedy may serve to protect and enforce a constitutionally entrenched fundamental right. Thus a claimant seeking 'appropriate relief' may properly resort to a common law remedy in order to vindicate a constitutional right.⁹ In another case,¹⁰ Moseneke DCJ recognised that there appears to be no sound reason why common law remedies which vindicate constitutionally entrenched rights should not pass for appropriate relief within the reach of s 38. The Constitution is explicit that subject to its supremacy, it does not deny the existence of any other rights recognised and conferred by the common law.

However, a violation of a constitutional right is markedly different from a violation of a common law right. With the former, there is state liability under public law, imposed directly by the Constitution. As Currie and De Waal put it, '[t]he harm caused by violating constitutional rights is not merely a harm to an individual applicant, but a harm to society as a whole: the violation impedes the realisation of the constitutional project or creating a just

⁶ *MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA) at para 22.

⁷ Max Loubser and Rob Midgley (eds) *The Law of Delict in South Africa* (2nd ed) (2010) Oxford University Press Southern Africa, Cape Town 265. Cases such as *Carmichele* (note 1), *K* (note 2), *Van Eeden* (note 3), *F* (note 5), and *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) were all argued successfully on this basis.

⁸ 2011 (1) SA 400 (CC) para 74.

⁹ *Ibid.*

¹⁰ *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 91.

and democratic society'.¹¹ For this reason, 'the object in awarding a remedy is not only to grant relief to the litigant before the court, but also to vindicate the Constitution and deter future infringements.'¹² The necessity of vindication stems from the fact that if harm to constitutional rights is not addressed, it will diminish the public's faith in the Constitution and erode the value of the Bill of Rights.¹³ It is from this premise that constitutional remedies have been understood to be community-oriented and forward-looking.¹⁴

Swart argues that '[t]he notion that remedies such as damages are not ideal constitutional remedies because constitutional remedies should be forward-looking and community oriented rather than individualistic and corrective is outdated.'¹⁵ I align myself with these views *in toto*. This approach is followed in *Mahambehlala v MEC for Welfare, Eastern Cape, and Another*¹⁶ where it was held that '[i]n essaying the determination of appropriate relief, it is important to bear in mind that, although constitutional remedies will often be forward-looking to ensure that the future exercise of public power is in accordance with the principle of legality [...] they may also be backward-looking.'¹⁷ Although constitutional remedies must generally be forward-looking, community-oriented and structural as opposed to backward-looking, individualistic and corrective or retributive,¹⁸ it remains a principle of law however that justice must be individualised.¹⁹ The violated person must receive relief at an individual level, and in the pursuit of community-oriented justice the individual must not suffer. The correct approach would be to grant relief that speaks to both objectives. Constitutional damages speak to both objectives. Thus, where forward-looking remedies do not make sense, damages may well be the only appropriate remedy.²⁰

Although seemingly clear and straightforward, the propriety of recognising constitutional damages has been an area of disputed judicial authority. The basis of the dispute is primarily on the overlap between co-extensive rights at common law and in constitutional law. This is where rights can find protection both in delict and in constitutional law. For instance, Loubser *et al* point out that one can reasonably easily find a delictual counterpart for the following fundamental rights: human dignity (s 10); life (s 11); freedom and security of the person (s 12); privacy (s 14); freedom of assembly, demonstration, picket and petition (s 17); freedom of trade, occupation and profession (s 22); environment (s 24) and property (s 25).²¹ In these

¹¹ Iain Currie and Johan de Waal *The Bill of Rights Handbook* (6 ed) (2013) Juta, Cape Town 181.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Mia Swart 'Left out in the Cold? Crafting Constitutional Remedies for the poorest of the Poor' (2005) *SAJHR* 239-240.

¹⁶ 2002 (1) SA 342 (SE).

¹⁷ Page 355-356.

¹⁸ Swart (note 15) 288.

¹⁹ Circumstances exists where backward-looking constitutional remedies are apposite.

²⁰ Swart (note 15) 298.

²¹ Loubser and Midgley (note 7) 32.

instances, overlaps are likely and conservative constitutionalists argue against the use of constitutional damages in these cases.²² However, there are dissimilarities too:

‘Some fundamental rights simply do not lend themselves to actions in delict. Political rights, such as the right to vote (s 19) and the right to citizenship (s 20) do not have private-law counterparts. Similarly, a person is unlikely to have an action in delict if, for example, that person’s right to housing (s 26), or rights to health care, food, water and social security (s 27), is infringed, unless some other fundamental right that has a subjective-right counterpart is also infringed. Other such examples include the rights to education (s 29), language and culture (s 30), access to information (s 32), and just administrative action (s 33).’²³

The pre-requisites for a delictual claim are that: (a) the right for whose infringement the claim is made must be recognised as a subjective right, and (b) the infringement of that right or breach of that duty must violate a societal norm.²⁴ Not all constitutional rights will pass this test. This means one will not have a remedy of a monetary nature at all for those rights that do not pass this test should constitutional damages be obliterated. The decisions of the Appellate Division in *Minister of Law & Order v Kadir*²⁵ and *Knop v Johannesburg City Council*²⁶ illustrate the problems that claimants for damages against public authorities encountered in the absence of a Bill of Rights.²⁷ The general sentiment of conservative constitutionalists seems to be that if constitutional damages are to stand, then they must stand only to deal with these non-overlapping rights. I contend that this is limiting the scope of constitutional damages which must extend even to those rights that can be redressed in delict.

The question of whether constitutional damages should be preferred over delictual remedies, and what difference there is between the two is not an isolated one. It speaks to a bigger question of the intersection between public and private law remedies, specifically whether private and public law remedies should concurrently be used where applicable, and whether that or the inverse would be effective. In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*²⁸ it was held that ‘private law damages claims are not always the most appropriate method to enforce constitutional rights. Private law remedies tend to be retrospective in

²² See Lourens du Plessis ‘Subsidiarity’: What’s in the name for constitutional interpretation and adjudication?’ (2006) 17 *Stell LR* 207-231.

²³ Loubser and Midgley (note 7) 32.

²⁴ See, *inter alia*, *Amod v MMVA Fund* 1999 (4) SA 1319 (SCA); *Carmichele* (note 1); *Dendy v University of Witwatersrand* 2007 (5) SA 382 (SCA) and *Jooste v Botha* 2000 (2) SA 199 (T).

²⁵ 1995 (1) SA 303 (A). ‘*Kadir* involved the failure of the police to act. The police officer investigating an accident had failed to take down the particulars of the fleeing driver who had caused the accident even though an officious bystander had pointed out the driver to him. It was held that, viewed objectively, society would take account of the fact that the functions of the police in terms of the Police Act related to criminal matters and were not designed for the purpose of assisting civil litigants and that therefore society would balk at the idea of holding policemen personally liable for damages arising from what was a relatively insignificant dereliction of duty. Accordingly, the police owed no legal duty to record the information in question.’ (as summarized by Chuks Okpaluba ‘The Law of Bureaucratic Negligence in South Africa: A Comparative Commonwealth Perspective’ (2006) *Acta Juridica* 117, 140.)

²⁶ 1995 (2) SA 1 (A).

²⁷ Okpaluba (note 25) 140.

²⁸ 2005 (2) SA 359 (CC) para 106.

effect, seeking to remedy loss caused rather than to prevent loss in the future'.²⁹ In the same vein, in *Steenkamp NO v Provincial Tender Board, Eastern Cape*,³⁰ the CC stated that the purpose of a public law remedy is to pre-empt, correct or reverse improper actions, to advance efficient and effective public administration, and at broader level to entrench the rule of law. Ideally, a court's order must not only afford effective relief to a successful litigant but also to all similarly situated people.³¹ Constitutional remedies are located within this context. There is 'a wider public dimension [and the] bell tolls for everyone'.³² As such, this requires the interests of all those who might be affected by the order to be considered and not merely the interests of the parties to the litigation.³³

Notwithstanding existing debates, the bottom line is that infringement of a constitutional right is purely a constitutional issue and it cannot be contended otherwise. It is therefore clear that in all its contested formulation, subsidiarity may not be a legal argument to crush monetary damages for the violation of constitutional rights. Outside the potential illegality in ousting the constitutional damages remedy, it does not seem constitutionally wise to do so.

6.2.2. A remedy of last resort?

Constitutional remedies are not remedies of last resort reserved for use where all else fails. It is not disputed that there are indeed cases where it would make judicial and practical sense to resort to existing common law remedies. However, this conclusion can only be reached after careful consideration of a claim and its intended goal. There is consensus that the rights contained in the Bill of Rights are fundamental rights,³⁴ and are not to be equated with other non-fundamental rights. Such rights are of a higher status and equally the vindication is of higher importance.³⁵

Although Van der Walt holds the view that 'based on the respect-for-democracy norm the subsidiarity approach restricts [direct application of the Bill of Rights] to a last resort solution rather than an open option that exists parallel to statutory or common law protection',³⁶ there is no principle at law that directs the use of constitutional remedies as a last resort. In *Kate v Member of the Executive Council for the Department of Welfare, Eastern Cape*,³⁷

²⁹ Ibid para 80.

³⁰ 2007 (3) SA 1210 (CC) para 29.

³¹ Currie and De Waal (note 11) 182.

³² *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 82; *Equity Aviation Services (Pty) Ltd v CCMA* 2009 (1) SA 390 (CC) para 56.

³³ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) paras 42 and 43.

³⁴ The concept of fundamental rights is used to refer to those rights that are inalienable and central to a person's life that they cannot be legally taken away without just cause. In the South African context, all the rights contained in Chapter 2 of the Constitution are fundamental rights. See Ian Currie and Johan de Waal (eds) *The New Constitutional and Administrative Law* Volume 1, Constitutional law (2001) 320.

³⁵ See s 7 of the Constitution, 1996.

³⁶ André van der Walt 'Normative Pluralism and Anarchy: Reflections on the 2007 Term' (2008) 1(1) *Constitutional Court Rev* 77, 119.

³⁷ [2005] 1 All SA 745 (SE).

commenting on the finding in *Jayiya v MEC for Welfare, Eastern Cape*³⁸ the High Court stated that:

'The further comments, that "constitutional damages" may only be awarded where no statutory or common-law remedies exist and that back-pay and interest cannot be claimed under PAJA, are also in my respectful view not straightforwardly obvious. Sections 8(1) and (2) of PAJA provide that the court may grant any order that is just and equitable including, in the case of judicial review under section 6(1), directing the administrator *or any other party to the proceedings* to pay compensation in exceptional circumstances. On the face of it the wording of PAJA does not preclude judicial review under the general rule of law principle of legality, nor does it preclude appropriate constitutional relief under such a claim. The remedies available under PAJA too are couched in wide, open-ended and permissive terms.'³⁹

In the SCA in *MEC for the Department of Welfare v Kate*,⁴⁰ Nugent J had the following to say:

'The question that submission raises is not so much whether the remedy that is now proposed is an appropriate one to remedy Kate's loss but rather whether a constitutional remedy should be granted at all. No doubt the infusion of constitutional normative values into delictual principles itself plays a role in protecting constitutional rights, albeit indirectly. And no doubt delictual principles are capable of being extended to encompass state liability for the breach of constitutional obligations. *But the relief that is permitted by s 38 of the Constitution is not a remedy of last resort, to be looked to only when there is no alternative – and indirect – means of asserting and vindicating constitutional rights.* While that possibility is a consideration to be borne in mind in determining whether to grant or to withhold a direct s 38 remedy it is by no means decisive, for there will be cases in which the direct assertion and vindication of constitutional rights is required. Where that is so the further question is what form of remedy would be appropriate to remedy the breach. In my view the breach in the present case warrants being vindicated directly ...' (my emphasis).

The existence of delictual remedies neither negates nor renders cosmetic the direct application of constitutional remedies. Constitutionalising delict is a constitutional imperative, but notwithstanding the evolution of the delictual remedy, constitutional remedies cannot be extinguished or devalued on account of the existence of other remedies at common law and in statute. Nor does that prescribe an indirect means to enforce constitutional rights when the Constitution can be directly enforced and vindicated. Prior to the new constitutional dispensation delictual damages and other alterative remedies may have applied as surrogates for the protection of constitutional rights. Today the constitutional architecture is such that it is now possible for constitutional rights to be vindicated directly, without need for recourse to indirect, secondary means of vindication. It is also such that while it is open for a litigant to resort to the common law for remedies, it would go against the constitutional order of the day for one to be denied use of constitutional remedies directly owing to the existence of those common law remedies. Both legal and policy reasons exist to support this assertion. Insofar as remedies are concerned, one must look at the breach that has occurred, the 'mischief' that needs to be corrected, and the impact that such correction

³⁸ 2004 (2) SA 611 (SCA).

³⁹ 2005] 1 All SA 745 (SE) para 20 (footnotes omitted).

⁴⁰ 2006 (4) SA 478 (SCA) para 27.

is intended to have. This would mean that there are instances where even though there is a remedy in common law, constitutional damages would be the most appropriate relief.⁴¹

Woolman correctly highlights the faults of using indirect application to vindicate constitutional rights.⁴² Although Van der Walt contests Woolman's propositions,⁴³ Woolman's contribution directs to the point that resort cannot continue to be had to common law as if the Constitution does not allow direct application. Van der Walt challenges Woolman as follows: 'Woolman's view that indirect application does not tell us whether the right requires vindication is based on the narrow assumption that vindication of constitutional rights primarily takes place via direct application. In terms of *SANDU* logic, constitutional rights can also be vindicated indirectly, via constitution-compliant interpretation of the common law.'⁴⁴ This Van der Walt does without himself engaging with the value of direct application of the Bill of Rights, and how this measures up to indirect application. Neither does he give reasons why he believes indirect application vindicates constitutional rights more than direct application, which is his own narrow and undeveloped assumption.

It is correct that in addition to its commendatory utility, delict plays a normative role in prescribing a set of ethical rules and principles for social interaction.⁴⁵ However, such is an incidental, secondary and indirect utility which does not replace the need for a direct normative authority in the form of the Constitution, and the direct enforcement thereof. Locating monetary claims against the state for breach of constitutional rights in delict deprives us of this public law function of the Constitution, itself the apex echelon of public law. Swart articulates the problem, perhaps with better clarity:

'There seems to be a tendency on the part of the Constitutional Court and academics to think in terms of a closed category of tried-and-tested remedies. An internet search of "constitutional remedies" throws up countless results on homeopathic treatments and medicines. If it is the function of constitutional remedies to help "heal the divisions of the past" as the Preamble to the Constitution puts it, *should the cure not be as individual as the ailment?*'⁴⁶ (my emphasis)

Whitman's views are not far-fetched against this background: 'When it comes to deciding the merits of a constitutional claim, torts is a distraction. That is the case whether torts serves as a positive model for the constitutional cause of action or as an alternative to be shunned.'⁴⁷ I do not go as far as arguing that they be shunned, but simply that they be an alternative to constitutional damages.

What must be clear is that a move for constitutional damages does not imply undoing the power of common law remedies to solve constitutional problems. Judicial remedies, in their

⁴¹ As Currie and De Waal (note 34) at 287 advance, there are some situations where a declaration of invalidity or an interdict makes little sense and an award of damages is the only form of relief which will 'vindicate the fundamental rights and deter future infringements'.

⁴² Stu Woolman 'The amazing, vanishing bill of rights' (2007) 124 *SALJ* 762, 762.

⁴³ Van der Walt (note 36) 118-119.

⁴⁴ *Ibid* 118.

⁴⁵ Loubser and Midgley (eds) (note 7).

⁴⁶ Swart (note 15) 240.

⁴⁷ Christina Brooks Whitman 'Emphasizing the Constitutional in Constitutional Torts' (1997) *Chicago-Kent LR* 661.

multiplicity and variance ultimately converge on the joint and collective purpose of vindicating and upholding the rule of law. Klaaren confirms that: 'A court's receipt of constitutional remedial powers does not oust its remedial powers based upon legislation and common law.'⁴⁸ The only qualification imposed is that these powers must be exercised in line with the Constitution. In fact, s 39(3) of the Constitution states that 'The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.' What s 39(3) does not imply, however, is that such other remedies are of first resort before refuge is sought in constitutional remedies. Judicial remedies located squarely within the four corners of the Constitution do not in any way devalue or detract from the developed delictual jurisprudence. Constitutional damages can therefore exist side by side with delictual remedies and this way the imperative of legal continuity in a society in transition, as argued by Roux,⁴⁹ is not lost.

6.2.3. Prevention of double compensation

When a right finds protection in both delict and constitutional law, where should one turn to in order to vindicate such right, and why? In such a case, it seems to me that the pragmatic and more constitutionally-compliant approach would be for the plaintiff to have the choice to locate their cause of action either in delict or in constitutional damages.

It is constitutionally problematic when the claimant is denied the option to locate their cause of action in constitutional law for the breach of their constitutional right. If it is accepted that payment of damages is one of the possible remedies under s 38 of the Constitution, there can hardly be justification to exclude this relief. The argument that allowing constitutional damages would allow for double recovery does not subsist in a choice approach. The argument in itself has fundamental fault lines. Okpaluba correctly points out that two distinct propositions arise from the constitutional goal of remedying fundamental rights breaches:

'First, a combination of the powers of the courts to grant "appropriate relief" in section 38 and to make "just and equitable" orders within the context of section 172(1)(b) suggests that an applicant for breach of fundamental rights can recover "constitutional damages" [...] Secondly, it is clear that the mandatory provisions of section 39(2) similarly empower the courts to award damages for breach of fundamental rights through the South African common law, having regard to the parallel developments of the law of governmental liability in other common law jurisdictions.'⁵⁰

These two propositions are not mutually exclusive.

⁴⁸ Jonathan Klaaren 'Judicial Remedies' (1999) Chapter 9 in Woolman et al (ed) *Constitutional law of South Africa*, Revision Service 5, 9-30.

⁴⁹ Theunis Roux 'Continuity and Change in Transforming Legal Order: The Impact of Section 26(3) of the Constitution on South African Law' (2004) *SALJ* 466.

⁵⁰ *Ibid* 118.

Although arguments exist to the effect that one can claim in both constitutional law and in delict,⁵¹ it is submitted that constitutional damages should not be granted in addition to delictual damages. Instead, the litigant should be given a choice between delictual and constitutional damages. Although one is a private law remedy and the other is a public law remedy, the justification for a choice approach lies in preventing double compensation for the claimant and ‘double jeopardy’ on the defendant. This would be different from a situation where one can claim compensation in private law (delict) but still proceed to pursue criminal charges (public law). There, the question of ‘double compensation’ does not arise.

An argument that may arise against the choice approach which I suggest would be that it promotes ‘forum-shopping’. This is not a convincing argument however. Firstly, where the principle of avoidance does not apply and where there is no substantive or procedural bar, there is no rule at law preventing situations where one can choose under what law they wish to pursue their case. Secondly, ‘forum-shopping’ was found to be problematic in *Chirwa v Transnet Limited and Others*,⁵² *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁵³ and *Independent Municipal and Allied Trade Union v Northern Pretoria Metropolitan Substructure and Others (IMATU)*⁵⁴ in cases of concurrent jurisdictions as opposed to cases where one simply has a choice between two claims – and not necessarily two forums. Thirdly, as discussed under the principle of avoidance below, it would be constitutionally defective for one not to be allowed to locate their action in constitutional law when the issue is purely constitutional. All constitutional rights matters are constitutional issues. It would only be when statutes have been enacted to deal with particular constitutional rights in detail that one would have to locate their action in statute. Even then, when the statute allows for monetary compensation, or allows for any remedy in terms of s 38 of the Constitution, then monetary damages can be granted. This is different as one is not resorting to common law, but to a statute which in effect is an extension of the particular enabling provision in the Constitution. In that sense, the statute does not detract from the constitutional nature of the fundamental right, and the issue holds the same weight as if it was being raised directly through the Constitution.

6.3 THE PRINCIPLE OF SUBSIDIARITY (OR AVOIDANCE)

Critics of constitutional damages argue that it is legal principle that one must resort to an already established remedy before resorting to another - a new one. Although not much literature exists on this there is an undeveloped attempt to locate this argument in the principle of subsidiarity. Seemingly correct at face value, this argument has flaws.

⁵¹ These arguments are outlined further below.

⁵² 2008 (4) SA 367 (CC) para 121, per Ngcobo J concurring and para 177 per Langa CJ concurring.

⁵³ 2008 (2) SA 24 (CC) para 97.

⁵⁴ 1999 (2) SA 234 (T) at 240 B-C.

Du Plessis defines 'subsidiarity' as a reading strategy whereby a court refrains from taking a decision that can be taken by a lower court or avoids a constitutional decision if the matter can be decided on a non-constitutional basis.⁵⁵ The CC confirmed this in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*.⁵⁶ In such a case, the Constitution would then find indirect application through s 39(2).⁵⁷ The principle of subsidiarity is sometimes referred to as avoidance, and although some have sought to draw distinctions the two words refer to the same principle.⁵⁸ These two words are used interchangeably henceforth.

In its classical formulation the principle of avoidance means that, whenever possible a case should be brought under ordinary legislation as opposed to the Constitution. This traditional formulation of the principle of subsidiarity is espoused in *South African National Defence Union v Minister of Defence (SANDU)*⁵⁹ following on other cases, wherein the CC confirmed that once legislation has been enacted to give effect to or to protect a right in the Constitution, litigants must rely on the legislation and not directly on the Constitution.⁶⁰ Subsequent decisions have articulated and adopted that reasoning.⁶¹ The exception is when the constitutional validity of legislation is challenged, in which case the constitutional provision applies directly.⁶² The application of the principle is such that where a litigant founds a cause of action on such legislation, the court cannot bypass the legislation to then decide the matter based on the relevant constitutional provision.⁶³ This is based on the policy that legislation enacted by a democratic Parliament to give effect to a constitutional right ought not to be ignored.⁶⁴

⁵⁵ Du Plessis (note 22) 207-231.

⁵⁶ 2000 (1) BCLR 39 (CC) para 21. See also the Zimbabwe Constitutional Court case of *Majome v ZBC & Others* CCZ 14-2016; AJ van der Walt *Constitutional Property Law* (3rd ed) Juta 66; *MEC for Education: KwaZulu Natal v Pillay* 2008 (1) SA 474 (CC) paras 39-40 and *Chirwa v Transet Ltd* 2008 (2) SA 24 (CC) paras 59 and 69.

⁵⁷ The section reads: 'When 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.'

⁵⁸ See Currie and De Waal (note 11) 24-25 and Van der Walt (note 36) 119. The meaning of these terms however remain highly contested. See generally Lourens Du Plessis 'The South African constitution as memory and promise' (2000) *Stell LR* 11 385-394 and 388-389; Wessel le Roux 'War memorials, the architecture of the Constitutional Court building and countermonumental constitutionalism' in Wessel le Roux and Karin van Marle (eds) *Law, memory and the legacy of apartheid. Ten years after Azapo v President of South Africa* (2007) PULP 65, 87.

⁵⁹ 2007 (5) SA 400 (CC) paras 51-52.

⁶⁰ This was originally formulated in *NAPTOSA v Minister of Education, Western Cape* 2001 (2) SA 112 (C) 123B, I-J; left open in *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town* 2003 (3) SA 1 (CC) para 17 and in *Ingledeu v Financial Services Board: In re Financial Services Board v Van der Merwe* 2003 (4) SA 584 (CC) paras 23-24, and discussed in *Minister of Health NO v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) paras 95-96. This is also discussed in Rautenbach 'Overview of Constitutional Court decisions on the bill of rights - 2007' (2008) *TSAR* 330, 330.

⁶¹ *Pillay* (note 56) paras 39-40; *Chirwa* (note 56) paras 59 (per Skweyiya J) and 69 (per Ngcobo J); *Sidumo* (note 53) para 248; and *MEC: Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd* 2008 (2) SA 319 (CC) para 24.

⁶² *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC) para 59.

⁶³ *New Clicks* (note 60) para 437.

⁶⁴ *Ibid.*

This came out strongly in *NAPTOSA*⁶⁵ wherein the court found that allowing litigants to rely on s 23(1) of the Constitution directly instead of the Labour Relations Act would encourage the development of two parallel streams of labour law jurisprudence, one under the Act and the other under s 23(1), and such a practice would be 'singularly inappropriate'.⁶⁶ This was adopted in *New Clicks*⁶⁷ by the Constitutional Court. The Constitutional Court has also held that such an approach would contradict the principle of 'one system of law grounded in the Constitution'.⁶⁸ From this understanding, there is identifiable legislation that falls into this category, and this primarily includes the Labour Relations Act (LRA),⁶⁹ the Promotion of Administrative Justice Act (PAJA),⁷⁰ the Promotion of Access to Information Act (PAIA),⁷¹ the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),⁷² the Employment Equity Act,⁷³ the Mineral and Petroleum Resources Development Act,⁷⁴ and the National Environment Management Act (NEMA).⁷⁵ Legislation such as Restitution of Land Rights Act,⁷⁶ the Extension of Security of Tenure Act (ESTA)⁷⁷ and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE)⁷⁸ may also be considered to fall into this category.

Where the legislation creates a speciality court to hear matters arising under that statute, or identifies an existing ordinary court, the principle of avoidance requires that that court be used instead of the CC. PEPUDA, for instance, creates the Equality Courts, and the Children's Act⁷⁹ creates the Children's Courts. Then there are Acts such as PAJA that set the High Court as the court of first instance in matters arising under those statutes.

According to Van der Walt, in what he considers to be the other side of subsidiarity, once legislation has been enacted to give effect to a right in the Constitution, and insofar as the legislation was intended to codify the common law, litigants may not rely directly on the

⁶⁵ Note 60 above para 123B, J.

⁶⁶ *Ibid.*

⁶⁷ Note 60 above para 436.

⁶⁸ *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC) para 44 and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at para 22.

⁶⁹ Act 66 of 1995 for s 23, confirmed in *NAPTOSA* (note 60); *NEHAWU* (note 60); *Sidumo* (note 53); *Chirwa* (note 56) and *SANDU* (note 59).

⁷⁰ Act 3 of 2000 for s 33, confirmed in *Sidumo* (note 53); *Chirwa* (note 56) and *New Clicks* (note 60).

⁷¹ Act 2 of 2000 for s 32, confirmed in *Ingladew* (note 60).

⁷² Act 4 of 2000 for s 9, confirmed in *Pillay* (note 56).

⁷³ Act 55 of 1998.

⁷⁴ Act 28 of 2002. Arguably promulgated to give effect to s 24(b)(iii) and s 25(5), read with s 25(4)(a).

⁷⁵ Act 107 of 1998 for s 24(b), confirmed in *MEC: Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd* 2008 (2) SA 319 (CC) para 24.

⁷⁶ Act 22 of 1994. See *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) and similar cases.

⁷⁷ Act 62 of 1997.

⁷⁸ Act 19 of 1998. Enacted to give effect to s 26(3). See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 11-23; *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) para 16.

⁷⁹ Act 38 of 2005.

common law when seeking to protect the concerned right against infringement.⁸⁰ Currie and De Waal take this further, holding that the avoidance principle also applies to disputes governed by common law, such that '[t]he ordinary principles of common law must first be applied, and if necessary developed with reference to the Bill of Rights, before a direct application is considered'.⁸¹ For this they rely on *Amod v Multilateral Motor Vehicle Accidents Fund*.⁸² Importantly, they proceed to state that 'the principle that constitutional issues should be avoided is not an absolute rule [and] does not require that litigants may only directly invoke the Constitution as a last resort'.⁸³ Van der Walt on the other hand takes a different view: '[w]hen no legislation applies to the protection of a constitutional right, the logic of the *SANDU* subsidiarity principle would imply that a litigant who wants to protect that right must rely on the common law and may not rely directly on the constitutional right, unless she challenges the constitutional validity of the common law'.⁸⁴ He submits that in terms of s 39(2), the obligation to have first resort to the common law includes development of the common law to align it with the spirit, purport and objects of the Bill of Rights.⁸⁵ Only once it is clear that the constitutional right cannot be given effect to by either application or development of the common law can a litigant resort directly to the constitutional provision either to launch a constitutional attack against a rule of the common law or to craft a special constitutional remedy.⁸⁶ Lewis calls this the principle of 'exhaustion of alternative remedies',⁸⁷ meaning that claimants should use procedures for redress that are available before making use of the procedure of judicial review.⁸⁸

This leads us to the conclusion that subsidiarity is about process and forum as opposed to the actual relief pronounced. This is the classical way the principle of avoidance works. Lewis identifies the rationale for this principle to be twofold. Firstly, 'where Parliament has provided for a statutory appeals procedure, it is not for the courts to usurp the functions of the appellate body'.⁸⁹ Secondly, 'the public interest dictates that judicial review should be exercised speedily, and to that end it is necessary to limit the number of cases in which judicial review is used'.⁹⁰

The argument that if litigants are allowed to rely on the Constitution when common law remedies are there the common law will never be brought into the new constitutional

⁸⁰ For this proposition he places reliance on *Chirwa* (note 56) para 23 and *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*, 2007 (6) SA 4 (CC) para 37. These confirmed *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 25 and *New Clicks* (note 60) para 96.

⁸¹ Currie and De Waal (note 11) 70.

⁸² 1998 (4) SA 753 (CC) para 26.

⁸³ Currie and De Waal (note 11) 70.

⁸⁴ Van der Walt (note 36) 115-116 (footnotes omitted).

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Clive Lewis *Judicial Remedies in Public Law* (2009) Sweet & Maxwell 426 (11-043).

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* and the English cases cited thereunder.

⁹⁰ *Ibid.*

dispensation,⁹¹ has to be faulted on the basis that it is misconceived and misrepresents the actual legal development that has occurred post-1993. Common law, even in non-constitutional issues, has been interpreted in line with the Constitution, from delict to contract to every other common law action. Many cases have been won because the common law was interpreted in light of the Constitution. Allowing direct resort to the Constitution in the case of constitutional damages neither stops nor impedes the continued 'constitutionalisation' of delict. When it comes to remedying constitutional rights violations using constitutional remedies, development of common law, as Currie and De Waal posit,⁹² must be done when looking for ways to cure private constitutional law wrongs in horizontal application of Bill of Rights. Public wrongs call for constitutional remedies in the direct and pure sense.

Nonetheless, Van der Walt persists with his arguments:

'The goal of ensuring one system of law under the guidance of the Constitution is promoted not only by preventing the common law to develop as a parallel system, but also by preventing development of a parallel system of unnecessary constitutional remedies. Leaving some aspect of the common law intact and crafting a new constitutional remedy should be justifiable only on constitutional grounds'.⁹³

It is difficult however to see how a constitutional remedy would imply the development of a parallel system of law when the country's law is based on that very Constitution as the overriding law. The CC in *Pharmaceutical Manufacturers*⁹⁴ unequivocally emphasised that the common law precedent continues to inform the law only to the extent that it is consistent with the Constitution, and that '[t]here is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control'.⁹⁵ The courts cannot simply adopt private law remedies to redress public law violations simply because common law civil remedies exist to cover the complaints. This shot-gun approach, while seemingly providing the required recompense, falls short of meeting the very purpose of public law remedies, being that all public law remedies have a public interest dimension to them. The objects of private and public law remedies are different. Kriegler J agrees with this in *Fose*:

'If constitutional rights have complementary remedies, the question is what these remedies should be. I would suggest that the nature of a remedy is determined by its object. I agree with the contention advanced on behalf of the appellant that the object of remedies under s 7(4)(a) differs from the object of a common-law remedy. ...'⁹⁶

Philpott, speaking of New Zealand said the following:

⁹¹ Ibid.

⁹² Currie and De Waal (note 11) 270.

⁹³ Van der Walt (note 36) 115-116 (footnotes omitted).

⁹⁴ *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

⁹⁵ Ibid para 44.

⁹⁶ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 95.

‘Whether a remedy for a rights violation is classified as a public law or a private law remedy is an important question, not only conceptually, but practically — the “characterisation of the wrong involved may have important consequences for the way in which damages under the [HRA and the NZBORA] are understood and developed by the courts” and may help to clarify precisely what the objective of the remedy is. That is, if the wrong is characterised as a type of constitutional tort, private law remedial principles, in which the goal is to return the claimant to the position he or she was in prior to the breach, will be relevant. If it is categorised as a public law cause of action, the objectives of the remedy may be broader; they may include affirming the importance of the violated right, deterring future breaches, and improving the standard of public administration’.⁹⁷

This questions the prudence of utilising a private law remedy to achieve public redress to the exclusion of public remedies. There is further no authority to the effect that all public law remedies subsist in non-monetary forms and neither is there a good enough reason in principle to model the law in that manner.

In any case, however, the above arguments by Van der Walt proposing the extension of the subsidiarity principle to the common law are merely proposals and are not a reflection of applicable law. Van der Walt admits that ‘[o]bviously the wider implications of subsidiarity have not been worked out by the courts and therefore the analysis above is purely speculative’.⁹⁸ However, notwithstanding that, the argument of Van der Walt puts us in the danger of conservatively holding on to common law at the expense of constitutional vindication. In the spirit of legislative and constitutional interpretation, it could not have been the intention of the crafters of the Constitution to provide for constitutional remedies for the breach of rights in the Bill of Rights, yet intending that resort *must* be had to the common law for such breaches. Subject to considerations of justiciability and jurisdiction, the Bill of Rights generates its own set of remedies.⁹⁹ Not only that; the common law can only develop to a certain point and cannot under any circumstances assume the same authority and status as the country’s Constitution.

Recently in *Life Esidemeni* arbitration, a case involving an unconstitutional and irrational decision by government officials that resulted in the death of some 144 mental healthcare patients, Judge Moseneke as the Arbitrator held that the only way in which to vindicate the claimants’ constitutional rights was to grant an order awarding constitutional damages over and above the amount already awarded for emotional shock and trauma.¹⁰⁰ There was an award for the delictual emotional shock and trauma, by that was as far as common law could go, and the Arbitrator found that remedy as falling short of vindicating the claimant’s constitutional rights – hence constitutional damages over and above the delictual relief. In Justice Mosoneke’s words, it was an award necessitated by ‘a harrowing account of the death, torture and disappearance of utterly vulnerable mental health care users in the care of an

⁹⁷ Juliet Philpott ‘Damages Under the United Kingdom’s Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990’ (2007) 5(2) *NZJPL* 211, 215.

⁹⁸ *Ibid* 125.

⁹⁹ Currie and De Waal (note 11) 24.

¹⁰⁰ *Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project Claimants v National Minister of Health of the Republic of South Africa; Government of the Province of Gauteng; Premier of the Province of Gauteng & Member of the Executive Council of Health: Province of Gauteng* 19 March 2019.

admittedly delinquent provincial government'.¹⁰¹ This award did not in any way undermine the single system of law, nor infringe on the principles of avoidance and subsidiarity. Instead, these awards completed each other in achieving fuller protection and vindication of rights. Judge Moseneke rejected the State's argument that all claims in this case should have been brought under the common law remedy of general damages. He ruled that claims under the Constitution, as the supreme law, could not be denied 'simply because it could not fit into the common law framework'.¹⁰² Quite emphatically, Justice Moseneke went on to state as follows:

'In effect the Government is arguing that the claimants should have converted all their claims to common law claims and if not they would be non-suited. Neither the Constitutional Court cases relied on nor *Mboweni* is authority for that proposition. The cases simply state that a remedy under section 38 of the Constitution may be vindicated by common law mode of pleading and claim. The cases do not mean that a party is barred from relying on the Constitution where the breaches defy common law formulation. It would be strange if not bizarre if a claim under the supreme law would be denied vindication simply because it could not fit into the common law framework. If that were so, the constitutional remedies would be granted only subject to the common law. That would be remarkably retrogressive understanding of the hierarchy of sources of law. It is important to restate that the common law is subservient to the Constitution and not the other way around.'¹⁰³

It gets no clearer than Moseneke J's formulation. In view of the egregious infringement of constitutionally protected rights, the arbitrator found that the claims could not fit under the umbrella of general damages. Per Toxopeüs' comment on the case:

'While alternative remedies are often suited to fulfil this role, courts cannot shy away from awarding constitutional damages directly where circumstances make it appropriate, particularly in cases of glaring and continuous state failure to adhere to its constitutional obligations. Essentially, courts should look to remedies that enforce and protect these rights. The remedy of constitutional damages does this by acting as a rectifying mechanism in circumstances of extreme state failure'.¹⁰⁴

The above is mindful of the fact that recently in *Komape and Others v Minister of Basic Education*¹⁰⁵, Muller J in the Polokwane High Court dismissed a claim for constitutional damages as 'nothing short of punitive damages' and that, if successful, it would result in the family being over-compensated without the award serving the interests of society.¹⁰⁶ The court had dismissed claims for emotional shock as well, with only those claims for which liability was admitted being granted by consent. The court was fixated on the common law infringement and remedies, despite the court acknowledging that constitutional rights had been infringed in a systemic and widespread manner. The structural interdict the court opted for, while it attempted to address the systemic nature of the violations, failed to appreciate

¹⁰¹ Ibid para 1.

¹⁰² *Life Esidemeni* (note 100) para 216.

¹⁰³ Ibid.

¹⁰⁴ Michelle Toxopeüs 'Constitutional damages: Recent decisions in focus' 24 June 2018 Helen Suzman Foundation, https://hsf.org.za/publications/hsf-briefs/constitutional-damages-recent-decisions-in-focus#_ftn10.

¹⁰⁵ [2018] ZALMPPHC 18.

¹⁰⁶ Ibid paras 67-68.

the need for the relief to directly vindicate the rights of the claimants who had lost a son through drowning in a faeces-filled pit latrine at a government school. An appeal was lodged against this judgment and is pending at the time of writing.

There is a final question to be addressed: are those rights such as equality, protection from illegal eviction, and administrative justice which have specific statutes dealing with them precluded from the reach of constitutional damages? The answer has to be no. Interestingly, Justice Moseneke also picks this up in the *Life Esidemeni* arbitration award. He asks:

‘What is the common law equivalent of a claim based on the State’s breach of the right of access to healthcare; right of access to food and water; freedom from torture; protection from cruel degrading and inhuman treatment? Similarly what is the common law equivalent of a claim against the State for breaching the rule of law, for disregarding protections provided by legislation that is meant to give effect to constitutional guarantees or a claim arising from a breach of international obligations on Mental Health care? And on the facts here all these breaches together led to agonising devastation for families of the deceased, survivors and their families.’¹⁰⁷

Firstly, there are instances such as PAJA¹⁰⁸ and the LRA¹⁰⁹, where monetary damages are expressly allowed for breach of the right to administrative justice and for unfair labour practices, respectively. Monetary damages ought to be granted where circumstances obtain appropriate. Secondly, there are instances where some statutes are silent on monetary relief. In such cases, the courts are entitled to grant any possible remedy as recognised in law, provided it is appropriate under the circumstances. This includes constitutional remedies, which in turn includes constitutional damages. Subsidiarity simply requires the case to be handled in terms of the legislation and before the appropriate court, but does not stop the court from granting constitutional remedies for the violation of the right addressed by the statute.

Interestingly, in none of the constitutional damages cases before South African courts have subsidiarity been expressly invoked by name, although a few have implied it by speaking of remedies of last resort. Swart holds the view that after the CC’s decision in *Pharmaceutical Manufacturers*, the principle of constitutional avoidance and indirect application of the Bill of Rights may no longer be appropriate in this context,¹¹⁰ and that perhaps the time has come to resort directly to the Bill of Rights for claims of damages.¹¹¹ Indirect application is not only a problem in itself, but it upsets other constitutional guarantees. For instance, strict requirement of indirect application of the Bill of Rights in all cases does violence to the generous approach to *locus standi* guaranteed by the Constitution.¹¹² Some litigants who would otherwise have had legal standing to bring a case may not have such legal standing if

¹⁰⁷ *Life Esidemeni* (note 100) para 217.

¹⁰⁸ Section 8(1)(c)(ii)(bb).

¹⁰⁹ Sections 193, 194(4), and 195.

¹¹⁰ The CC emphasised that the control of public power by the courts through judicial review is and always has been a constitutional matter. This is so irrespective of whether the principles are set out in a written Constitution or contained in the common law. The common law precedent continues to inform the law only to the extent that it is consistent with the Constitution. (See note 94 para 44).

¹¹¹ Swart (note 15) 225, citing *Pharmaceutical Manufacturers* (note 94).

¹¹² Section 38.

the Constitution is applied indirectly via the common law. This is because the *locus standi* requirements at common law differ. It is self-evident that focus on indirect application renders the Bill of Rights nugatory.

6.4 POTENTIAL INCONSISTENCY OF A MUTUALLY EXCLUSIVE APPROACH BETWEEN CONSTITUTIONAL DAMAGES AND DELICTUAL DAMAGES

The proposition of the choice approach in this thesis, that once one claims in constitutional law then they must not claim in delict to avoid double-compensation, is not without a potential legal inconsistency. It is possible that it may be legally tenable for one to be allowed to claim both in delict and in constitutional law from the same set of facts, the reason being that one is a public law remedy and the other a private law remedy. Public and private law remedies can co-exist. At times even two private law remedies can co-exist, the classic examples being delictual and contractual remedies. The question of double compensation does not arise as each form of compensation will be addressing a specific part of the breach.

This potential inconsistency has already been picked up in Canada, where a criticism has been raised that this exclusionary approach following *Vancouver (City) v Ward*,¹¹³ is potentially inconsistent with precedent that allows concurrent actions in tort and contract law. The Supreme Court stressed on this potential inconsistency in the court's explanation of the quantum of damages. It remarked that the court must focus on the breach of Charter rights as an independent wrong, worthy of compensation in its own right. Simultaneously, damages under s 24(1) of the Charter should not duplicate damages awarded under private law causes of action where the issue is compensation for personal loss. The common law position in Canada is similar to that of South Africa, being that where a given wrong *prima facie* supports an action in contract and tort, the party may sue in either or both, subject to any limit the parties themselves have placed on that right by their contract.¹¹⁴ This is because the tort duty of care is independent of the specific obligations and duties in a contract between private parties. The corollary to this principle is significant: both tort and contract damages can be sought, despite the possibility that damages will be awarded for both claims. In the same vein, the government's delictual duty of care is independent of the negative or positive duties of the government pursuant to the Bill of Rights.

The above were merely reservations the court was expressing in its approach. The Canadian Supreme Court nevertheless proceeded to decide that Charter damages will be barred where a concurrent action in tort or private law would result in double recovery.¹¹⁵ The court however was clear in expressing that this must be distinguished from a case where the claimant has not instituted a concurrent tort action. As such, the *mere existence* of a potential

¹¹³ 2010 SCC 27, [2010] 2 S.C.R. 28.

¹¹⁴ *Central Trust Co. v Rafuse* [1986] 2 S.C.R. 147.

¹¹⁵ *Ward* (note 113) para 36.

tort claim would not preclude a claimant from claiming Charter damages, and it is so because '[t]ort law and the Charter are distinct legal avenues'.¹¹⁶

Recent Charter damages cases in Canada seem to have picked up on the Supreme Court's remarks on the potential inconsistency discussed above. In the 2016 British Columbia case of *Henry v British Columbia (Attorney General)*,¹¹⁷ the British Columbia Supreme Court awarded \$7.5 million in Charter damages for wrongful conviction and imprisonment in addition to a separate award for compensation for past loss of income and special damages. In the court's words, it sought to deter future violations as 'the occasions where the Canadian criminal justice system sees a wrongful conviction and incarceration must be rare, and the need to deter the conduct that might lead to such results is thus limited'.¹¹⁸ Of importance, the court concluded that given the compensation that had been determined as appropriate to vindicate the breach of the appellants' Charter rights, a further award to deter future such breaches would be unnecessary and would duplicate the compensation assessed for the vindication of his rights, and constitute double recovery.¹¹⁹ This is an interesting approach to double-recovery, as already Charter damages had been awarded *in addition* to past loss of income and special damages. Thus double compensation in this case was only considered in respect of different utilities of the remedy, and not on the distinction between constitutional damages on the one hand and delictual damages of past loss of income and special damages on the other.

6.5 JUDICIAL DISCRETION AND DEFERENCE

An aspect where courts across all the jurisdictions considered in Chapter 5 are *ad idem* is that constitutional damages are a discretionary remedy. The possible exception is France, owing to the debate on the fundamentalisation of compensation for human rights violations. Just because a claimant has established a violation does not mean they are entitled to constitutional damages as of right. The selection of an appropriate remedial device has been held to be driven by underlying substantive goals and, ideally, is tailored to meet interests thought worthy of judicial protection.¹²⁰ The courts have to assess the best remedy under the circumstances, having regard to a multiplicity of factors such as the nature of the violation, the prevalence of the violation, the violator and the victim, the interest threatened or harmed, and the end goal. This is a departure from delictual damages which are claimed as of right.¹²¹ This is because constitutional damages are not compensatory in the restitutionary

¹¹⁶ Ibid para 35.

¹¹⁷ 2016 BC 1038.

¹¹⁸ Ibid para 468.

¹¹⁹ Ibid.

¹²⁰ See, for example, the following cases: *Carey v Piphus* 435 U.S. 247, 257 (1978); *Carlson v Green* 446 U.S. 14 (1980) (awarding damages for failure to provide medical care); and *Davis v Passman* 442 U.S. 228 (1979) (allowing damages in sex discrimination suit).

¹²¹ See Tom Bingham *The Rule of Law* (2010) Allen Lane, London 51.

sense. Thus a judge may refuse damages preferring an injunction if it occurs to him that an injunction is better relief in the circumstances.

Kriegler J in *Fose* drew attention to the fact that ‘while applicants are entitled to relief if their fundamental rights have been violated, they have no right to a particular remedy’.¹²² He wrote alone, however, and in no subsequent decision has the court expressly endorsed this approach.¹²³ However, in *Modderklip*,¹²⁴ the court acknowledged the existence of a ‘constitutional right to an effective remedy’¹²⁵ which was said to flow from the right of access to courts and the requirements of the rule of law.¹²⁶ This is unlike the more assertive French approach towards ‘fundamentalisation’ of compensation, as discussed in Chapter 5, where constitutional damages are beginning to be seen as a right. What one can insist on is an effective remedy. This should eliminate the fear of abuse of the constitutional damages remedy. The US has also held firm on this principle, and not all seemingly sound constitutional damages claims have been granted.¹²⁷ A variety of constitutional damages claims, even in recent times, have been rejected for one reason or another, but not because of the non-recognition of the action.¹²⁸ There may well be limited cases, however, where the discretion strongly points towards the granting of damages, limiting the scope of that discretion, and requiring that that discretion be exercised in only one way – to grant damages.

Owing to the nature of the remedy, it cannot be denied that budgetary implications should be considered at the remedial stage of the analysis.¹²⁹ This kind of assessment will work as a safety net, ensuring that only deserving cases get the benefit of the remedy. It is at this critical stage that the courts must also not be blind to the position of government regarding how and why the government violated the right(s), what it could have avoided, what it could or should have done, and why that was not done. This ensures that while the courts exercise their remedial and checks and balances function, they do not make it difficult or impossible for the government to operate. This is dictated by practical and pragmatic considerations, and the need to strike a balance between those considerations and the exercise of the check and balance function as well as the dispensing of justice. This is all part of a functional approach to the remedy. As Jafta J pointed out in *Mvumvu and Others v Minister of Transport and Another*,¹³⁰ ‘in determining a suitable remedy, the courts are obliged to take into account not

¹²² *Fose* (note 96) para 100 (Kriegler J).

¹²³ Hofmeyr ‘A Central-Case Analysis of Constitutional Remedial Power’ (2008) *SALJ* 537.

¹²⁴ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC).

¹²⁵ *Ibid* para 51.

¹²⁶ *Ibid*.

¹²⁷ Gene R Nichol ‘Bivens, Chilicky, and Constitutional Damages Claims’ (1989) 75(6) *Virginia LR* 1118 also recognizes that ‘Not all constitutional violation give rise to even arguable damage claims.’

¹²⁸ Examples include in the following cases: *Chappell v Wallace* 462 U.S. 296 (1983) (rejecting a claim for damages in a discrimination suit against military superiors); *United States v Stanley* 107 S. Ct. 3054 (1987) (holding that a former serviceman could assert no constitutional claim against military officials for being involuntarily subjected to LSD testing); *Bush v Lucas* 462 U.S. 367 (1983); and *Schweiker v Chilicky* 108 S. Ct. 2460 (1988).

¹²⁹ Currie and De Waal (eds) *The New Constitutional and Administrative Law Volume 1, Constitutional law* (2001) 289.

¹³⁰ 2011 (2) SA 473 (CC) para 49.

only the interests of parties whose rights are violated, but also the interests of good government'. This confirmed what the CC had stated earlier in *Minister of Health and Others v Treatment Action Campaign and Others (No 2)*:¹³¹

'Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.'¹³²

At the same time, in seeking to strike the required balance, the courts must not be constrained by these considerations so much so that they are restricted in the execution of their constitutional mandate. A key principle emerged from the High Court in *Modderklip* in this regard, to the effect that courts should not be overawed by practical problems, but should 'attempt to synchronise the real world with the ideal construct of a constitutional world' as they have a duty to mould an order that will provide effective relief to those affected by a constitutional breach.¹³³

In *Fose*, a final rationale in rejecting the damages claim, which was not as prominent as the other two, was the desire to leave the field of determining damages for constitutional violations to Parliament.¹³⁴ Klaaren shares the same sentiment:

'Finally, it clearly remains open to Parliament to pass national legislation to provide for constitutional damages claims. Indeed, in order to facilitate access to remedies for constitutional wrongs, it is to be hoped that Parliament will pass a statute laying down general guidelines on this topic. Questions of institutional implementation and funding are best addressed by a legislature. For this reason alone courts should not be eager, as the *Fose* court was not eager, to allow constitutional damages claims, although in appropriate cases a court may order damages without legislative authorization.'¹³⁵

I do not share these views, as I have argued elsewhere in this thesis, save to stress that these views are indicative of part of the reasons discretion is crucial in the consideration of constitutional damages. The principle of deference is not an abstract notion. It is a principle reflected in the very structure of government.¹³⁶ The Western Cape High Court succinctly captured the notion in *Tlouamma and Others v Speaker of the National Assembly and Others*¹³⁷:

'In *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* the Court stated that:

"In a constitutional democracy such as ours, in which the Constitution is the supreme law of the Republic, substantial power has been given to the Judiciary to uphold the Constitution. In

¹³¹ 2002 (5) SA 721 (CC).

¹³² Ibid para 38.

¹³³ Para 43 (footnotes omitted).

¹³⁴ Para 85 (Didcott J concurring).

¹³⁵ Jonathan Klaaren 'Judicial Remedies' (1998) in [REVISION SERVICE 2, 1998] 9-12 and 9-13.

¹³⁶ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) para 37.

¹³⁷ 2016 (1) SA 534 (WCC).

exercising such powers, obedience to the doctrine of the separation of powers requires that the Judiciary, in its comments about the other arms of the State, show respect and courtesy, in the same way that these other arms are obliged to show respect for and courtesy to the Judiciary and one another.”¹³⁸

The court decided that in *Pharmaceutical Manufacturers*¹³⁹ and *Carmichele*¹⁴⁰ the CC had established that there is no executive, administrative, parliamentary or judicial conduct, and no law whatsoever, including amendments to the Constitution, that escape constitutional scrutiny.¹⁴¹ Undoubtedly, this includes by extension constitutional relief where it is deemed fit and appropriate. The court further cited the CC in *Glenister v President of the Republic of South Africa and Others*¹⁴² where it held that: ‘It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their powers’.¹⁴³ Nonetheless, as pointed out by the CC in *Doctors for Life*, ‘Courts must be conscious of the vital limits on judicial authority [and] should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.’¹⁴⁴

The granting of constitutional damages must be viewed in this context, and it must be assessed whether to grant constitutional damages is ultra vires for the courts. Do the courts need to allow Parliament to give a greenlight to damages against the state? Is it intruding on the executive and the executive’s allocated resources? I would argue in the negative. Judicial authority is vested in the courts, and so is the power to grant appropriate and effective judicial remedy. The courts do not need Parliament to tell them what remedies to grant in what circumstances. Except in cases of statutorily prescribed fine schedules and sentences, such as the Minimum Sentences Act¹⁴⁵, the judiciary has full authority to decide its sanctions. With constitutional damages, there are no questions of the state issuing orders that may be difficult or impossible to implement – the classical cases that call for deference.¹⁴⁶

At times judicial deference will be used as a vehicle for ‘passing the buck’. Brand argues that at times deference is ‘the strategy of courts, when faced with difficult technical or contested social questions in such cases to leave decision of those issues, in different ways and to varying degrees, to the other branches of government.’¹⁴⁷ While Brand focuses his work on judicial

¹³⁸ Ibid para 66; citing *Van Rooyen and Others v The State and Others* 2002 (5) SA 246 (CC) para 48.

¹³⁹ Note 94 above.

¹⁴⁰ *Carmichele* (note 1).

¹⁴¹ Note 128 para 68.

¹⁴² 2009 (1) SA 287 (CC).

¹⁴³ Ibid para 33.

¹⁴⁴ *Doctors for Life* (note 136) para 37. Also *Glenister* (note 142) para 44.

¹⁴⁵ Criminal Law Amendment Act 105 of 1997.

¹⁴⁶ For a similar description/discussion of the concept of deference, see Kirsty McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) PULP 3-4 and 25-26 and Kirsty McLean ‘Towards a Framework for Understanding Constitutional Deference’ (2010) 25 *SAPL* 445.

¹⁴⁷ Danie Brand ‘Judicial deference and democracy in socio-economic rights cases in South Africa’ (2011) 3 *Stell LR* 614.

deference in socio-economic rights cases, he does so for no deep conceptual reason as deference operates generally in administrative and constitutional review as elsewhere in a similar manner.¹⁴⁸

Pertinently, Brand poses the question of how comfortably judicial deference fits with the constitutional imperative that courts should, through their work in socio-economic rights cases seek to advance or at least to avoid limiting the kind of ‘thick, or empowered conception of democracy’ envisaged in the South African Constitution.¹⁴⁹ The answer, according to him, is not pleasing:

‘From the point of view of claimants, deference has so far in our courts’ socio-economic rights jurisprudence operated as an obstacle to effective enforcement, leading in those cases where claims are successful to attenuated forms of relief and explicitly forming the basis for rejection of claims in the few cases so far where claimants have been unsuccessful. My focus on deference is intended to address this problem – I seek to debunk deference as an obstacle to the effective enforcement of socio-economic rights.’¹⁵⁰

What he proposes is worthwhile to reproduce:

‘[T]he South African Constitution is a transformative document in that it has a certain political character; in short that it embodies a certain vision of society and requires positive action on the side of all agencies of the state toward the attainment of that vision. This transformative duty – the duty to work toward the achievement of the constitutional vision of society – is one that rests also on courts. Courts must also, in both the outcomes they generate in their judgments and the manner in which they reach their judgments (their reasoning and judicial “method”), to the extent that it “innovate[s] and model[s] intellectual and institutional practices” for the rest of society, work toward the achievement of the society envisaged in the Constitution. One important aspect of the society envisaged in the Constitution is the establishment and maintenance of a particular kind of democracy – a ‘thick’ conception of democracy, or what Klare has described as an “empowered” model of democracy’.¹⁵¹

If this description of the constitutional conception of democracy is accepted, Brand proceeds, then his critique of judicial deference becomes possible.¹⁵² It entails that the strategy of deference amounts to a failure in the democracy-related aspect of the transformative duty on courts, in that the strategy of judicial deference embodies a conception of democracy simply at odds with the constitutional conception of democracy.¹⁵³ These ‘counter-majoritarian dilemma’ type of arguments, he argues, promote exactly the kind of democracy that the Constitution does not require, or require alone - an institutional, procedural or structural conception of democracy, in terms of which democracy is equated with the formal representative institutions that result from it.¹⁵⁴ Brand’s arguments find support in Dutton who argues that the South African judicial system inherited ‘a reduced conception of the judge’s role’, a role limited to findings and statements strictly necessitated by the disposition

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid 615.

¹⁵¹ Ibid 622 (footnotes omitted).

¹⁵² Ibid 624.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

of the particular case.¹⁵⁵ It would appear to be this heritage informing those arguing for judicial deference on constitutional damages and other constitutional remedies. Deference of this nature constricts the kind of transformative vision envisioned by the Constitution.¹⁵⁶

Judicial activism also finds itself an applicable concept, within this context. Pertinently, it is the kind of approach that may be required to push beyond confining damage claims to delict, almost completely avoiding locating damages in the Constitution. Judicial activism has been explored almost in exhaustive detail in Chapter 2, but the point to be made here is that judicial activism is not at odds with separation of powers and deference. Deference, I would argue, is not a legal concept to undercut the courts' powers. Rather, it is a concept meant to ensure that courts do not pronounce on what they do not have practical powers of enforcement, and where courts are not better suited to make a pronouncement over the executive or the legislature. As long as ruling upon a particular matter is within the remit and province of the court, the court can be activist, so long as that activism stays within the confines of what is allowable at law, and what wisdom and practical exigencies dictate. This approach, in fact, accords with how deference has been argued by various scholars including Plasket who argues that deference has no place as a standalone concept.¹⁵⁷ Deference itself is embedded in the law, that is, administrative-law principles, and separation of powers. Indeed, deference must be understood within the context of separation of powers, and what the Constitution does or does not authorise the court to do. Plasket concludes thus: 'The idea of according a measure of respect to the decision of another decision-maker is, in the judicial context, nothing strange. It is a familiar concept in the courts and an integral part of the judicial function that runs throughout the judicial system'.¹⁵⁸ For that reason, deference, properly understood, is not at odds with judicial activism.

6.6 CONCLUSION

Considerations of the powers granted to courts by the Constitution, the vision set by the Constitution, and the limits envisaged on how far the courts may go in discharging their constitutional mandate, taken together, enable the balanced exercise of judicial discretion in the handling of constitutional damages. Such powers as permitted by the Constitution can be exercised in a way that does not upset the operations of government, the public purse, the rights of the victim, the duties and accountability of the violator, the importance of the Constitution and constitutional rights, and the efficacy of the courts as a player in the *trias politica*. At the same time, the Constitution is vindicated through solid and meaningful remedies – not just through the delict.

¹⁵⁵ Pia Dutton 'Politics and Injudicious Heroism' (2010) 6 *Cambridge Student LR* 316, 317.

¹⁵⁶ *Ibid* 625.

¹⁵⁷ Clive Plasket 'Judicial powers, administrative review and deference: a view from the bench' (2018) 3 *SALJ* 502.

¹⁵⁸ *Ibid*, at 520.

Yet notwithstanding the arguments raised that constitutional damages are viable and good at law, it is submitted that because of the nature of the remedy, constitutional damages must be awarded only in deserving and appropriate cases. Where the matter is simply the inadequacy of the common law remedies, the courts are called upon to develop the common law in terms of s 8(3) of the Constitution, even at its own volition in terms of s 39(2) of the Constitution. The point to be made is that not all constitutional violations necessitate damages claims.¹⁵⁹

¹⁵⁹ Nichol 'Bivens, Chilicky, and Constitutional Damages Claims' (1989) 1133.

CHAPTER 7

IMPLICATIONS OF A MONETARY REMEDY IN CONSTITUTIONAL LAW – SUBSTANTIVE ASPECTS AND ADDITIONAL CRITICISMS

7.1 INTRODUCTION

As has been made clear in previous Chapters, constitutional damages are not without academic and judicial critique. A number of judges and academics have voiced concerns over locating monetary damages in constitutional law as opposed to the traditional delict.¹ A number of these criticisms have already been canvassed, or mentioned in passing in the preceding Chapters. This Chapter will deal with a few select criticisms in more detail. While numerous criticisms have emerged, I will confine myself to a few selected on the basis of their relative importance and their repeated and persistent appearance in both judicial and academic critique.

7.2 DEPLETING THE TAX-PAYER'S POCKET

It has been argued that allowing monetary damages for violation of constitutional rights is an unwarranted expense to the consolidated revenue fund. This was advanced in *Olitzki*:

'Leaving aside the conceptual and practical difficulties this omission raises, the nub of the matter is that the plaintiff in effect claims a windfall, and does so on the premise that its gain has also the public dimension of constitutional vindication. Yet, as Ackermann J pointed out in relation to the punitive damages sought in *Fose*, for awards to individuals to have a salutary effect on the conduct of public officials they would have to be very substantial, and "the more substantial they are, the greater the anomaly that a single plaintiff receives a windfall of such magnitude".²

Here Ackermann J was lamenting the costs that this form of relief would impose on the State. He went on to state that there is not only an anomaly in this, but that the grave impact on the exchequer raises a critical policy consideration:

'In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are "multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform", it seems to me it would be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are already compensated...'³

These were regarded as powerful reasons of policy pointing away from a constitutional entitlement to damages in the terms the plaintiff asserted.⁴ Specific to the facts of that case, however, it must be borne in mind that this statement was made in the context of punitive

¹ For this, see the various cases discussed in Chapter 2. See also academic sources quoted below in this Chapter.

² *Olitzki Property Holdings v State Tender Board & another* 2001 (3) SA 1247 (SCA) para 40.

³ *Ibid* para 41 (footnotes omitted).

⁴ *Ibid* para 42.

damages. Additionally, the court stated that it was not necessary in the circumstances to decide that a lost profit can never be claimed as constitutional damages.⁵ The rejection of punitive damages in *Olitzki* resonates with *Fose*. The court in *Fose* gravitated towards denying the remedy as, quoting an English case, the ‘principal objection was to purely punitive damages, where the plaintiff was given “a pure and undeserved windfall at the expense of the defendant [who] was being subjected to pure punishment”’.⁶ The court there considered punitive damages to be highly anomalous, that they confused the functions of the civil law with those of the criminal law, and that they contravened almost every principle which has been evolved for the protection of offenders.⁷ Notwithstanding the specific focus of this argument to *punitive damages*, I will address this argument to the extent that it applies to constitutional damages in general and not solely to punitive damages.

Of all the arguments addressed in this Chapter, this is perhaps the best example of a logical fallacy and a *non-sequitur*. If a litigant claims damages from the State in delict and succeeds, that money is paid from government coffers, which is taxpayers’ money. Would it then make a difference that the damages have been renamed ‘constitutional damages’? Would constitutional damages suddenly become an undesirable expense to the taxpayer, but not when the money is paid as ‘delictual damages’? Arguments that an individual claimant would receive a windfall at the expense of the taxpayer, while appearing sound at first sight, become questionable when we consider that even delictual damages are granted against the State, and it is the same pocket that is paying. To then say it is preferable to give the compensation as delictual damages and not as constitutional damages because the latter has more cost does not seem sound.

A basic premise in a constitutional state is that maintaining that constitutional state costs money. Enforcing rights – whatever they may be – has a price tag. The Constitutional Court in the *First Certification* judgment⁸ made it clear that all rights orders have monetary implications.⁹ Put differently, one cannot avoid expense in enforcing constitutional rights.

In *Kate*,¹⁰ yet another counter-argument to the ‘depletion of taxpayers money’ argument against constitutional damages was presented:

‘It is indeed troubling [...] that the public purse, upon which there are many calls, should be depleted by claims for damages. If the provincial administration must seek further funds, in addition to those that have been appropriated for providing social assistance, in order to meet claims for damages, hopefully its accountability to the legislature will contribute to a proper resolution. But the cause for

⁵ Ibid.

⁶ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 45.

⁷ Ibid.

⁸ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC).

⁹ Ibid para 77.

¹⁰ *MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA).

that is the unlawful conduct of the provincial administration and it does not justify withholding a remedy.¹¹

The need to account for those monies by the concerned departments is itself a check that will force the departments to act constitutionally and avoid costly litigation. It is too simplistic and inaccurate an argument to claim that the expense of constitutional damages is on the public purse, and is a loss to the taxpayer and the departments paying could not care less. More expenditure in litigation or payment of damages by a government department or agency is a red-flag that would raise questions regarding how that department or agency is operating. In turn, the pressure to account would self-correct the department in the medium to long-term, and it is this kind of pressure that ought to be imposed on government and its departments and functionaries by the constitutional damages remedy, so as to induce increased constitutional compliance.

Although not raised in any court judgment, or academic work, perhaps the fear is that if the damages are handled as constitutional damages, then many individuals whose rights are violated will approach courts claiming constitutional damages – the so-called ‘opening the flood-gates’ legal cliché. As a starting point, if rights are violated then indeed the litigants are legitimately entitled to claim against the State, and that right to seek redress cannot be taken away from them simply because it is expensive for the State to make good its constitutional damage. Even then, there is a check to ensure that the State does not pay that for which it is not liable. The courts do not and must not blindly pass claims of money against the State without being satisfied as to the State’s liability, and also without being satisfied as to the appropriateness of the remedy – which is the whole point in establishing a framework for the awarding of constitutional damages.

On the whole, Corder’s pragmatic and functional approach is to be preferred, that the acknowledgment of limited resources must be balanced against the necessity for continued efforts to lift the levels of compliance, particularly in the civil-political rights area.¹² In fact, consistent compliance will prove cheaper in the long-run, as fewer and fewer lawsuits are brought against the State.

7.3 THE TRIAS POLITICA AND SEPARATION OF POWERS

Yet another argument is raised against constitutional damages is that the recognition of damages claims arising directly from the Constitution's broad commands appears strangely at odds with the scheme of the separation of powers.¹³ Proponents of this argument submit that the decision to render government officials monetarily accountable to citizens for redress of harm has traditionally been thought to lie within the legislative domain, and entertaining

¹¹ Ibid para 32.

¹² Hugh Corder ‘Securing the rule of law’ (2011) in Carnelly and Shannon (eds) *Law, Order and Liberty: Essays in Honour of Tony Mathews* 27.

¹³ See Nichol ‘Bivens, Chilicky, and Constitutional Damages Claims’ (1989) 75(6) *Virginia LR* 1117, 1122.

constitutional causes of action involves the judiciary, at least indirectly, in policy choices concerning the allocation of limited resources.¹⁴ It is important to note that this argument mainly emanates from, and is premised in the context of the United States of America. Notwithstanding this, local scholars have also raised the subject. For example, Klaaren argues that courts should not be eager to allow such claims because Parliament should pass national legislation for damages since 'the question of institutional implementation and funding are best addressed by the legislature.'¹⁵ O'Regan echoes similar sentiments, opining that 'an express statutory provision providing for damages will put the matter beyond doubt'.¹⁶

It is submitted that such a proposition cannot be sustained in the South African context where the judiciary is expressly empowered by the Constitution not only to develop the common law where it falls short (including common law remedies) in terms of s 8, but also to forge new tools or remedies that would allow for 'appropriate relief' in terms of s 38. In any case, while the doctrine of separation of powers is important, it cannot be used to avoid the obligation of a court to prevent a violation of the Constitution.¹⁷ The courts not only have the power and right to uphold and enforce the Constitution through enablers stated in the Constitution itself, but also the duty to do so. It is uncontroverted that the Constitution in s 172 grants the courts the power to scrutinise the conduct of the other two branches of government and declare any law or conduct inconsistent with the Constitution invalid. That power of judicial review is essential for the maintenance and enforcement of the separation of powers and the balancing of power among the three branches of government.¹⁸

So the courts are expressly empowered to grant a remedy that is within its power without the need for authorisation, or to seek such authorisation, from the legislature. In any case, Chief Justice Langa notes that it is no longer sufficient for the judiciary to rely on the authority of Parliament as justification for judicial decisions, since under a transformative Constitution the judiciary bears the fundamental responsibility to justify its decisions 'not only by reference to authority, but by reference to ideas, rights and values'.¹⁹ The old order of parliamentary sovereignty is no more, where the judiciary saw its role as merely being to interpret and apply

¹⁴ Kate O'Regan 'Fashioning constitutional remedies in South Africa: some reflections' (2011) April *Advocate* 44.

¹⁵ Jonathan Klaaren 'Judicial Remedies' in Woolman et al (ed) *Constitutional law of South Africa* (2nd ed) (2004) 9-13.

¹⁶ O'Regan (note 14) 44.

¹⁷ *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 200. The CC said: 'Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty. As O'Regan J explained in a recent minority judgment, "the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution." In order for the founding values that lie at the heart of our Constitution to be made concrete, it is particularly important for this Court to afford a remedy, which is not only effective, but which should also be seen to be effective.'

¹⁸ *Tlouamma and Others V Speaker of the National Assembly and Others* 2016 (1) SA 534 (WCC) para 62.

¹⁹ Pius Langa 'Transformative constitutionalism' (2006) 3 *Stell LR* 351, 353.

the law as enacted by Parliament with no regard to individual rights or the social consequences of applying that law.²⁰ In any event, as Lord Steyn in the House of Lords makes abundantly clear: 'Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural.'²¹ Thus ordering strong affirmative remedies such as structural relief and constitutional damages will not mean that courts overstep their power but that they fulfil their constitutional mandate.²²

7.4 ABSTRACT, NON-COMPENSATORY DAMAGES?

Emanating mainly from American conservative jurists is the proposition that there is simply no room for non-compensatory damages as that would be based on a judge's perception of the abstract 'importance' of a constitutional right. This proposition has found its way into South African jurisprudence. This argument is premised on the misconceived belief that constitutional rights are abstract, with varying weight accorded to rights according to the judge's perception.

Firstly, this argument does violence to accepted international human rights norms, standards, and principles which state that human rights are indivisible, interrelated, interconnected and are of equal importance.²³ There is therefore no task upon the judge to apportion various degrees of importance or monetary value to constitutional rights.

Secondly, the argument commits the offence of selective evidence. The granting of non-pecuniary damages is nothing novel at law. This is how *solatium* is granted in private law. There need not be a scale that states what value in monetary terms each right is worth, and what amount of money is equivalent to what form and level of violation. Instead, with non-pecuniary damages judges have always been called upon to exercise judicial discretion and make value assessments, having close regard to the facts at hand and any other relevant considerations. Violations of privacy and dignity, for example, are treated in this manner in delict. To then lament this same approach being taken with constitutional damages as if it were an introduction of a novel concept of non-pecuniary damages to law amounts to double standards. There can be no basis to argue that non-pecuniary damages in public law are abstract and hence untenable, but quite the contrary in private law.

²⁰ See Dikgang Moseneke 'The Fourth Bram Fischer Memorial Lecture: transformative adjudication' (2002) 18 *SAJHR* 309, 316 and Kirsty McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) PULP 81.

²¹ *R v Secretary of State for the Home Department, ex p. Pierson* [1998] AC 539, 591.

²² Mia Swart 'Left out in the Cold? Crafting Constitutional Remedies for the poorest of the Poor' (2005) *SAJHR* 40.

²³ John Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (2nd ed) (2013) Juta, Cape Town 4.

7.5 CONSTITUTIONAL DAMAGES AND DETERRENCE OF VIOLATIONS

From the analysis of cases done in Chapters 4 and 5 above, the capacity of constitutional damages to serve as a deterrent is brought to question. This has been used by some courts and scholars to discredit constitutional damages as a tenable remedy. The temptation is to summarily dismiss this argument as too broad, general, abstract and too speculative an assertion, for there is no evidence that where constitutional damages have been granted, they have achieved no deterrent effect. Swart points out that Kriegler J's statement in *Fose* that punitive damages were inappropriate because the problem of police torture was widespread and the damages would therefore not have a deterrent effect can be criticised.²⁴ Deterrence is only one of the functions of an award of damage,²⁵ and not an end in and of itself. For these reasons alone, the argument that constitutional damages are untenable because they achieve no deterrence cannot gain traction. Nevertheless, I shall proceed to deal with the argument on merits.

The primary rationale of constitutional damages is always to satisfy the affected and wronged individual, not financially, but through vindication of their rights. It is not therefore correct to categorise constitutional damages as having the primary utility of deterrence, or punishment, and then proceed to deny the remedy on that basis alone. The primary utility is vindication of an individual's fundamental rights, and any secondary rationale does not take precedence. The other effects of the remedy can rightly be termed consequential and incidental, and unless such effects have such a huge and negative effect on the remedy and its purpose, consequential effects cannot be used to deny the soundness of the remedy on its main utility.

The CC came down heavily against granting constitutional damages as 'punitive damages' in *Fose*. Partly, it is this formulation of the constitutional damages claim as 'punitive damages' that led to the court denying the remedy. The use of constitutional damages for punitive purposes is not advanced in this thesis. However, it is of service to unearth double standards - some subtle - in the way the courts dismiss remedies they think to be inappropriate. There are instances where courts in South Africa have granted and can grant delictual damages which are expressly considered 'punitive'.²⁶ The point to be made here is that there is judicial precedent of monetary damages being awarded for punitive purposes for the infringement of an interest. I mention this simply to show that either way, there is no wisdom in denying monetary damages for constitutional breaches on the wrong premise that the remedy is merely punitive, nor on the unproven basis that the remedy achieves no deterrence.

²⁴ *Fose* (note 6) para 103 (Kriegler J concurring).

²⁵ Swart (note 22) 225.

²⁶ For a detailed analysis of when punitive damages are permissible in South Africa, see Johann Neethling 'Punitive Damages in South Africa' (2009) in Helmut Koziol and Vanessa Wilcox (eds) *Punitive Damages: Common Law and Civil Law Perspectives* 25 Tort and Insurance Law Series, Springer, New York 123-136.

7.6 THE LAW OF UNINTENDED CONSEQUENCES?

Another argument raised against constitutional damages is that the imposition of such damages against public bodies or officials would result in unintended negative consequences. Public officials, it is argued, may take an 'unduly defensive and cautious approach' in carrying out their work.²⁷ This would cause, so the argument goes, a chill on government decision-making.²⁸ The High Court in *Steenkamp NO v Provincial Tender Board, EC*²⁹ per Van Zyl J was in agreement, noting that the imposition of liability may produce adverse consequences, and that considerations of convenience may militate strongly against allowing an action for damages as the threat of such an action would unduly hamper the expeditious consideration and disposal of applications for the subdivision of land by the public body in question in that case.³⁰ Contrary to these obiter remarks, however, Van Zyl J went on to hold that:

'[T]he argument that the imposition of liability on the Tender Board may cause it to become unduly cautious, is not convincing. The imposition of liability may rather lead to a higher standard of care in the carrying out of its activities. This would also be in accordance with the concept of accountability imposed on all organs of government by the Constitution.'³¹

These apparently conflicting statements in a single judgment, where in the first instance Van Zyl J seems to support the negative consequences argument, only to refute it shortly afterwards, are telling. These statements themselves attest to the existing uncertainty as to the practical effect and impact of constitutional damages even in the mind of the judiciary. Suffice it to state that the claim that constitutional damages may have the effect of developing circumspection and over-cautiousness on government officials which then hampers functionality is at best speculative and pessimistically far-fetched. This danger is more apparent than real because the public officials have substantial protection against the imposition of damages for good faith violations of the Constitution.³² Various safeguards exist in the law to protect against unwarranted legal actions.

Although not its main purpose, monetary remedies for constitutional breaches do achieve deterrence, and in the process, contributing to government efficiency and accountability. To augment, De Beer and Vettori submit that '[p]ersonal accountability will encourage state officials to perform up to standard thus discouraging litigation and the consequent unnecessary financial burden on the state.'³³ In fact, as was found by Plasket J in *Vumazonke*

²⁷ See Clive Lewis *Judicial Remedies in Public Law* (4th ed) (2009) Sweet & Maxwell 545 (14-023).

²⁸ See Gene R Nichol 'Bivens, Chilicky, and Constitutional Damages Claims' (1989) 75(6) *Virginia LR* 1122 who postulates that: 'Potential federal liability for every constitutional short-coming visited upon the populace – with its attendant chill on government decision making and its economic consequences also poses problems of significant dimension.'

²⁹ [2006] JOL 16488 (Ck).

³⁰ *Ibid* para 35 (footnotes omitted).

³¹ *Ibid* para 63.

³² Jean C Love 'Damages: A Remedy for the Violation of Constitutional Rights' (1979) 67(6) *California LR* 1276.

³³ RJ De Beer and S Vettori 'Enforcing Socio-economic Rights' (2007) 1 *PELJ* 27.

v MEC,³⁴ such orders as constitutional damages have the effect of cutting costs by ensuring efficiency and in the process saving millions of rands in taxpayers' money that would have been wasted in unnecessary legal costs occasioned by indolence and/or incompetence on the part of public servants.³⁵ If one can argue that monetary damages would result in unintended consequences then one could also argue the same for most of the constitutional remedies, as they actually cause government officials to be conscious of the unlawfulness and illegality of their actions when they are *ultra vires* the law.

7.7 CONCLUSION

As numerous as criticisms for constitutional damages exist, none of the criticisms emerges clean of double standards or unnecessarily and even regrettably undermining the powers of the courts to award remedies they deem fit in accordance with the facts before them. The result is that there is no substantive constraint to the awarding of constitutional damages at law, nor is there necessarily any constraint by reason of expedience. In what follows, I conclude by considering the practical considerations and any elements that may be necessary to successfully found a claim and prosecute for constitutional damages.

³⁴ 2005 (6) SA 229 (SE) 234.

³⁵ *Ibid* para 5.

CHAPTER 8

CONCLUSION - STRUCTURAL AND PROCEDURAL ASPECTS OF A FUNCTIONAL APPROACH

'We who have taken the oath of high office as judges of the republic must effect the promise of the Constitution and close the gap between rights and remedies and avoid perpetuating the jurisprudence of deficiency as far as effective remedies for constitutional violations may be concerned.'

Dingake J, *Oatile v Attorney General* 2010 (1) BLR 404 (HC) at 422D.

8.1 INTRODUCTION

This thesis has attempted to deconstruct constitutional damages from their perceived mystic and nebulous nature, as with the perceived vexed intersection between constitutional and delictual damages. In this concluding Chapter, I will tie together my arguments on constitutional damages and offer some final thoughts on the framework that I suggest should be followed in the context of South Africa and comparable constitutional democracies. The process attendant to the public law remedy of constitutional damages and the private law delictual action cannot be the same, for in law much is informed by process as by substance. Admittedly, one can see from the examination of jurisprudence both in South Africa and comparative jurisdictions that private law remedial principles, especially the delictual action, exert a lot of influence on the way constitutional damages are approached.¹ This should not be problematic given the desirability of the principle of consistency and unity in the law. Differences in approach should only be drawn to the extent necessary, and to the extent that such differences facilitate achievement of the objective of the relief in a functional framework. It is with this in mind that I proceed to outline a distinctive functional procedural framework that should inform constitutional damages.

8.2 OPTIONS FOR CONSTITUTIONAL DAMAGES IN SOUTH AFRICA

One can accept as a conclusion from the preceding discussions that 'any problem about using damages as a public law remedy resides not in the nature of damages as a remedy. If there is such a problem, we should look for it not in the nature of damages as a remedy but rather in the grounds on which damages might be awarded in respect of the performance of government functions'.² It is from this premise that options of an approach in awarding constitutional damages can begin to be considered.

¹ See for example Juliet Philpott 'Damages Under the United Kingdom's Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990' (2007) 5(2) *NZJPIL* 211, 216 who in discussing the UK and New Zealand approach opines as follows: 'However, having classified the remedy as a public law remedy, the courts in both jurisdictions have adopted an approach to remedies for rights violations that is heavily influenced by private law remedial principles'.

² Peter Cane 'Damages in Public Law' (1999) *Otago Law Review* 9(3) 489 at 498.

From a reading of the preceding Chapters and the literature and judicial decisions surveyed, a number of options in approaching constitutional damages are available to South Africa.³ The first approach would be that of using constitutional damages only where no common law or statutory remedies are applicable. This is a very narrow and constrained approach to the relief. According to Klaaren, one instance where this might occur is where there is a statutory ouster of the court's common-law jurisdiction,⁴ and another is where the Constitution protects an interest which the common law does not recognise, such as an environmental right.⁵ With such a claim the choice will be between developing the common law and invoking the Constitution directly to award damages. While the *Fose* decision views the South African common law as flexible enough to be stretched to provide compensation in most cases, it cannot be bent and pulled out of all recognition. As has already been pointed out, this approach more than the others seems to be reflective of the cautious and conservative approach the judiciary in South Africa is taking. The downside of this approach is that it potentially subtracts from the essence and purpose of constitutional damages, relegating constitutional damages to a residual remedy.

A second option is that of using constitutional damages where the existing common law and statutory remedies are *inadequate* to remedy the specific violation. In such a case, there may be an impetus to then use constitutional damages as a gap-filler remedy. The main critique to this approach is that constitutional remedies in general and constitutional damages in particular were never intended to be gap-fillers, but competent remedies in their own right. As with the first option, constitutional damages here would occupy an inferior and peripheral position.

A third approach is the pursuit of an award for punitive damages. The courts have not been forthcoming with this approach, providing scant support for awards of punitive damages over and above those for patrimonial loss, pain and suffering, loss of amenities, contumelia, and other general damages. At the core of the courts' argument against punitive damages has been that they would serve no deterrent effect.⁶ In the courts' mind therefore, punitive damages would be awarded in those circumstances where they would likely have a deterrent effect. This approach runs the risk of turning constitutional damages into a punitive remedy to the exclusion of its other utilities.

A fourth approach is to award nominal damages. As with punitive damages, the presumption against this category of damages is a rebuttable one where no compensation has been

³ See Jonathan Klaaren 'Judicial Remedies' (1998) in Stu Woolman *et al* (ed) *Constitutional Law of South Africa* [Revision Service 2] 11-12 who states that after *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), there are at least three approaches. My position is that the options are more than just three.

⁴ Klaaren (note 3) 11-12: 'The tension here will be whether relief should be confined to remedies of general validity (such as invalidity or severance) or should include appropriate individual relief such as damages'.

⁵ *Ibid.*

⁶ *Fose* (note 3) para 71 (Ackermann J); see also para 65 where Ackermann J provides a lengthy list of arguments against punitive damages.

awarded in the matter.⁷ Such awards would have little monetary value but would serve to vindicate the constitutional rights at issue as for instance in political rights cases. The question here is whether nominal damages alone are enough to vindicate rights and ensure public accountability.

Merely appropriating any one of these options would not address the numerous questions and concerns raised in this thesis regarding the status and utility of constitutional damages in South African law. For that reason, a tailor-made hybrid and functional approach is preferred, which borrows from all the enumerated options – a fifth option. Such a tailor-made approach would be purpose-oriented. It would look at the goal to be achieved, and then consider the most appropriate remedy to reach such a goal. In regard to constitutional damages, this approach would mean that the existence of a delictual or other alternative remedy to a claimant would not necessarily mean that a constitutional damages claim will be met with failure. Instead, the onus would rest on the plaintiff to establish why such damages are the most appropriate relief, while the State's role would be to show how there are other more appropriate remedies, or any special reason why constitutional damages should not be granted. This approach finds support in Canadian jurisprudence.⁸ Canada follows the same approach in awarding non-pecuniary damages in personal injury cases.⁹ What must be looked at is the breach that has occurred, the 'mischief' that needs to be corrected, and the impact that such correction is intended to have. This would mean there are instances where even though there is a remedy in common law, constitutional damages will be appropriate. I now proceed to the proposed approach below.

8.3 A TAILOR-MADE FUNCTIONAL APPROACH FOR SOUTH AFRICA

8.3.1 Defining the functional approach

A case has been made in this thesis that local conditions dictate a vigorous, determined and sustained offensive against constitutional malfeasance and public disregard for or active violation of constitutional rights. The nature of a functional approach that is meaningful in its problem-solving capabilities must be premised on the notion that 'legal norms can be applied to novel situations without rigidity or blind conformity to precedent',¹⁰ and that 'such an evolution might require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand'.¹¹ The interplay between principles and contingent fact becomes of central importance if remedies granted are to have

⁷ Ibid para 68.

⁸ See the discussion on *Vancouver (City) v Ward* 2010 SCC 27, [2010] 2 S.C.R. 28 in Chapter 5.

⁹ *Andrews v Grand & Toy Alberta Ltd.* [1978] 2 S.C.R. 229.

¹⁰ Oscar Schachter 'Dag Hammarskjöld and the Relation of law to Politics' (1962) 56 *AJIL* 3.

¹¹ *Ward* (note 8) paras 20-21 and also *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003] 3 SCR 3 paras 55-58.

any meaningful effect both to the direct litigants and to similarly situated persons.¹² Remedies cannot be carved in stone and a 'mechanical approach to determining the appropriate remedy is ultimately impractical because no list can include all harms or take account of the variations in circumstance that could make a given remedy appropriate'.¹³

While suggesting a functional approach to the application of constitutional damages is novel in the South African context, propositions of functional approaches to legal questions generally are not novel. Jessup has discussed the functional approach in the following terms:

¹⁴

'The functional approach to law is incapable of concise definition. In general it describes an attempt to correlate rules of law with the forces of human activity which they purport to regulate or from which they spring. It has been characterised also as an attempt "to see law in terms of activity and effect" rather than in terms of isolated and detached rules; it thinks of law in relation to everyday realities rather than as a "brooding omnipresence in the skies". As a pedagogical procedure, the contrast is between conceptual and functional groupings of material'.

A functional approach is therefore a means and ends exercise. The premise is that law ought to be an effective means to solve people's problems. To this end the functional approach is normative. I take the averments by Currie and De Waal as a premise, that '[d]eciding on a remedy requires a more pragmatic approach than that adopted in any of the other stages of Bill of Rights litigation'.¹⁵

8.3.2 Appropriate relief and the 'choice approach'

The awarding of constitutional damages should be needs-based. Thus in some cases constitutional damages would be awarded for the reason that existing common law remedies are insufficient as was the case in *Mahambehlala*.¹⁶ Yet this should not be the definitive consideration. There may as well be instances where there are sufficient common law remedies but the unique circumstances of the case require much more forceful and vindicatory relief, perhaps because of the frequency of violations, reprehensibility of violation, extent of violations or any other relevant factor. By so doing, we avoid constricting constitutional damages to rigid circumstances – what could also fit the description of the austerity of tabulated legalism. Rigidity does not serve constitutional remedies well in general. The discretion bestowed upon the courts must allow them to grant relief not out of

¹² Ibid.

¹³ David I Levine, David J Jung and Tracy A Thomas *Remedies: Public and Private* (5th ed) (2009) West Publishing 1-2.

¹⁴ Philip Jessup 'The Functional Approach as Applied to International Law' (1928) Third Conference of Teachers of International Law 1.

¹⁵ Iain Currie and Johan de Waal *The Bill of Rights Handbook* (2013) (6th ed) Juta, Cape Town 179.

¹⁶ *Mahambehlala v MEC for Welfare, Eastern Cape, and Another* 2002 (1) SA 342 (SE) 354I-J and 355A-B: 'In my opinion, in the light of these considerations, the applicant's common-law remedies are insufficient to be regarded as appropriate relief as envisaged by s 38 of the Constitution. [...] I am of the view that it is incumbent upon this Court to attempt to fashion what may loosely be referred to as "constitutional relief" ...'.

mere procedure but of the need to effectively remedy a violation. For that reason, the Constitution itself did not prescribe what form of constitutional relief is permissible under what circumstances, choosing rather to leave such considerations in the capable and trusted hands of the courts.

The utility and effectiveness of constitutional damages is the key determinant to whether or not the remedy ought to be granted.¹⁷ It is submitted that this should be the guiding principle in modelling a case for constitutional damages. *Modderklip*¹⁸ and *Kate*¹⁹ provide excellent examples of where constitutional damages are granted as of necessity and for pragmatic purposes in vindicating rights. Levine *et al*²⁰ argue that there are four critical trans-substantive choices in identifying the appropriate remedy. Firstly, the choice is to identify the remedy's goal.²¹ The second choice is the choice between a *specific* and a *substitutionary* remedy.²² A Specific remedy achieves the remedy's goal in kind, by giving the plaintiff the exact thing to which he or she is entitled.²³ Then substitutionary remedies operate by giving the plaintiff a substitute – typically, an award of money – equal to the value of the plaintiff's entitlement.²⁴ The third choice has to do with how to implement the first two choices in crafting the remedy.²⁵ Then the fourth choice is how to enforce the remedy.²⁶ These four choices demand consideration when constitutional damages are sought.

The functional approach is meritorious for one more reason: not every breach of a right will call for constitutional damages. Not all constitutional violations give rise to a damages claim.²⁷ In this regard a functional approach prevents the acceptance and use of constitutional damages from having far-reaching and unintended consequences. Such an approach would inform us that where the goal is single, for example, compensation, then existing delictual remedies will be sufficient. Similarly, in some situations a mere declarator would be sufficient. A functional approach would mean that constitutional damages are only granted in deserving cases, while at the same time meaning that the existence of a delictual or other alternative remedy does not necessarily mean that a claimant cannot succeed in a constitutional damages claim. The question of the co-existence of constitutional damages and the private

¹⁷ This approach has been endorsed by the Supreme Court in Canada. The court states in *Ward* (supra) para 24, that: 'A functional approach to damages finds damages to be appropriate and just to the extent that they serve a useful function or purpose. This approach has been adopted in awarding non-pecuniary damages in personal injury cases (*Andrews v Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229), and, in my view, a similar approach is appropriate in determining when damages are 'appropriate and just' under s 24(1) of the Charter'.

¹⁸ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC).

¹⁹ *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA).

²⁰ Levine *et al* (note 13).

²¹ Ibid 3.

²² Ibid.

²³ Ibid.

²⁴ Ibid

²⁵ Ibid.

²⁶ Ibid.

²⁷ Gene R Nichol 'Bivens, Chilicky, and Constitutional Damages Claims' (1989) 75(6) *Virginia LR* 1117, 1133.

delictual remedy is thus not one without an answer. It should lie upon the litigant to pick and pursue a cause of action, in what can be termed a choice approach. The nature of the violation is a key consideration. For instance, systematic violations of fundamental rights as opposed to isolated violations call for structural remedies.²⁸ Ngcobo J noted in *Hoffman v South African Airways*²⁹ that invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case.

A choice approach would work in a manner in which Bishop articulated as follows: ‘a litigant should not have to fail at claiming indirect damages or prove that they will be ineffective to qualify for direct relief. Whether a court should award direct or indirect damages should depend on all the facts of the matter. The fact that a person framed a claim in terms of direct relief rather than indirect relief should not be used to deny them any relief at all. For what is ultimately at stake is the vindication of a constitutional right.’³⁰

Concerns regarding preventing the creation of a parallel system of law are allayed by the courts determining appropriateness of a remedy on the facts of the case. Facts are the ultimate decider. The onus rests on the plaintiff who is claiming constitutional damages to establish why they are the most appropriate relief, with the State showing why constitutional damages should not be granted. A claim should be supported on the facts, and it is those facts that would determine whether a constitutional damages claim is meritorious, or a delictual claim would have been more appropriate. As Bishop has noted, ‘No formula or algorithm exists for courts charged with determining which remedy is appropriate. Indeed, the chosen remedy most often turns on the facts and the relief pursued by the person asserting a constitutional claim’.³¹ In their evaluation the courts must have regard to the consequences of imposing liability in each case, bearing in mind that the imposition of this species of liability is intended to lead to a higher standard of care in the way public officials and bodies carry out their work.³² Other factors include the impact of the violation on the victim,³³ and violations which result in the imprisonment of the victim, for instance, should not be tolerated, even temporarily.³⁴ Yet another vital consideration is the comparative balancing of the interests of the parties concerned.³⁵ This achieves fairness as a principle. In an attempt to give substance to the term ‘appropriate relief’ the SCA has stated that the word ‘appropriate’ means ‘specially suitable’ or ‘proper’.³⁶ The appeal court referred to the CC’s decision in *Hoffmann*³⁷

²⁸ Currie and De Waal (note 15) 182.

²⁹ 2001 (1) SA 1 (CC) para 45.

³⁰ Michael Bishop ‘Constitutional Remedies’ in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed (Original Service 06-08) 9-157.

³¹ Michael Bishop ‘Constitutional Remedies’ in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed (Original Service 06-08) 9-151.

³² Clive Lewis *Judicial Remedies in Public Law* (4th ed) (2009) Sweet & Maxwell 545 (14-023).

³³ Currie and De Waal (eds) *The New Constitutional and Administrative Law Volume 1, Constitutional law* (1st ed) (2001) 289.

³⁴ Ibid.

³⁵ Abram Chayes ‘The Role of the Judge in Public Law Litigation’ (1976) 89 *Harv LR* 1281.

³⁶ *Pharmaceutical Society of South Africa v Tshababala-Msimang* 2005 (3) SA 238 (SCA) para 76.

³⁷ Note 30 paras 42-43 cited in *Pharmaceutical Society* (note 34).

in which it was stated that in the context of the Constitution appropriateness imports the elements of justice and fairness. According to the CC, fairness 'requires a consideration of the interests of all those who might be affected by the order'.³⁸

While constitutional damages may appear to be relief aimed at satisfying the individual litigant concerned, the vindicatory nature of the relief sends a message beyond the plaintiff. Thus, it is not correct to say that constitutional damages do not meet the characteristics of structural relief. It must also be borne in mind that constitutional vindication is not a goal to be attained by one super remedy. Rather, it is a cocktail of several constitutional remedies that collectively achieve this goal, including constitutional damages.

Ultimately a shift in judicial attitude is required. Judicial remedies are primarily a domain for the courts, and the judiciary cannot wait upon the legislature to prescribe remedies. If nothing, then a measure of judicial activism is required. This is not to say the courts should be blind to practical considerations, but rather that they should have the willingness to realise the full potential of constitutional damages, and the open-mindedness to accept its viability as a remedy.

8.3.3 Special factors?

The 'special factors' or special remedy approach to constitutional damages should be rejected. Not only is it inconsistent with progressive public law litigation but it takes the remedies regime backwards to where equitable remedies were only granted as a matter of 'extraordinary' circumstances. It must no longer be accepted that breaching fundamental rights in itself is 'normal' or 'ordinary' such that constitutional damages are not appropriate for lack of 'special' factors and 'extraordinary' circumstances. There is nothing normal about breaching the Constitution. Chayes argues that surely the old sense of equitable remedies as 'extraordinary' has faded.³⁹ Where constitutional damages would constitute equitable just and appropriate relief, the courts should grant them and not hold on till they establish some 'special factors'.

Allowing constitutional damages only in 'exceptional circumstances' where 'special factors' are present is predominantly an American approach, and should not be an option for South Africa. At its most ambitious this discretionary rationale would cast a considerable shadow over the practice of constitutional review.⁴⁰ This is true given that special factors analysis is, by definition, or even by intention, unprincipled.⁴¹ The reality is that 'a court creates distinct, standardless exceptions when it is worried that, in the future, it will be unable to live with the principle it announces. The special factors exception provides the court an escape hatch if

³⁸ *Hoffmann* (note 29) para 43.

³⁹ Chayes (note 35) 1281.

⁴⁰ Nichol (note 27) 1124.

⁴¹ *Ibid* 1126.

circumstances, to the judicial mind, warrant.⁴² It is for this reason that, in as much as the courts exercise their discretion to grant the most appropriate remedy, the special factors approach must be rejected.⁴³ Following a special factors approach in South Africa will result in predictable outcomes: the perpetual underdevelopment of the constitutional damages remedy.

8.3.4 The four-stage test

As to process, the four-stage test formulated by the Canadian Supreme Court in *Ward* and reproduced in various forms in New Zealand and Trinidad and Tobago jurisprudence is a concept that would work for South Africa, as detailed and discussed in Chapter 5. First, the claimant must establish that a constitutional right has been violated. Second, the claimant must show why damages are an appropriate and just remedy to the extent that they serve a useful function or purpose. In the third stage there is a shift in onus, with the State rebutting the damages claim through presenting countervailing factors that defeat the functionality of damages or render them inappropriate or unjust. Should the government fail to rebut the damages claim the court moves on to the fourth and final step, which is the assessment of quantum. Once more, the guiding principle is that the amount awarded should be just and appropriate, and the approach to assessment of quantum should be goal-oriented and functional, with the test to determine whether constitutional damages are the appropriate remedy applying *mutatis mutandis* to the assessment of quantum. Here the court must focus on the breach of constitutional rights as an independent wrong worthy of compensation in its own right.

Structuring a constitutional damages remedy in this way helps address the concern of whether in a constitutional society the remedies available augment or facilitate what the substantive law promises.⁴⁴ There is thus a gap-bridging utility in this endeavour. In what follows, I address key procedural and structural aspects relevant to the functional approach that I propose.

8.4 THE STATE AS DEFENDANT

An action for public law damages lies against the State and not against individual actors or non-state juristic persons. Distinctively, actions against individual actors should be pursued in

⁴² Ibid.

⁴³ Similarly, Nichol (note 27) 1153 makes a case for the abolition of this approach in the US in the following terms: 'In my view, the special factors exception should be abolished. The recognition of damages claims under the Constitution is an acceptable, even essential, aspect of constitutional interpretation. Values that serve to defeat such claims should, at a minimum, be similarly constitutional in pedigree. The special factors concept has strayed very far from that central determination.'

⁴⁴ See Vicky Jackson and Mark Tushnet *Comparative Constitutional Law* (3rd ed) (2014) Foundation Press 155, who discuss the dichotomy in substance and procedure in attaining constitutional rights.

accordance with existing causes of action, that is, at common law and in statute, although the underlying policy considerations that are engaged when awarding private law damages against State actors may be relevant when awarding public law damages, and ‘such considerations may be appropriately kept in mind’.⁴⁵ This is by no means to suggest that the law should not develop in the direction of public remedies for private violations of constitutional rights.

The immediate question is, why are constitutional damages claimable only against the State and not private violators of constitutional rights? There is a difference between a private citizen and the State violating a constitutional right of an individual. Foundationally, constitutional damages represent attempts to render governments and their officials and employees accountable for the constitutional harm they cause.⁴⁶ The nature of the remedy is to require the State on behalf of society at large to compensate an individual for breaches of the individual’s constitutional rights. This is an aspect the Canadian Supreme Court addressed in *Ward*, emphasising that an action for public law damages lies against the State and not against individual actors.

Where the State is concerned with the violation of constitutional rights, it is using power in the public sphere (public power) and there is an asymmetrical power relationship between the private citizen and the State. Whitman correctly points out that in constitutional cases, the person who is said to have wronged another is by definition someone who has a special power to do harm because of his government position.⁴⁷ Not only are the rights in the Bill of Rights meant to protect citizens from bureaucratic overreach and abuse of power by the State and its functionaries, but the State itself is supposed to be the main protector of people’s rights. It therefore becomes more reprehensible when the State violates the rights of the private citizens who entrust public power into its hands to exercise it for the greater good of society.

None of the comparative jurisdictions surveyed in Chapter 5, or any that I am aware of, allows for constitutional damages for horizontal violations of constitutional rights. The rationale is articulated by the United States Supreme Court per Brennan J writing for the majority in *Bivens*: ‘An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own’.⁴⁸

There are fundamental differences in the philosophies underlying the violation of constitutional rights on the one hand and a delict on the other. In delict, when a state functionary acts in the course and scope of their employment, their conduct is attributed to

⁴⁵ Ibid.

⁴⁶ Sheldon Nahmod, Michael Wells and Thomas Eaton *Constitutional Torts* (1995) Anderson Publishing Company, Cincinnati 1.

⁴⁷ Christina B Whitman ‘Emphasizing the Constitutional in Constitutional Torts’ (1997) 72 *Chicago-Kent LR* 675.

⁴⁸ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics* 403 U.S. 388 (1971) 392.

the State, leaving the State vicariously liable. However, the trajectory that constitutional law cases - constitutional damages cases included, have followed is that the State is not liable through vicarious liability but is directly liable for violating the Constitution through its representative functionary, entrusted in his own capacity with public power. This is important as the State will not be allowed to escape liability by disassociating itself from the conduct of its functionary when such a functionary has been placed in a position to violate the Constitution because of the public power he or she is vested with.

The liability of the State in the case of constitutional damages is thus, strictly speaking, not based on the theory of vicarious liability for a tort committed by its servants, but rather primary liability for a wrong committed by the State in its own name. In *Maharaj v Attorney General of Trinidad and Tobago 2*,⁴⁹ the court spoke as follows:

‘Lord Diplock put it succinctly when he said in relation to redress under the constitution of Trinidad and Tobago – “The claim for redress under 6 (1) for what has been done by a judge is a claim against the State for what has been done in the exercise of the judicial power of the State. This is not vicarious liability; it is liability of the State itself. It is not a liability in tort at all: it is a liability in the public law of the State not of the judge himself, which has been newly created by Section 6 (1) and (2) of the constitution”.

Nonetheless, this is an aspect of disputed positions as some jurisdictions prefer to characterise the State liability as vicarious. Notwithstanding, whether the liability is characterised as vicarious or direct makes no practical difference to the claimant.

8.5 THE ELEMENTS OF A CONSTITUTIONAL DAMAGES CLAIM

An action for damages in delict consists of six elements- conduct, wrongfulness, unlawfulness, causation, fault and harm.⁵⁰ More often than not, delictual cases turn primarily on wrongfulness, causation and fault. The question then is whether these elements are a pre-requisite for a constitutional damages claim. This is critical not only to the extent that it establishes the requisites of a model constitutional damages case, but also to the extent that it delineates differences between delictual and under constitutional damages.

Generally, there is consensus that delictual elements are not applicable *in toto* and *mutatis mutandis* to constitutional damages claims. Rather, it is sufficient for a claimant to prove the violation of a right, and to establish that constitutional damages are an *appropriate remedy* in the circumstances. Judicial discretion in the granting of constitutional damages is thus not a check-list exercise of satisfying certain fixed elements. Satisfying the requirements of violation of a specified right – of which each right may require proof of violation in different ways and degrees, is enough to establish that a constitutional wrong has been done. That, of course, must be a violation that is not saved by the general limitations clause (s 36) or any

⁴⁹ 1979 A.C. 399.

⁵⁰ Max Loubser and Rob Midgley (eds) *The Law of Delict in South Africa* (2012) Oxford University Press Southern Africa, Cape Town 7 and 21-22.

internal savings provision within the clause that provides for the right, or any other constitutional clause that may have the effect of removing or limiting liability for the State.

The violation of constitutional rights is said to have occurred when an individual is denied access to his or her right, when the enjoyment of that right is unduly limited, or when an individual is persecuted for having exercised his or her rights. Practically and functionally the burden of proof will not be the same in delict and in the violation of constitutional rights. Whereas delict is proven on an established test that takes the litigant through the six elements, violation of constitutional rights is defined differently depending on the rights in question. This may involve different elements in each case. The import of this is that the constitutional damages case is not as structured as a delictual case, and need not follow an element by element enquiry as in delict. What needs to be determined is the violation of a constitutional right, including the manner in which it occurs, and the effects thereof on the victim and on society. Next, the court will then determine whether monetary damages are the appropriate remedy in the circumstances. This is because in constitutional law the remedy varies depending on facts and circumstances while in delict the remedy is default.

Nevertheless, the elements of delict may find relevance and application in some of the enquiries into whether a constitutional rights violation has occurred, and should therefore not be disregarded completely. In *Government of the Republic of South Africa v Von Abo*,⁵¹ the court held that fault and causation are particularly important factors when considering constitutional remedies.⁵² This suggests that a party should show that his or her harm was causally connected to the breach of a constitutional right, before an award of damages can be considered.⁵³ This can only be logical given that while the nature of constitutional damages does not follow the delictual enquiry, it is recognised that there cannot be damage without causation and fault. The State must have acted, or omitted to act in a way that causes a violation of the fundamental right(s) of the claimant. It must be made clear however that insofar as constitutional rights are concerned, the fault element would almost always be inherent in the finding of a violation. If there is no fault a finding of violation would rarely be made – unless strict liability applies. Alternatively, there would be a violation complete with fault, but then the violation is allowable through the limitations clause or some other savings clause.

An important element to consider is harm. Harm is a pre-requisite in delict and would differ in nature depending on whether the action is brought under the *actio legis aquiliae*, the *actio iniuriarum* or the Germanic action for pain and suffering.⁵⁴ The *actio legis aquiliae* requires out-of-pocket financial loss. The *actio iniuriarum* deals with injury to personality interests and

⁵¹ 2011 (5) SA 262 (SCA)

⁵² Para 33: 'In order to decide on an appropriate remedy, the nature of the breach must also be considered. This brings the issue of causation into focus'.

⁵³ *Maharaj (2)* (note 49) para 33.

⁵⁴ Johann Neethling, JM Potgieter and PJ Visser *Law of Delict* (6th ed) (2010) Lexis Nexis, Durban 5; Loubser and Midgley (note 50) 27-28.

requires contumelia or injuria, being hurt feelings or hurt reputation. The action for pain and suffering deals with non-patrimonial harm, the loss of enjoyment of the amenities of life, and/or actual physical pain and suffering. With constitutional damages the harm could be any of these. There could be out of pocket financial loss when one's property is violated by the State, or there could be contumelia when one's dignity is impaired, and there could be loss of enjoyment of amenities of life and actual pain and suffering when one is tortured and physically disabled in the process. All these harms are acceptable under the constitutional damages claim. The fundamental question is whether there has been violation of a constitutional right, and since constitutional damages are awarded for the purposes of declaring and vindicating legal rights, proof of the harm itself is not required, unlike in delict.⁵⁵ Whenever there is a proven violation of a constitutional right there is harm in one form or another, keeping in mind that the harm is always beyond the individual but also to society's interests in the protection of the Bill of Rights.

Both in *Modderklip*⁵⁶ and *Kate*⁵⁷ the awards were based on quantifiable financial harm. But would this mean that constitutional damages may only be awarded where financial harm can be proven? This cannot be so. The violation of constitutional rights involves loss on many fronts. Some of the loss is not financial but costing the affected more than a mere loss of money. Constitutional rights are beyond issues of financial protection or security, and cannot be reduced to such. The financial loss compensated for in *Modderklip* and *Kate* happened to simply direct the court in the quantification of the damages, not that the quantifiability was the determinant factor for the granting of the relief in the first place. Rather, the court in both cases directed payments to be made in terms of existing calculations for ease of quantification, and because it simply made sense to do so.

Currie and De Waal provide a useful list of ten considerations that come into play in determining appropriateness of the constitutional damages remedy.⁵⁸ These are: (1) the need for effective remedies;⁵⁹ (2) a court order must not only afford effective relief to a successful litigant, but also to all similarly situated people;⁶⁰ (3) good governance;⁶¹ (4) separation of powers and deference to legislative powers; (5) identity of the violator; (6) the nature of the violation; (7) consequences or impact of the violation on the victim; (8) fault and causation;⁶²

⁵⁵ Loubser and Midgley (note 50); Jean C Love 'Damages: A Remedy for the Violation of Constitutional Rights' (1979) 67(6) *California LR* 1246-7.

⁵⁶ *Modderklip* (note 18).

⁵⁷ *Kate* (note 19).

⁵⁸ Currie and De Waal (note 15) 181-183.

⁵⁹ Citing *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 65.

⁶⁰ *Ibid* para 82; *Equity Aviation Services (Pty) Ltd v CCMA* 2009 (1) SA 390 (CC) para 56 and *Hoffman* (note 29) paras 42-43.

⁶¹ For instance, the CC has refused to grant relief that would lead to 'serious inconsistencies' in the legislative framework in *Geldenhuis v National Director of Public Prosecutions* 2009 (2) SA 310 (CC) para 42.

⁶² *Von Abo* (note 51) para 33.

(9) victim responsibility;⁶³ and (10) prospects of successful implementation of the court's order.⁶⁴

With all public law actions and remedies, the end goal is the protection and welfare of society. When a crime occurs, for instance, the harm assumes a public character and affects society at large. To illustrate how far this goes, there is a recognised category of victimless crimes and offences at law.⁶⁵ Here there is no specific human being who can be identified as a victim, but the victim is society as a whole through endangering or violating public safety, peace, order, morality or health. Thus, when a criminal is imprisoned, or is made to pay a fine, this is not done to satisfy the victim or complainant but to do justice to society, yet in that process the victim is not forgotten. It is for this reason that in sentencing the court will look at the triad of the crime, the victim and society.⁶⁶ Where a victim has suffered damage or loss of property due to crime, the court may order the accused to compensate the victim in terms of s 300 of the Criminal Procedure Act.⁶⁷ This compensation is not the core of the trial or the justice sought, but is a means by which both individual and public justice is attained, in addition to imprisonment or a fine. Similarly, a violation of the Constitution by the State, while not causing actual financial loss and actual physical harm, has harmful effects to society and the constitutional order. In the same way, in awarding constitutional damages the court would look at the constitutional violation, the victim (both the individual and society), and the offender (how the offender has taken advantage of his public powers to violate rights, or how s/he has misused, abused or neglected such powers). With both criminal sanction and constitutional damages as public remedies, the court cannot be confined to looking at the parties only.

Finally, the arguments advanced above draw support from the French position, as articulated by Quézel-Ambrunaz in discussing of the elements of a damages case. Relying on a case before the *Cour de cassation* (Court of Cassation), Quézel-Ambrunaz argues that mere proof of violation of privacy entitles the victim to obtain compensation.⁶⁸ Whereas in an action for civil liability the plaintiff must prove fault or other basis for liability, the damage caused and the causation, according to this ruling he cites, the proof of the fault alone is sufficient in a constitutional damages case and damage and causation are presumed because of the nature

⁶³ Such as the victim being responsible for the delay in the discharge of duties, or exercise of own rights. See *Sanders v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para 33-34 and *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile* 2010 (5) BCLR 422 (CC).

⁶⁴ See *Hoffman* (note 29) para 45; *Von Abo* (note 51) paras 26-27; and *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E) 633A.

⁶⁵ These are crimes and offences which do not involve any harm to the person, property or personality of another, but nonetheless are illegal and criminal. Examples would include drug use, driving without a licence, public drinking, and illegal gambling.

⁶⁶ *S v Zinn* 1969 (2) SA 537 (A); *S v Rabie* 1975 SA 855 (A).

⁶⁷ Act 51 of 1977 'CHAPTER 29: COMPENSATION AND RESTITUTION'.

⁶⁸ Citing Cass. Civ. 1, November 5, 1996, Bull. I,378.

of the right infringed. The *Cour de cassation* broke it down as follows in a case of privacy:⁶⁹ since violation of privacy had been established, there was necessarily damage requiring compensation.⁷⁰ Thus violation of a right is itself damage.

8.6 RIGHTS FOR WHICH CONSTITUTIONAL DAMAGES ARE CLAIMABLE

Firstly, should constitutional damages be available only for rights contained in the Bill of Rights? This question is posed in the context of s 39(3) of the Constitution which provides that 'The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill'. In *Pharmaceutical Manufacturers*,⁷¹ with added reference to the Interim Constitution, the CC explained as follows:

'What section 35(3) and section 33(3) of the interim Constitution make clear is that the Constitution was not intended to be an exhaustive code of all rights that exist under our law. The reference in section 33(3) of the interim Constitution and section 39(3) of the 1996 Constitution is to "other rights", and not to rights enshrined in the respective Constitutions themselves. That there are rights beyond those expressly mentioned in the Constitution does not mean that there are two systems of law. [...] There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply.'⁷²

The meaning of this provision is that there are rights beyond those enumerated in the Constitution. However, that does not necessarily mean that every constitutional remedy is available to these other rights that are not in the Constitution. For this assertion, I am fortified by the case of *Modderklip*,⁷³ in which the SCA defined constitutional damages as 'damages due to the breach of a *constitutionally entrenched right*'. (My emphasis). The meaning of this is that what defines 'constitutional' damages is the fact that the right sought to be remedied is in the Constitution itself. This, of course, does not necessarily extend to every constitutional remedy. Some remedies do lend themselves to rights that are not constitutionally entrenched.

Secondly, the question remains whether constitutional damages are claimable for the breach of every constitutional right, or the cause of action does not subsist for some rights. In *Fose* the following statement was made by Ackermann J in his majority opinion:

'Notwithstanding these differences it seems to me that there is no reason in principle why "appropriate relief" should not include an award of damages, where such an award is necessary to protect and

⁶⁹ Cass. Civ. 3, February, 25 2004, Bull. III, 41.

⁷⁰ See Christophe Quézel-Ambrunaz 'Compensation and Human Rights (From A French Perspective)' (2011) 4 *NUJSLR* 189, 194.

⁷¹ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).

⁷² *Ibid* para 49.

⁷³ *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)* 2004 (6) SA 40 (SCA) para 43.

enforce Chapter 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the legislature's intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the Supreme law. *When it would be appropriate to do so, and what the measure of damages should be, will depend on the circumstances of each case and the particular right which has been infringed.*⁷⁴ (My emphasis).

What Ackermann J suggests is that whether constitutional damages are to be awarded, and to what measure, will depend on the circumstances of each case *and* the nature of the particular right for which a claim is made. Does this suggest that certain rights may attract constitutional damages and not others?

As has already been stated, constitutional damages are simply a remedy that is considered after liability has been determined. A violation would have already been proven. The determinant considerations remain the effectiveness and appropriateness of the remedy. A hypothetical application of this test to different kinds of violations would reveal that not all breaches open up to claims for constitutional damages. This principle was laid down by Wallis JA in *Mboweni*,⁷⁵ holding that even if it is found that a constitutional right has been infringed, that does not necessarily establish the right to claim damages, for '[n]ot every breach of constitutional duty is equivalent to unlawfulness in the delictual sense and therefore not every breach of a constitutional obligation constitutes unlawful conduct in relation to everyone affected by it.'⁷⁶ Further, even if infringement could be found there remains the issue of whether constitutional damages are the appropriate constitutional remedy for that breach.⁷⁷ Although Wallis JA's attempt to measure a constitutional damages claim by resort to delictual elements should be faulted, it is clear from his statement that there is no question of ranking rights and selecting those for which constitutional damages are appropriate, but simply a consideration of appropriateness at the remedial stage after breach and liability have already been established. It is therefore inappropriate and undesirable to list rights which lend themselves to constitutional damages as this can be fluid depending on facts and circumstances.

The utility of constitutional damages, together with other considerations, would dismiss an assertion that such a remedy would be applicable to certain rights in the Bill of Rights and not others. Firstly, a constitutional damages claim has more to do with vindication of the constitutional right as opposed to the nature of the constitutional right itself. Secondly, the notions of indivisibility, interrelatedness and interdependence inform us that one cannot arbitrarily pick and choose which rights are to be regarded as worthy of constitutional damages over others. This would not only violate the fundamental and basic universal principles of human rights, but also the architecture of the Constitution which sets the rights

⁷⁴ Fose (note 3) para 60.

⁷⁵ *Minister of Police v Mboweni and Another* 2014 (6) SA 256 (SCA).

⁷⁶ *Ibid* para 18.

⁷⁷ *Ibid* para 20.

at par, without any preferential order expressed or implied.⁷⁸ Finally, I would borrow the French expression of legal principle that there is no hierarchy in the protection of lawful interests.⁷⁹

8.7 ASSESSING QUANTUM

Having established a case for constitutional damages, it remains for the court to determine quantum. This is one of the perceived areas of difficulty with constitutional damages, with some arguing the impossibility of apportioning an amount to a violation of a constitutional right. The argument is that there is no price tag to a right, such that it would not be possible to apportion money based on the 'abstract' value of a right infringed. Granted, there is no monetary value fixed to constitutional rights. What the argument conveniently overlooks, however, is that there is also no price tag when the right is dealt with under the delictual *actio iniuriarum*. Yet courts do not exactly struggle to calculate an amount to be paid for contumelia, or invasion of privacy, or defamation of character. As with the determination of the appropriateness of the remedy itself, a functional approach would, with relative ease, lend to the assessment of quantum. It is not hard to see why quantum assessment in constitutional damages is and must be distinct from the manner of quantifying damages in delict, especially under the aquilian action.⁸⁰

There are cases in which the courts have granted constitutional damages which in delict would be classified as 'special damages' because these are amounts determined or fixed by a certain specific criterion. For example, we have seen how in *Kate* and *Modderklip* the damages awarded were essentially 'special damages' in the sense that in the former case damages were quantified by calculating interest at the prescribed rate of 15.5% per annum, and in the latter an amount was calculated in terms of s 12(1) of the Expropriation Act 63 of 1975.⁸¹ Here there was no need for 'thumb suck' figures to be assessed by the courts as is the case with what would be general damages in delict.

In dealing with quantum in *Kate*,⁸² the court made the following remarks:

'It has not been shown that Kate suffered direct financial loss and it is most unlikely that she did, for the grant was destined to be consumed and not invested, but the loss was just as real. To be held in poverty is a cursed condition. Quite apart from the physical discomfort of deprivation it reduces a human in his or her dignity. The inevitable result of being unlawfully deprived of a grant that is required for daily sustenance is the unnecessary further endurance of that condition for so long as the unlawfulness continues. That is the true nature of the loss that Kate suffered. There is no empirical monetary standard against which to measure a loss of that kind. Counsel for Kate submitted that in the absence of such a measure she should be awarded an amount equivalent to the interest that is

⁷⁸ The only 'grading' of rights in the Constitution, and remotely so, is to be found in s 37(5), where non-derogable rights and the specific subsections are listed.

⁷⁹ Quézel-Ambrunaz (note 70) 200-202.

⁸⁰ This difference in assessing constitutional and delictual damages was mentioned in *Maharaj v Attorney General of Trinidad and Tobago* (No 2) [1979] AC 385 (PC) 400.

⁸¹ Note 73 above para 52(b) and (c). This was confirmed by the CC.

⁸² *Kate* (note 19).

recognised in law to be payable when money is unlawfully withheld [...] and I think we ought to adopt it. Counsel were agreed that the damages ought not to accumulate such as to exceed the capital amount.⁸³

Here the circumstances of the case allowed for a practical way of calculating damages using the prescribed rate of interest of 15.5% per annum, and a similar approach was followed in *Mahambehala*.⁸⁴

What we see in these cases is but an example of approaching quantification, and not a definitive approach. Contrary to what cases like *Minister of Defence v Dunn*⁸⁵ and *Darson Construction (Pty) Ltd v City of Cape Town*⁸⁶ suggested that proof of pecuniary loss is required for constitutional damages to be awarded (albeit in respect of PAJA damages – which I demonstrated to be constitutional damages in Chapter 4), this is in fact not a requirement for constitutional damages. That is a preserve for delictual damages where the primary agenda is to make good a loss.

So where it is possible for a figure to be calculated and precisely determined based on a formula applicable to the case, then that should be followed for reasons of expediency. Where applicable and necessary the damages here would serve to place the plaintiff in the position they would have been had the breach not occurred. In no way however would this imply that such damages become compensatory. Rather, it is simply a practical and convenient way to calculate quantum. There is no doubt however that such cases will be exceptions as at most times the courts will be seized with violations that do not involve formulas through which determinable damages could be calculated.

What must be clear is that constitutional damages cannot be negated for the sole reason that there is no objective criterion for determining quantum. Arguments to the contrary are disingenuous and dabble in double standards. As demonstrated above, it has always been a practice in delict in general damages matters for the court to assess and come up with a figure that it believes would do justice to the case and cause. There is absolutely no reason in principle, in substance or both that can then seek to deny this approach when it comes to constitutional damages. While admittedly, quantification would continue to be contested, quantification alone should not be reason for the courts to shy away from awarding constitutional damages. As the French have argued, it is politically indecent for a State to be found liable for violation of human rights, and to this end the ruling itself, without regard to

⁸³ Ibid para 33.

⁸⁴ *Mahambehala* (note 16) page 355-356:

‘Bearing in mind the observation of Kriegler J in *Fose’s* case ... para [97] ... it seems to me that it would be just and equitable for an aggrieved person in the position of the applicant to be placed in the same position in which she would have been had her fundamental right to lawful and reasonable administrative action not been unreasonably delayed, and that relief placing her in such a position would be “appropriate” as envisaged by the Constitution.’

⁸⁵ 2007 (6) SA 52 (SCA).

⁸⁶ 2007 (4) SA 488 (C).

the amount of damages, may help in the enforcement of human rights.⁸⁷ There is thus a strong political and legal statement to be made when a court pronounces that the State has violated constitutional rights and must pay damages. Such a statement is made stronger in a pronouncement of constitutional damages as opposed to delictual damages for the reasons advanced throughout this thesis.

Where precise calculation is not practically possible, then there is nothing irregular, unlawful, or inappropriate to grant damages as 'reparations' or 'satisfaction'/solatium, just in the same way damages are awarded under the *actio iniuriarum*. This is done with due regard to fairness under the circumstances.⁸⁸ For non-pecuniary harm and other intangible interests such as reputation, voting rights, liberty, and privacy, general damages are presumed although the scope of the presumption varies.⁸⁹ This is how the courts have always made delictual awards for personality rights without any specific amount being proved as harm or loss.⁹⁰ These damages cannot therefore be dismissed as 'abstract'. As with 'nominal damages', these typically consist of an allocation awarded upon proof that the defendant has violated the plaintiff's legal rights.⁹¹ The purpose of this award is to provide some relief for the infringement in the form of monetary satisfaction and to attempt to assuage the feelings of injustice that the plaintiff may feel.⁹² In all instances courts make the award *ex aequo et bono*, which means that the award reflects what a court considers to be fair and just under the circumstances.⁹³

The above discussion demonstrates that there may be instances where damages in constitutional law would fall into the classifications of special and general damages if an analogy is to be drawn with delict. Although no such formal classification is necessary or motivated for here, the courts may simply use this distinction to help them reach a decision on quantum. To that extent I would give credence and weight to the assertion in *Merson v Cartwright*⁹⁴ (Bahamas) that: 'The comparable common law measure of damages will often be a useful guide in assessing the amount of compensation. But this measure is no more than a guide because the award of compensation [...] is discretionary, and moreover, the violation of the constitutional right will not always be co-terminous with the cause of action of law'.

Some scholars have suggested further means of ascertaining quantum. Funnah and Sibanda have argued for 'case-specific amount ceilings'.⁹⁵ The two propose that some standard should

⁸⁷ Quézel-Ambrunaz (note 70) 193.

⁸⁸ *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194, 199.

⁸⁹ Love (note 55) 1245.

⁹⁰ See Loubser and Midgley (note 48) 400-402.

⁹¹ *Ibid* 427.

⁹² *Ibid*; Love (note 55) 1246-7.

⁹³ *Ibid*.

⁹⁴ [2005] UKPC 38.

⁹⁵ Abdul Karim Funnah and Omphemetse Sibanda 'Towards a Selective Awarding of Punitive Damages Awards in South Africa? A Comment on *Fose v The Minister of Safety and Security*' (2008) 48(2) *Codicillus* 36, 39.

be introduced to set a limit on the amount of damages in certain cases, a model which they argue 'has become an important feature of punitive damages reforms in the United States'.⁹⁶ In Alabama, they argue, the limitation of the amount of damages depends on the nature of the harm - whether the harm is physical or non-physical, and on the type of the defendant and the defendant's business' net worth.⁹⁷ Similarly, they proceed, the State of Alaska limits the amount of damages to be awarded in terms of the nature of the wrong and of the defendant.⁹⁸ As pragmatic as the suggestion may sound, this is a potential minefield as it essentially amounts to putting price tags on rights. On what basis do we determine which right is more important than the other, and what objective criteria do we use to assign value to rights, if any? In addition, this method would mean little attention is paid to the specific circumstances of the case before the court, yet it is the violation and the circumstances that have always guided the court in determining quantum even in delict.

Another option, suggested by French scholar Quézel-Ambrunaz, is to rank rights.⁹⁹ This suggestion is quite close to that of Funnah and Sibanda above as it amounts to making decisions as to what rights are more important than others. Quézel-Ambrunaz does admit that French tort law does not apply a hierarchy among the protected rights, and full compensation of any legal injury is the rule and the defences are the same whichever interest is violated.¹⁰⁰ Nevertheless, it is important to stress that the character of human rights attached to the violated interest leads the judges to modify their approach towards proof of

⁹⁶ Ibid para 48-49.

⁹⁷ Ibid. They cite as follows: 'See Punitive Damages Reform: SB 137 (1999): Ala. Code § 6-11-21. The law limits the award of punitive damages in most non-physical injury cases to the greater of three times the award of compensatory damages or \$500,000. Limits the award of punitive damages in non-physical injury cases against businesses with a net worth of less than \$2 million to the greater of \$50,000 or 10% of the business's net worth up to \$200,000. Limits the award of punitive damages in physical injury cases to the greater of three times the award of compensatory damages or \$1.5 million. Prohibits application of the rule of joint and several liability in actions for punitive damages, except for wrongful death actions, actions for intentional infliction of physical injury, and class actions. Provides that the limit on punitive damages will be adjusted on January 1, 2003 and increased at three-year intervals in accordance with the Consumer Price Index. See further Gold 'Trial by Jury and Statutory Caps on Punitive Damages: Lessons for Alabama from Ohio's Constitutional History' (2001) *Cumb LR* 287'.

⁹⁸ Funnah and Sibanda (note 95) 48-49, citing as follows: 'Punitive Damages Reform: HB 58 (1997). Limits the award of punitive damages in most cases to the greater of three times the award of compensatory damages or \$500,000. Limits the award of punitive damages to the greater of four times compensatory damages, four times the aggregate amount of financial gain, or \$7,000,000, when the defendant's action is motivated by financial gain. Limits punitive damages in unlawful employment practices lawsuits to: \$200,000, when the employer has less than 100 employees in the state; \$300,000, when the employer has more than 100, but less than 200 employees in the state; \$400,000, when the employer has more than 200, but less than 500 employees in the state; and \$500,000, when the employer has more than 500 employees in the state. Requires a plaintiff to show by "clear and convincing" evidence that a defendant acted with "reckless indifference" or was engaged in "outrageous" conduct. Requires the determination of awards for punitive damages to be made in a separate proceeding. Requires that 50% of punitive damages awards be paid to the state treasury. ...'

⁹⁹ Quézel-Ambrunaz (note 70) 193-4.

¹⁰⁰ Ibid citing *The Principles of European Tort Law* (2005) European Group on Tort Law and E von Bar, E Clive and H Schulte-Nolke (eds) *Draft Common Frame of Reference* (2009).

damage, he says.¹⁰¹ Again, ranking of rights is not agreeable for the same reasons as with Funnah and Sibanda's suggestion which raises more problems than solutions.

Amounts awarded ought to be such that it does not cost litigants more to seek to vindicate their rights than they will receive in the end if successful. Anything less would inevitably invoke the question whether such a remedy is effective at all.¹⁰² One could, of course, argue the need to discourage litigants from approaching the courts seeking damages but to seek alternative dispute resolution, but that is not an enviable goal when it comes to vindication of rights. Quite the contrary, litigants should be encouraged to enforce their rights using legal process, including the courts. In any event, one can see the double standards in this argument given that the argument is never raised in respect of delictual claims.

As for punitive damages, the court need not award a separate amount under the head of punitive damages. Rather a global award should be made. A court can make a punitive order without necessarily saying so, but rather through a global award without complicating the compensation with further categorisation. On the whole, compensation should be adjusted to reflect the intrinsic value of the breach. The New Zealand courts' approach that awards should not be extravagant but such awards need not be nominal is agreeable. It is important to adopt this reasoning of the French: '[T]he economic analysis of law furnishes an ambiguous answer that the State will be incentivised to prevent the violation of human rights only if the cost of compensation for any violation is higher than the cost of prevention of such violations. By this approach, the higher the damages are, the better the enforcement of human rights is.'¹⁰³ While pronouncing a violation of rights by the State is in itself a strong legal and political statement made upon which voters and citizens can act to hold the State accountable in other ways, the judiciary still needs to enforce that accountability as per the law, and this is achieved through a meaningful award that would force government to act and prevent future violations – if not for a moral or legal reason, then for an economic reason.

8.8 RECOMMENDATION FOR FURTHER RESEARCH

A point that has been frequently made in this research is that constitutional damages are a novel device in the context of South Africa. It has been indicated in Chapter 1 that there is minimal research in South Africa in this area. It is therefore pertinent that given what this research has covered, I end by suggesting ways that the research can be taken a step further. Constitutional damages are granted when the State violates the rights of an individual. It is a vertical approach. As Devenish outlines, traditionally a Bill of Rights was conceived and designed to protect individuals against abuse of State power.¹⁰⁴ This was because the

¹⁰¹ Quézel-Ambrunaz (note 70) 193-4.

¹⁰² See Philpott (note 1) 234-35.

¹⁰³ Ibid 193.

¹⁰⁴ George E Devenish *A Commentary on the South African Bill of Rights* (1999) Butterworths, Durban 24.

relationship between the individual and the State is not one of equality: the State obviously is more powerful and has far more resources than the individual.¹⁰⁵ This has now changed by virtue of ss 8(1) and (2) of the Constitution, which stipulates that the Bill of Rights operates both horizontally and vertically.¹⁰⁶

The Constitution thus recognises that private individuals and non-state juristic persons can also violate the constitutional rights of individuals. Section 7 expressly provides for the horizontal application of the Bill of Rights, that is, it requires everyone to respect, promote and protect fundamental rights in the Bill of Rights, and equally places a duty on private individuals and non-state juristic entities. Depending on the circumstances, this means that a provision of the Bill of Rights may bind a natural or a juristic person.¹⁰⁷ The clear difference in the application of the Bill of Rights in the interim era and in the post 1997 era in South Africa is made manifest by the 1996 CC decision in *Du Plessis v De Klerk*,¹⁰⁸ where it ruled that Chapter 3 of the Interim Constitution did not directly apply horizontally. This position in the Interim constitution changed in the Final Constitution. Devenish also points out that the phrasing of many specific provisions of the Bill of Rights, such as those dealing with children (s 28) and labour relations (s 23) indicates with clarity that they have a horizontal application.¹⁰⁹ The issue of individual liability for constitutional damages when they violate fundamental constitutional rights is becoming important to ventilate. It must therefore be investigated in further research whether constitutional damages can and should be expanded to cover horizontal relationships, and if so, what approach should be taken. The High Court in *Snyman v Van Tonder*¹¹⁰ passed an opportunity to pronounce on this question, where a private citizen was seeking constitutional damages from another citizen. However, damages were simply dismissed for non-exhaustion of other remedies, with the court stating that the Applicant claim could be met in delict – not necessarily because a private citizen cannot claim constitutional damages from another.

Further, it remains an open question whether the French approach of ‘fundamentalisation of compensation’ should be adopted, that is, making constitutional damages a right.

¹⁰⁵ Ibid.

¹⁰⁶ These issue is discussed extensively is a long list of literature e.g. Karthy Govender ‘Horizontality revisited in the Light of *Du Plessis v De Klerk* and clause 8 of the Republic of south Africa Constitution Bill 1996’ (1996) 1(3) *Human Rights and Constitutional Law Journal of SA* 20; Van der Walk ‘Justice Kriegler’s Disconcerting Judgment in *Du Plessis v De Klerk*: Much ado about Direct Horizontal application (read Nothing)’ 1996 *TSAR* 732; Cheadle and Davis ‘The application of the 1996 Constitution in the Private Sphere’ (1997) *SAJHR* 45, 54; Smidt ‘Horizontal Rights: Fundamental Rights in the Private Sphere’ (1996) 4 *Juta’s Business Law* 153; and Pringle ‘Broadening Your Horizons: The Constitutional court decides on Retrospectivity and Horizontality’ (1996) 4 *Juta’s Business Law* 167.

¹⁰⁷ Devenish (note 104) 24.

¹⁰⁸ (1996) 5 BCLR 658 (CC).

¹⁰⁹ Devenish (note 104) 25.

¹¹⁰ [2017] ZAWCHC 60.

8.9 CONCLUSION

South Africa is grappling with an action that gained momentum after 1993, not because that is when constitutional damages began to be considered worldwide, but because that is when a new constitutional culture emerged in South Africa. The test for constitutional damages must reflect a reasoned balance between remedying constitutional violations and public policy considerations, but the latter should never be used overly to frustrate the achievement of the former. This is an issue of competing interests, but in handling those, constitutional vindication should not give way, given the elevated legal status of the Bill of Rights.

In all circumstances, the approach to follow in awarding relief directly under the Constitution is the need to give the Constitution and the Bill of Rights a generous and expansive interpretation rather than a narrow, technical or legalistic one. This will inevitably involve doing away with the undeniably archaic approach to remedies, to think in terms of a closed category of 'tried-and-tested' remedies.¹¹¹ A healthy measure of judicial activism is appropriate,¹¹² and of necessity, the obligation in a constitutional state of the courts to make the Constitution's demands meaningful carries ramifications well beyond the glories of constitutional theory.¹¹³ As a legal document the Constitution carries the force of ultimate authority as opposed to mere political suggestion.¹¹⁴ This makes it susceptible to adjudication, an essential attribute of which is the application of a remedy.¹¹⁵ Thus ordering strong affirmative remedies such as constitutional damages will not mean that courts overstep their power but that they fulfil their constitutional mandate. Arguments of state immunity do not belong in a constitutional state, and boldness by the courts is not misplaced to hold government accountable.¹¹⁶

To this end, the approach in *Fose*,¹¹⁷ a case which Swart describes as 'unnecessarily conservative',¹¹⁸ must promptly be revisited and corrected. The broadly conservative approach to damages that the South African judiciary has adopted, which sees damages 'in the narrow and dated strictures of the common law only',¹¹⁹ does not serve the new constitutional order well. Whatever little merit there is in ensuring that damages awards for human rights violations remain the exception rather than the norm, preferring an overly conservative approach would at times leave deserving plaintiffs without an effective

¹¹¹ Mia Swart 'Left out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor' (2005) 21(2) *SAJHR* 215, 240.

¹¹² Judicial activism in the area of constitutional damages is required. This is discussed in full in Chapter 6.

¹¹³ Nichol (note 27) 1117.

¹¹⁴ *Ibid* 1137.

¹¹⁵ *Ibid*.

¹¹⁶ Swart (note 111) 240.

¹¹⁷ *Fose* (note 3).

¹¹⁸ Swart (note 111) 225.

¹¹⁹ This is how Justice Moseneke described the invitation by the State to reject constitutional damages as good at law, where there are common law remedies, in the *Life Esidemeni* arbitration award at para 219.

remedy.¹²⁰ Should one feel the need to treat constitutional damages as exceptional relief, then that relief may as well become the order of the day for constitutional breaches, for breaching the constitution in itself is exceptional behaviour. There is nothing normal about that. If that were accepted as a premise, then exceptional behaviour may as well be met with an exceptional remedy. Either way, constitutional damages cannot be suppressed with decency.

¹²⁰ Philpott (note 1) 242.

Bibliography

Local Cases

- *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* 2014 (4) SA 179 (CC)
- *Amod v MMVA Fund* 1999 (4) SA 1319 (SCA)
- *ANC (Border Branch) v Chairman, Council of State of the Republic of Ciskei* 1992 (4) 434 (Ck)
- *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC)
- *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC)
- *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile* 2010 (5) BCLR 422 (CC)
- *Botha v Niekerk* 1983 (3) SA 513 (W)
- *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC)
- *Chirwa v Transnet Ltd* 2008 (2) SA 24 (CC)
- *Claassen v Minister of Justice and Constitutional Development and Another* 2010 (6) SA 399 (WCC)
- *City of Cape Town v South African National Roads Authority Limited and Others* 2015 (3) SA 386 (SCA)
- *Consolidated Fish (Pty) Ltd v Zive* 1968 (2) SA 517 (C)
- *Daniels v Campbell NO* 2004 (5) SA 331 (CC)
- *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC)
- *De Klerk v Union Government* 1958 (4) SA 496 (T)
- *Dendy v University of Witwatersrand, Johannesburg* 2005 (5) SA 357 (W)
- *Dendy v University of Witwatersrand* 2007 (5) SA 382 (SCA)
- *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC)
- *Die Regering van die Republiek van Suid Afrika v SANTAM Versekeringsmaatskappy Bpk* 1964(1) SA 546 (W)
- *Dikoko v Mokhatla* 2006 (6) SA 235 (CC)
- *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC)
- *Ebrahim & another v Aiport Cold Storage (Pty) Ltd* 2008 (6) 585 (SCA)
- *Equity Aviation Services (Pty) Ltd v CCMA* 2009 (1) SA 390 (CC)
- *Eveleth v Minister of Home Affairs* 2004 (11) BCLR 1223 (T)
- *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC)
- *Ex Parter Gore and Others NNO* 2013 (3) SA 382 (WCC)
- *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC)
- *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC)
- *East London Local Transitional Council v MEC: Health, Eastern Cape, and Others* 2001 (3) SA 1133 (CkH)
- *F v Minister of Safety and Security and Another* 2012 (1) SA 536 (CC)
- *Fakie NO v CCI Systems (Pty) Ltd* 2006 (4) SA 326 (SCA)

- *Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project Claimants v National Minister of Health of the Republic of South Africa; Government of the Province of Gauteng; Premier of the Province of Gauteng & Member of the Executive Council of Health: Province of Gauteng* 19 March 2019.
- *Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education, Gauteng* 2002 (1) SA 660 (T)
- *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 ILJ 974 (LAC)
- *Fingleton v R* [2005] HCA 34; (2005) 216 ALR 474
- *Fischer v Persons listed on Annexure X and 2 other cases* 2018 (2) SA 228 (WCC)
- *Fose v Minister of Safety and Security* 1996 (2) BCLR 232 (W)
- *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC)
- *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc* 1996 (3) SA 355 (A)
- *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC)
- *Geldenhuys v National Director of Public Prosecutions* 2009 (2) SA 310 (CC)
- *Glenister v President of the Republic of South Africa and Others* 2009 (1) SA 287 (CC)
- *Government of the Republic of South Africa v Von Abo* 2011 (5) SA 262 (SCA)
- *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC)
- *Groenewald v Minister van Justisie* 1972(3) SA 596 (O)
- *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC)
- *Hardy Ventures CC v Tshwane Metropolitan Municipality* 2004 (1) SA 199 (T)
- *Highveld Steel & Vanadium Corporation Ltd v National Union of Metalworkers of SA & others* (2004) 25 ILJ 71 (LAC)
- *Hoffman v South African Airways* 2001 (1) SA (CC)
- *Hofmeyr v Fourie* 1975 2 SA 590 (C)
- *Hulse-Reutter and others v Godde* 2001 (4) SA 1336 (SCA)
- *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC)
- *Ingledeu v Financial Services Board: In re Financial Services Board v Van der Merwe* 2003 (4) SA 584 (CC)
- *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC)
- *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* 2004 (2) SA 602 (SCA)
- *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC)
- *Jooste v Botha* 2000 (2) SA 199 (T)
- *K v Minister of Safety and Security* 2005 (6) SA 419 (CC)
- *Kate v MEC, Department of Welfare, Eastern Cape* 2005 (1) SA 141 (SE)
- *Killian v Gauteng Provincial Legislature* 1999(2) BCLR 225 (T)
- *Komape and Others v Minister of Basic Education* [2018] ZALMPPHC 18
- *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC)
- *Mahambehlala v MEC for Welfare, Eastern Cape, and Another* 2002 (1) SA 342 (SE)
- *Marais v Union Government of South Africa* 1911 TPD 127
- *Marais and others v Pongola Sugar Milling Co Ltd and others* 1961(2) SA 698 (N)

- *Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC)
- *Matiso and Others v Minister of Defence* 2005 (6) SA 267 (Tk)
- *May v Udwin* 1981 (1) SA 1 (A)
- *Mbanga v MEC for Welfare, Eastern Cape, and another* 2002(1) SA 359 (SE)
- *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC)
- *Minister of Health and Another v Bruckner* [2007] 5 BLLR 418 (LAC)
- *Ngomana v CEO of the SA Social Security Agency* 2010 ZAWCHC 172
- *Magidimisi NO v Premier of the Eastern Cape Magidimisi NO v Premier of the Eastern Cape* 2005 (6) SA 267 (TkD)
- *Mchunu v Executive Mayor, Ethekewini Municipality* 2013 (1) SA 555 (KZD)
- *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* (767/2013) [2014] ZASCA
- *MEC for Education: KwaZulu Natal v Pillay* 2008 (1) SA 474 (CC)
- *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA)
- *MEC, Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd* 2008 (2) SA 319 (CC)
- *Metropolitan Industrial Corporation (Pty) Ltd v Hughes* 1969 (1) SA 224 (T)
- *Minister of Health and Another v Bruckner* [2007] 5 BLLR 418 (LAC)
- *Minister of Health NO v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC)
- *Minister of Health & others v Treatment Action Campaign & others (No 1)* 2002 (5) SA 703 (CC)
- *Minister of Finance v Barberton Municipal Council* 1914 AD 335
- *Minister of Police v Mboweni and Another* 2014 (6) SA 256 (SCA)
- *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA)
- *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA)
- *Minister of the Interior and Another v Harris and Others* 1952 (4) SA 769 (A)
- *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd and Others* 2006 (5) SA 333 (W)
- *Mjeni v The Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk HC)
- *Modderklip Boerdery (Edms) Bpk v President of the RSA* 2003 (6) BCLR 638 (T)
- *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)* 2004 (6) SA 40 (SCA)
- *Moeketsi v Minister van Justisie en n Ander* 1988 (4) SA 707 (T)
- *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC)
- *Muller NO v Government of the Republic of South Africa* 1980 (3) SA 970 (T)
- *NAPTOSA v Minister of Education, Western Cape* 2001 (2) SA 112 (C)
- *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 1999 (3) SA 173 (C)
- *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC)

- *National Education Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC)
- *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC)
- *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E)
- *Noel Lancaster Sands (Edms) Bpk v Theron* 1974 (3) SA 688 (T)
- *Nyathi v MEC for Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC)
- *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC)
- *Olitzki Property Holdings v State Tender Board & another* 2001 (3) SA 1247 (SCA)
- *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC)
- *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA)
- *Pharmaceutical Society of South Africa v Tshababala-Msimang* 2005 (3) SA 238 (SCA)
- *Pinchin & another, NO v Santam Insurance Co. Ltd* 1963 (2) SA 254 (W)
- *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC)
- *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC)
- *Prince v President, Cape Law Society and Others* 2000 (3) SA 845 (SCA)
- *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC)
- *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC)
- *Richards and another v Port Elizabeth Municipality and others* 1990(4) SA 770 (SE)
- *S v Mamabolo* 2001 (3) SA 409 (CC)
- *S v Manamela* 2000 (3) SA 1 (CC)
- *S v Rabie* 1975 SA 855 (A)
- *S v Zinn* 1969 (2) SA 537 (A)
- *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194
- *Sanderson v Attorney-general (Eastern Cape)* 1998 (2) SA 38 (CC)
- *Schierhout v Minister of Justice* 1926 AD 99
- *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC)
- *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC)
- *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC)
- *Steenkamp NO v Provincial Tender Board, EC* [2006] JOL 16488 (CK)
- *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC)
- *Swart v Union Government* 1948 (3) SA 149 (T)
- *Tefu v Minister of Justice and another* 1953 (2) SA 61 (T)
- *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA)
- *Twentieth Century Fox Film Corporation and Others v Playboy Films (Pty) Ltd and Another* 1978 (3) SA 202 (W)
- *Tlouamma and Others v Speaker of the National Assembly and Others* 2016 (1) SA 534 (WCC)
- *Van Eeden v Minister of Safety and Security* 2001 (4) SA 646 (SCA)
- *Van Rooyen and Others v The State and Others* 2002 (5) SA 246 (CC)

- *Van Straaten v President of the Republic of South Africa and Others* 2009 (3) SA 457 (CC)
- *Vumazonke v MEC for Social Development, Eastern Cape and three similar cases* 2005 (6) SA 229 (SE)
- *York Timbers Ltd v Minister of Water Affairs and Forestry* 2003 (4) SA 477 (T)

Foreign Cases

- *Andrews v Grand & Toy Alberta Ltd.* [1978] 2 S.C.R. 229
- *Anufrijeva v Southwark London Borough Council* [2004] QB 1124
- *Attorney-General v Chapman* [2012] 1 NZLR 462
- *Attorney General v Chapman* [2010] 2 NZLR 317
- *Auckland Unemployed Workers' Rights Centre Inc v Attorney General* [1994] 3 NZLR 720
- *Behera v State of Orissa* AIR 1993 SC 1960
- *Bell v Hood* 327 U.S. 678 (1946)
- *Binstead v Northern Regional Domestic Violence (Programmes) Approval Panel* [2002] NZAR 685 (HC)
- *Bivens v Six Unknown Named Agents of Fed. Bureau of Narcotics* 403 U.S. 388 (1971)
- *Brown v Attorney-General* [2005] 2 NZLR 405 (CA)
- *Brown v Attorney-General* [2003] 3 NZLR 335 (HC)
- *Brown et al v Board of Education of Topeka et al* (Brown I) 347 US 483 (1954)
- *Brown et al v Board of Education of Topeka et al* (Brown II) 349 US 294 (1955)
- *Bush v Lucas* 462 U.S. 367 (1983)
- *Byrne v Ireland* [1972] IR 241
- *Carey v Phipus* 435 U.S. 247 (1978)
- *Carlson v Green* 446 U.S. 14 (1980)
- *Central Trust Co. v Rafuse* [1986] 2 S.C.R. 147
- *Chappell v Wallace* 462 U.S. 296 (1983)
- *Chaturvedi v MP* 1983 (2) Cr LJ 1928 (SC)
- *Chrispen v Kalinowski* (1997) 148 DLR (4th) 720 (Sask QB)
- *Collin v Lussier* (1983) 6 CRR 89
- *Combined Beneficiaries Union Incorporated v Auckland City COGS Committee* [2008] NZCA 423
- *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307
- *Davis v Passman* 442 U.S. 228 (1979)
- *Dix v Canada (Attorney General)* (2002) 7 Alta LR (4th) 205
- *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003] 3 SCR 3
- *Dulude v Canada* [2001] 1 FC 545
- *Dunlea v Attorney-General* [2000] NZCA 84, [2000] 3 N.Z.L.R. 136
- *Evans and Anor v Surtee and Ors* 2012 ZLR (8) SC
- *Federal Convention, Namibia v Speaker, National Assembly, Namibia* 1994 (1) SA 177 (Nm HC)
- *Fingleton v R* (2005) 216 ALR 474
- *Gomez v Toledo* 446 US 635, 639 (1980)
- *Gouriet v Union of Post Office Workers* [1977] QB 729

- *Guimond v Quebec (Attorney General)* (1996) 138 DLR (4th) 647 (SCC)
- *Harrington v North London Polytechnic* [1984] 3 All E.R. 666, CA
- *Kearney v Minister of Justice, Ireland, and the Attorney-General* [1986] IR 116
- *Khatri v Bihar* (1981) 1 SCC 627
- *Kochar v Union of India* AIR 1983 SC 1107
- *Lord v Allison* (1986) 3 BCLR (2d) 300 (SC)
- *M v Home Office* [1994] 1 AC 377
- *M v Home Office (UK)* [1993] 3 WLR 433
- *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*, 2002 SCC 13, [2002] 1 SCR 405
- *Majome v ZBC & Others* CCZ 14/2016
- *Manga v Attorney-General* [2000] 2 NZLR 65
- *Maharaj v Attorney General of Trinidad and Tobago (No 2)* [1979] AC 385 (PC)
- *Maharaj v Attorney General of Trinidad and Tobago* [1978] 2 All ER 670 (PC)
- *Marengo v Daily Sketch and Sunday Graphic Ltd* [1948] 1 All E.R. 406
- *McC v Mullan and Others* [1984] 3 All ER 908 (HL)
- *McKinney v University of Guelph* (1990) 67 DLR (4th) 545
- *Minister of Immigration v Udompun* [2005] 3 NZLR 204 (CA)
- *Mireles v Waco*, 502 US 9 (1991)
- *Nilabati Behera v State of Orissa* [1993] AIR 1960 (SC) 1969
- *Nixon v Fitzgerald* 4, 5 7 U.S. 731 (1982)
- *Oatile v The Attorney General* 2010 (1) BLR 404 (HC)
- *Patenaude v Roy* (1994) 123 DLR (4th) 78 (Que CA)
- *Persaud v Donaldson* (1995) 130 DLR (4th) 701
- *R (Edwards) v Environmental Agency* [2008] UKHL 22
- *R (on the application of Prolife Alliance) v British Broadcasting Corporation* [2003] 2 All ER 977 (HL)
- *R v Secretary of State for the Home Department, ex p. Pierson* [1998] AC 539
- *R v Grayson and Taylor* [1997] 1 NZLR 399, 409 (CA)
- *Re McC (A Minor)* [1985] AC 528 (HL) also reported as *McC v Mullan and Others* [1984] 3 All ER 908 (HL)
- *Rochford v Attorney General* [2008] NZAR 404 (HC)
- *Rudul Sar v Bihar* AIR 1983 SC 1086
- *SAHELI, A Women's Resources Centre v Commissioner of Police, Delhi* AIR 1990 SC 513
- *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194
- *Schweiker v Chillick* 208 S. Ct. 2460 (1988)
- *Shadreck v Attorney General* [2011] 3 S.L.R 778
- *Simpson v Attorney General* [1994] 3 NZLR 667 (CA) 677
- *Smith v. Wade* 103 S. Ct. 1628 (1983)
- *State (Quinn) v Ryan* [1965] IR 70
- *Sunday Times v United Kingdom* (1979) 2 EHRR 245
- *Taunoa v Attorney-General* [2007] NZSC 70, 231
- *Taunoa v Attorney General* [2008] 1 NZLR 429 (SCNZ)
- *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394
- *Udompun v Attorney-General* [2005] 3 NZLR 204 (CA)

- *United States v Stanley* 107 S. Ct. 3054 (1987)
- *Vancouver (City) v Ward* 2010 SCC 27
- *Vancouver (City) v Ward* (2009) 89 BCLR (4th) 217 (BCCA)
- *Vespoli v The Queen* (1984) 12 CRR 185 (Fed CA)
- *Webster v Southwark London Borough Council* [1983] 2 WLR 217
- *Wilding v Attorney-General* [2003] 3 NZLR 787

Local Statutes

- Aliens Control Act 96 of 1991
- Criminal Law Amendment Act 105 of 1997
- Crown Liabilities Act 1 of 1910
- Employment Equity Act 55 of 1998
- Expropriation Act 63 of 1975
- Extension of Security of Tenure Act 62 of 1997
- Labour Relations Act 66 of 1995
- Limitation of Legal Proceedings Act 94 of 1970
- Mineral and Petroleum Resources Development Act 28 of 2002
- National Environment Management Act 107 of 1998
- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
- Promotion of Administrative Justice Act 3 of 2000
- Promotion of Access to Information Act 2 of 2000
- Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
- Restitution of Land Rights Act 22 of 1994
- State Liability Act 20 of 1957
- Superior Courts Act 10 of 2013

Constitutions & Foreign Statutes

- Canadian Charter of Rights and Freedoms, Constitution Act, 1982
- Constitution of the Democratic Socialist Republic of Sri Lanka, 1972 (as amended)
- Constitution of India 1949
- Constitution of Zimbabwe Amendment (No. 20) Act 2013
- Constitution of the Republic of South Africa, 1996
- Constitution Act 1982
- Interim Constitution of South Africa, 1993
- International Covenant on Civil and Political Rights
- New Zealand Bill of Rights Act 1990

Books

- Barry (ed) *Governmental Tort Liability: Laws in Eastern Europe* Vol 17 (1970) Sijthoff, Leyden

- Bhatia, KL *Judicial Review and Judicial Activism - A comparative study of India and Germany from an Indian perspective* (1997) New Delhi: Deep & Deep Publications
- Bingham, Tom *The Rule of Law* (2010) Allen Lane, London
- Botha, Henk; Van der Walt, André and Van der Walt, Johan (eds) *Rights and democracy in a transformative constitution* (2003) SUN Press Stellenbosch
- Burchell, JM; Gauntlett, JJ; Corbett, MM and Honey, DP *The Quantum of Damages in Bodily and Fatal Injury Cases Vol 1* Juta, Cape Town
- Butler, Andrew and Butler, Petra *The New Zealand Bill of Rights: a commentary* (2005) LexisNexis, Wellington
- Cameron, Edwin *Justice: A Personal Account* (2014) Tafelberg, Cape Town
- Cameron, Edwin *Witness to Aids* (2005) IB Tauris, Cape Town
- Canelley and Hctor (eds) *Law, order and Liberty: Essays in Honour of Tony Mathews* (2011) University of KwaZulu-Natal Press
- Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2002)
- Cooper-Stephenson, Kenneth *Charter Damages Claims* (1990) Calgary: Carswell
- Currie, Iain and De Waal, Johan (eds) *The New Constitutional and Administrative Law Volume 1, Constitutional law* (1st ed) (2001) Juta, Cape Town
- Currie, Iain and De Waal, Johan *The Bill of Rights Handbook* (6th ed) (2013) Juta, Cape Town
- Davis, Dennis *Democracy and deliberation: Transformation and the South African legal order* (1999) Juta, Kenwyn
- De Secondat, Charles and De Montesquieu, Baron *The Spirit of the Laws* (1748)
- De Vos, Pierre and Freedman, Warren (eds) *South African Constitutional Law in Context* (2014) Oxford University Press, Cape Town
- Devenish, George *Constitutional Change and Reform in South Africa*, unpublished doctoral thesis, Unisa (1986)
- Devenish, George *The South African Constitution* (2005) LexisNexis Butterworths
- Devenish, George *A Commentary on the South African Bill of Rights* (1999) Butterworths, Durban
- Dicey, Albert V *Introduction to the Study of the Law of the Constitution* (10th ed) (1960) Macmillan & Co Ltd, London
- Du Bois, François (ed) *Wille's Principles of South African Law* (9th ed) (2007) Juta, Cape Town
- European Group on Tort Law *The Principles of European Tort Law* (2005)
- Fletcher, George *Tort Liability for Human Rights Abuses* (2008) Hart Publishing, Oxford
- Fuller, Thomas *Gnomologia: Adages and Proverbs* (1733)
- Govindjee, Vrancken and Holness *Introduction to Human Rights Law* (2009) Lexis Nexis
- Grogan *Dismissal, Discrimination and Unfair Labour Practices* (2nd ed) (2007) Juta, Cape Town.
- Harlow, Carol *Compensation and Government Torts* (1982) Sweet & Maxwell, London
- Hogg, Peter *Constitutional Law of Canada* (3rd ed) (1992) Carswell, Toronto
- Hoexter, Cora *The New Constitutional and Administrative Law Vol 2* (2002) Juta, Lansdown
- Hoexter, Cora *Administrative Law in South Africa* (2007) Juta, Cape Town
- Hoexter, Cora *Administrative Law in South Africa* (2nd ed) (2012) Juta, Cape Town
- Humphreys, Stephen *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (2010) Cambridge University Press

- Jackson, Vicky and Tushnet, Mark *Comparative Constitutional Law* (3rd ed) (2014) Foundation Press
- Jain, MP *Indian Constitutional Law* (4th ed) (1987) NM Tripathi Private Ltd, Bombay
- Joseph, Philip A *Constitutional & Administrative Law in New Zealand* (4th ed) (2014) Brookers, Wellington
- Klug *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2000) Cambridge University Press, Cambridge
- Levine, David I; Jung, David J and Thomas, Tracy A *Remedies: Public and Private* (5th ed) (2009) West Publishing : Minnesota
- Lewis, Clive *Judicial Remedies in Public Law* (4th ed) (2009) Sweet & Maxwell, London
- Loubser, Max and Midgley, Rob (eds) *The Law of Delict in South Africa* (2nd ed) (2012) Oxford University Press, Cape Town
- McLean, Kirsty *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) PULP, Pretoria
- Mubangizi, John *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (2nd ed) (2004) Juta, Lansdowne
- Nahmod, Sheldon; Wells, Michael and Eaton, Thomas *Constitutional Torts* (1995) Anderson Publishing Company, Cincinnati
- Neethling, Johann; Potgieter, JM and Visser, PJ *Law of Delict* (6th ed) (2010) Lexis Nexis, Durban
- Nwabueze, Benjamin Obi *Judicialism in Commonwealth Africa: The Role of the Courts in Government* (1977) St Martin's Press, New York
- Oakeshott, Michael *On History and Other Essays* (1999) Liberty Fund, Indianapolis
- Paine, Thomas *Rights of Man: Part II* (1972) AMS Press, New York
- Rautenbach, IM and Malherbe, EFJ *Constitutional Law* (1999) Butterworths, Durban
- Roach, Kent *Constitutional Remedies in Canada* (1994) Aurora, Canada
- Rosen, Lawrence *Law as Culture: An Invitation* (2006) Princeton University Press, Princeton and Oxford
- Todd, Stephen (ed) *The Law of Torts in New Zealand* (6th ed) (2013) Brookers, Wellington
- Tortell, Lisa *Human Rights Law in Perspective: Monetary Remedies for Breach of Human Rights: A Comparative Study* (2006) Hart Publishing, Oxford
- Van der Walt, AJ *Constitutional Property Law* (3rd ed) Juta, Claremont
- Warrington, John (ed. and trans.) *Aristotle's Politics and Athenian Constitution* (1959) JM Dent, Book III, s.1287
- Wolfe, Christopher *Judicial Activism: Bulwark of Freedom or Precarious Security?* (1997) Lanham, Rowman & Littlefield.

Journal Articles and Book Chapters

- Ackermann, Lourens 'The legal nature of the South African constitutional revolution' [2004] *NZ L Rev* 633
- Albertyn, Catherine and Goldblatt, Beth 'Facing the challenges of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248

- Baar, Carl 'Social Action Litigation in India: The Operation and Limits of the World's Most Active Judiciary' in Jackson, Donald W and Tate, C Neal (eds) *Comparative Judicial Review and Public Policy* (1992)
- Baxi, Upendra 'The Avatars of Judicial Activism: Explorations in the Geography of (In) Justice' (2001) in Verma and Kusum (eds) *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (2000) Oxford University Press and Indian Law Institute, Delhi 156
- Beatson, J 'The Discretionary Nature of Public Remedies' [1991] *NZ Recent Law Rev* 81
- Bingham, Tom 'Should Public Law Remedies be Discretionary?' (1991) *Public Law* 64
- Bingham, Tom 'The Rule of Law' (2007) 66 *Cambridge LJ* 67
- Bishop, Michael 'Constitutional Remedies' in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed (Original Service 06-08) 9-1.
- Blumoff, Theodore Y 'Some Moral Implications of Finding No State Action' (1994) 70 *Notre Dame LR* 95
- Brand, Dannie 'Judicial deference and democracy in socio-economic rights cases in South Africa' (2011) 3 *Stell LR* 614
- Caldwell, JL 'Discretionary Remedies in Administrative Law' (1986) 6 *Otago LR* 245
- Chaskalson, Arthur 'Human Dignity as a Foundational Value of our Constitutional Order' (2000) *SAJHR* 193
- Chayes, Abram 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harv LR* 1281
- Cheadle and Davis 'The application of the 1996 Constitution in the Private Sphere' (1997) *SAJHR* 45
- Cooke, Robin 'The Struggle for Simplicity' (1984) 2 *NZLR* 214
- Cooke, Robin 'Fundamentals' (1988) *NZLJ* 158
- Corder, Hugh 'From Prisoner to Patriarch: Transforming the Law in South Africa, 1985-2000' (2001) *SALJ* 118
- Corder, Hugh 'Reviewing review: much achieved, much more to do' in Corder, Hugh and Van de Vijver, Linda (eds) *Realising Administrative Justice* (2002) Siberink, Cape Town
- Corder, Hugh 'Securing the rule of law' in Carnelly and Hoctor (eds) *Law, Order and Liberty: Essays in Honour of Tony Mathews* (2011) University of KwaZulu-Natal Press, Pietermaritzburg
- Davis, Dennis 'Elegy to transformative constitutionalism' (2003) in Botha, Henk; Van der Walt, André and Van der Walt, Johan (eds) *Rights and Democracy in a Transformative Constitution* Stellenbosch University Press, Stellenbosch 57
- Davis, Dennis 'Socio Economic Rights in South Africa: The Record After Ten Years: Towards "Deference Lite"?' (2006) 22 *SAJHR* 301
- De Beer, RJ and Vettori, S 'Enforcing Socio-economic Rights' (2007) 1 *PELJ* 27
- De Vos, Pierre 'A bridge too far? History as context in the interpretation of the South African Constitution' (2001) 17 *SAJHR* 9
- De Vos, Pierre 'Grootboom, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *SAJHR* 258
- Dellinger, Walter 'Of Rights and Remedies: The Constitution as a Sword' (1972) 85 *Harv LR* 1532
- Devenish, George 'The doctrine of separation of powers with special reference to events in South Africa and Zimbabwe' (2003) 66(1) *TSAR* 84
- Devenish, George 'The rule of law revisited with special reference to South Africa and Zimbabwe' (2004) 4 *TSAR* 677

- Dolan, Michael W 'Constitutional Torts and the Federal Tort Claims Act' (1980) 14(2) *Univ of Richmond LR* 281
- Dror, Yehezkel 'Law and Social Change' (1958-1959) 33 *Tulane LR* 787
- Du Plessis, Lourens 'The South African constitution as memory and promise' (2000) *Stell LR* 11
- Du Plessis, Lourens "'Subsidiarity': What's in the name for constitutional interpretation and adjudication?" (2006) 17 *Stell LR* 207
- Dutt, Om 'The role of judiciary in the democratic system of India (judicial activism under the Supreme Court of India) (2012) 2(3) *Golden Research Thoughts* 1
- Dutton, Pia 'Politics and Injudicious Heroism' (2010) 6 *Cambridge Student LR* 316
- Eisenberg and Schwab 'The Reality of Constitutional Tort Litigation' (1986-1987) 72 *Cornell LR* 641
- Funnah, Abdul Karim and Sibanda, Omphemetse 'Towards a Selective Awarding of Punitive Damages Awards in South Africa? A Comment on Fose v The Minister of Safety and Security' (2008) 48(2) *Codicillus* 36
- Gold, David 'Trial by Jury and Statutory Caps on Punitive Damages: Lessons for Alabama from Ohio's Constitutional History' (2001) 31(2) *Cumberland LR* 287
- Goodhart, Arthur L 'The Rule of Law and Absolute Sovereignty' (1958) 106 *Penn LR* 943
- Govender, Karthy 'Horizontality revisited in the Light of *Du Plessis v De Klerk* and clause 8 of the Republic of south Africa Constitution Bill 1996' (1996) 1(3) *Human Rights and Constitutional LJ of SA* 20
- Graglia, Lino A 'It's not Constitutionalism, It's Judicial Activism' (1996) 19 *Harvard Journal of Law and Public Policy* 293
- Greabe, John M 'A Better Path for Constitutional Tort Law' (2008-2009) *Constitutional Commentary* 25189, 193
- Hoexter, Cora 'Judicial Policy revisited: Transformative adjudication in administrative law' (2008) 24 *SAJHR* 81
- Hofmeyr 'A Central-Case Analysis of Constitutional Remedial Power' (2008) *SALJ* 537
- Huscroft, Grant 'Civil Remedies for Breach of the Bill of Rights' in Rishworth Paul *et al The New Zealand Bill of Rights* (2003) Oxford University Press, Melbourne
- Jeffries Jr 'Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts' (1989) 75(8) *Virginia LR* 1467
- John L Caldwell 'Judicial Sovereignty - A New View' (1984) 1 *NZLJ* 357
- Jones, G 'Proper Judicial Activism' (2002) 14 *Regent Univ LR* 141
- Khosla, Madhav 'Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate' (2009) 32 *Hastings International and Comparative LR* 55
- Kika, Musa 'Justice for the Poor and Many: Public Litigation in South Africa Through the Cases – 20 Years of Impact Litigation' (2013-2014) 2 *UKZN Student LR* 45
- Klaaren, Jonathan 'Chapter 9 - Judicial Remedies' (1999) in Woolman, Stu *et al* (eds) *Constitutional Law of South Africa* (1st ed) Revision Service 5
- Klaaren, Jonathan 'Judicial Remedies' (1998) in Woolman, Stu *et al* (ed) *Constitutional Law of South Africa* [Revision Service 2]
- Klaaren, Jonathan 'Judicial Remedies' (2004) in Woolman, Stu *et al* (ed) *Constitutional law of South Africa* (2nd ed)
- Klare, Karl 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146

- Labuschagne, Pieter 'Trias politica as guiding constitutional principle in the modern state: Obsolete relic or constitutional necessity' (2006) 25 (1) *Politeia* 18
- Landau, David 'Political Institutions and Judicial Role in Comparative Constitutional Law' (2010) 51 *Harv Int LJ* 31
- Langa, Pius 'The separation of powers in the South African Constitution' (2006) 22 *SAJHR* 2
- Langa, Pius 'Transformative constitutionalism' (2006) 3 *Stell LR* 351
- Le Roux, Wessel 'War memorials, the architecture of the Constitutional Court building and countermonumental constitutionalism' in Le Roux, Wessel and Van Marle, Karin (eds) *Law, memory and the legacy of apartheid. Ten years after Azapo v President of South Africa* (2007) PULP 65
- Liebenberg, Sandra 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?' (2002) 6 *Law, Democracy and Development* 159
- Love, Jean C 'Damages: A Remedy for the Violation of Constitutional Rights' (1979) 67 *Cal LR* 1242
- Malherbe, Rassie and Van Eck, Michele 'State Non-Compliance with Legal Duties: The Constitutional Court Finally Cracks the Whip Nyathi v MEC for the Department of Health, Gauteng 2008 9 BCLR 865 (CC)' (2009) 1 *TSAR* 191
- Manika 'Judicial Activism: A means for Attaining Good Governance' (2006) VII (3) *Nyaya Deep NALSA* 117
- McLean, Kirsty 'Towards a Framework for Understanding Constitutional Deference' (2010) 25 *SAPL* 445
- Mhango, Mtendeweka 'Transformation and the Judiciary' in Cora Hoexter and Morné Olivier *The Judiciary in South Africa* (2014) Juta 68
- Moseneke, Dikgang 'The Fourth Bram Fischer Memorial Lecture: transformative adjudication' (2002) 18 *SAJHR* 309
- Neethling, Johann 'Punitive Damages in South Africa' (2009) in Koziol, Helmut and Wilcox, Vanessa (eds) *Punitive Damages: Common Law and Civil Law Perspectives* 25 Tort and Insurance Law Series, Springer, New York 123
- Nichol, Gene R 'Bivens, Chilicky, and Constitutional Damages Claims' (1989) 75(6) *Virginia LR* 1118
- O'Regan, Kate 'Checks and Balances: Reflections on the Development of the doctrine of separation of powers under the South African Constitution' (2005) 8 *PELJ* 1
- O'Regan, Kate 'Fashioning constitutional remedies in South Africa: some reflections' (2011) April *Advocate* 41
- Okpaluba, Chuks 'The Development of Charter Damages Jurisprudence in Canada: Guidelines from the Supreme Court' (2012) 1 *Stell LR* 63
- Okpaluba, Chuks 'The Law of Bureaucratic Negligence in South Africa: A Comparative Commonwealth Perspective' (2006) *Acta Juridica* 117
- Okpaluba, Chuks 'Vindictory approach to the award of constitutional and public law damages: contemporary Commonwealth developments' (2012) 45(2) *Comparative and International LJ of Southern Africa* 115
- Paris, Marie-Luce 'Europeanization and Constitutionalization: The Challenging Impact of a Double Transformative Process on French Law' (2010) 29 (1) *Yearbook of European Law* Oxford University Press

- Park, James J 'Constitutional Tort Action as Individual Remedy' (2003) 38 *Harv Civil Rights-Civil Liberties LR* 393
- Philpott, Juliet 'Damages Under the United Kingdom's Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990' (2007) 5(2) *NZJPIL* 211
- Pieterse, Marius 'Beyond the welfare state: Globalisation of neo-liberal culture and the constitutional protection of social and economic rights in South Africa' (2003) 14 *Stell LR* 3
- Pieterse, Marius 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *SAPL* 155
- Pilkington 'Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms' (1984) 62 *Canadian Bar Review* 517
- Pilkington, Marilyn L 'Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms' (1984) 62(4) *Canadian Bar Review* 517
- Plasket, Clive 'Administrative Justice and Social Assistance' (2003) 120 *SALJ* 494
- Plasket, Clive 'Judicial powers, administrative review and deference: a view from the bench' (2018) 3 *SALJ* 502
- Price, Alistair 'The Influence of Human Rights on Private Common Law' (2012) 129 *SALJ* 330
- Price, Alistair 'The Evolution of the Rule of Law' (2013) 130 *SALJ* 658
- Pringle, Brian 'Broadening Your Horizons: The Constitutional court decides on Retrospectivity and Horizontality' (1996) 4 *Juta's Business Law* 167
- Pugh, George W 'Historical Approach to the Doctrine of Sovereign Immunity' (1952-1953) 13 *Louisiana LR* 476
- Quézel-Ambrunaz, Christophe 'Compensation and Human Rights (From A French Perspective)' (2011) 4 *NUJS LR* 189
- Ramose, Mogobe B 'Towards a post-conquest South Africa: beyond the constitution of 1996' (2018) *SAJHR* 326.
- Rautenbach 'Overview of Constitutional Court decisions on the bill of rights - 2007' (2008) *TSAR* 330
- Raz, Joseph 'The Rule of Law and its Virtue' in Raz, Joseph *The Authority of Law: Essays on Law and Morality* (1979) Oxford University Press 270
- Roach, Kent 'The Challenges of Crafting Remedies for Violations of Socio-economic Rights' 46 in Langford, Malcolm (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* Cambridge University Press (2008)
- Roos, Rolien 'Executive disregard of court orders: enforcing judgments against the state' (2006) 123 (4) *SALJ* 744
- Roux, Theunis 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?' (2009) 20 *Stell LR* 258
- Roux, Theunis 'Continuity and Change in Transforming Legal Order: The Impact of Section 26(3) of the Constitution on South African Law' (2004) *SALJ* 466
- Sathe, SP 'Judicial Activism: The Indian Experience' (2001) 6 *Washington Univ Journal of Law & Policy* 2
- Schachter, Oscar 'Dag Hammarskjöld and the Relation of law to Politics' (1962) 56 *AJIL* 3.
- Seedorf, Sebastian and Sibanda, Sanele 'Separation of Powers' in Woolman *et al* (eds) *Constitutional Law of South Africa* (2014) 1 Revision Service 6

- Smidt 'Horizontal Rights: Fundamental Rights in the Private Sphere' (1996) 4 *Juta's Business Law* 153
- Shapo, Marshall 'Constitutional Torts: *Monroe v Pape*, The Frontiers and Beyond' (1965-1966) 60 *Northwestern LR* 277
- Smillie, John A 'The Allure of Rights Talk: Baigent's Case in the Court of Appeal' (1994) *Otago LR* 191
- Swart, Mia 'Left out in the Cold? Crafting Constitutional Remedies for the poorest of the Poor' (2005) *SAJHR* 215
- Toxopeüs, Michelle 'Constitutional damages: Recent decisions in focus' 24 June 2018 Helen Suzman Foundation, https://hsf.org.za/publications/hsf-briefs/constitutional-damages-recent-decisions-in-focus#_ftn10 (Accessed 15 July 2019)
- Van der Walt, André 'Normative Pluralism and Anarchy: Reflections on the 2007 Term' (2008) 1(1) *Constitutional Court Review* 77
- Van der Walk 'Justice Kriegler's Disconcerting Judgment in *Du Plessis v De Klerk*: Much ado about Direct Horizontal application (read Nothing)' 1996 *TSAR* 732
- Van der Walt, AJ 'Tentative Urgency: Sensitivity for the Paradoxes of Stability and Change in Social Transformation Decisions of the Constitutional Court' (2001) 16 *SAPL* 1
- Van Marle, K 'Transformative Constitutionalism as/and Critique' (2009) 20 *Stell LR* 286
- Van Schoor d'Oliveira, Jan Adriaan 'Administrative Justice' in *Law of South Africa (LAWSA)* (3rd ed) Volume 2, 67
- Van Wyk, DH 'Suid-Afrika en die regstaat idee' (1980) *TSAR* 153
- Whitman, Christina Brooks 'Constitutional Torts' (1980) 17(1) *Michigan LR* 5
- Whitman, Christina Brooks 'Emphasizing the Constitutional in Constitutional Torts' (1997) 72 *Chicago-Kent LR* 661
- Woolman, Stu 'The amazing, vanishing bill of rights' (2007) 124 *SALJ* 762

Online Sources, Policy Documents, Reports, Presentations, Media Articles and Conference Papers

- Constitutional Court of South Africa, <http://www.constitutionalcourt.org.za/text/court/main.html> (accessed 03 June 2016)
- De Bruin 'Official ignores court order' (http://www.news24.com/News24/South_Africa/News) 28 October 2003
- Department of Justice and Constitutional Development 'Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State' (2012)
- Gbadamosi, Gbolahan 'Eso at 83: Judicial Activism revisited' 27 September 2011, <http://www.nigerianlawguru.com/articles/general/ESO-20at-2083-20judicial-20activism-0revisited.pdf>
- Gibson 'Manto facing jail threat' (http://www.news24.com/News24/South_Africa/Politics) 22 October 2003
- Gonzalez, Laura 'How South Africa's fight against HIV stacks up', 3 September 2013. <http://www.health-e.org.za/2013/09/23/south-africas-fight-hiv-stacks/> (Accessed 31 July 2014)

- Gubbay, Anthony R 'The Progressive Erosion of the Rule of Law in Independent Zimbabwe' (2009) Third International Rule of Law Lecture: Bar of England and Wales, 9 December 2009
- Jessup, Philip 'The Functional Approach as Applied to International Law' (1928) Third Conference of Teachers of International Law 1
- 'Judge warns of constitutional crisis' *LegalBriefToday* Issue Number 1652, 29 August 2006
- Klaaren 'Judicial Remedies, Centre For Human Rights' (1999) 5, Available at [Http://www.Chr.Up.Ac.Za/Chr_Old/Centre_Publications/Constitlaw/Pdf/9-Judicial%20Remedies.Pdf](http://www.Chr.Up.Ac.Za/Chr_Old/Centre_Publications/Constitlaw/Pdf/9-Judicial%20Remedies.Pdf). (Accessed 05 May 2017)
- New Zealand law Commission 'Law Commission Crown Liability and Judicial Immunity: A Response to Baigent's case and Harvey v Derrick' (NZLC R37, 1997)
- Quansah, EK and Fombad, CM 'Judicial Activism in Africa: Possible Defence Against Authoritarian Resurgence?' <http://www.ancl-radc.org.za/sites/default/files/Judicial%20Activism%20in%20Africa.pdf>23. (Accessed 05 June 2016) 3
- Van der Linde, I 'HIV/AIDS in South Africa: At last the glass is half full' 20 June 2013. <http://www.hsrc.ac.za/en/media-briefs/hiv-aids-stis-and-tb/plenary-session-3-20-june-2013-hiv-aids-in-south-africa-at-last-the-glass-is-half-full> (Accessed 31 July 2014)
- Rao, MN 'Judicial Activism' to be found at www.geocities.com/bororissa/jud.html?20088
- 'Rule by fear' Cape Times, 5 March 2001
- 'SA could face constitutional crisis' (Stolley Mail & Guardian Online 28 August 2006)
- Sharma, Lipika 'Judicial Activism in India: Meaning and Implications' http://www.academia.edu/2148025/JUDICIAL_ACTIVISM_IN_INDIA_MEANING_AND_IMPLICATIONS (Accessed 03 June 2016)