The recognition of unenumerated rights in South Africa

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1 Introduction

In 1997 a South African man married a woman who, at the time of the conclusion of their marriage, was a national of a foreign country. The couple decided to set up home and start a family in South Africa. They were advised that the granting of a permanent residence permit to the wife would only be considered upon payment of a hefty application fee, and that she had to apply for the permit from outside South Africa. The couple was of the view that the high cost of the application coupled with their temporary separation at the time of the lodging of the application amounted to an unjustifiable limitation of their right to family life. One of the obstacles faced by the couple was the silence of the South Africa Constitution on the right to family life.

Most followers of South African Constitutional Court jurisprudence will be familiar with the facts and outcome of the matter set out above. In *Dawood v Minister of Home Affairs,*[1] the Constitutional Court extended constitutional protection to the family life of the applicants through purposive interpretation of the right to dignity. The Court chose to extend protection to the choices people make in respect of their family lives by interpreting the right to dignity expansively, rather than by recognising the existence of a self-standing (or unenumerated) right to family life. The practical effect thereof, however, was to extend constitutional protection to family life.

Constitutions and bills of rights are necessarily products of their time and context. The South African Constitution, incorporating a bill of rights, was drafted only a few years ago and its provisions are, in comparison to those of older constitutions, comprehensive. This comprehensiveness does not mean that the provisions of the Constitution expressly cater for every eventuality. Cases may occasionally give rise to issues not directly addressed by the fundamental rights enumerated in the

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[1]*Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) paras 36-38.

Constitution and complete non-recognition of unenumerated rights may leave the claimants of such rights vulnerable. Does constitutional silence in relation to a particular claimed right mean that such a right is not protected by the Constitution?

This article considers the judicial recognition of constitutionally unenumerated rights in South Africa. We specifically consider whether constitutional silence in relation to particular (claimed) rights results in the conclusion that such rights are not protected by the Constitution. The effect of extending constitutional protection through a wide interpretation of enumerated fundamental rights (as opposed to recognising rights unlisted in the Bill of Rights) is also considered in relation to a theoretical framework. Pertinent foreign jurisprudential approaches are briefly discussed where relevant in analysis of the approach adopted in South Africa.

2 The rights of the Bill of Rights in perspective

2.1 Background

Apartheid formally came to an end with the coming into operation of the interim Constitution on 27 April 1994.[2] According to the political agreement reached between the representatives of the liberation movements and the apartheid government in the early 1990s, the transition to constitutional democracy would be staggered. In the first stage of the transition, governance was to take place in accordance with the politically negotiated interim Constitution, where after the final Constitution was to be drafted by a democratically elected constitutional assembly after a democratic election. The agreement further stipulated that the constitution-making process after the first election was to be guided by 34 constitutional principles which were included in the interim Constitution. The final Constitution would furthermore only come into operation after it was certified as compliant with the 34 constitutional principles by the Constitutional Court.[3]

Principle II guided the constitution-making process insofar as fundamental rights were concerned:

> Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.

Before we consider the Bill of Rights that was certified as compliant with this principle and its impact on the question of unenumerated rights recognition, it is fitting to consider the position under the interim Constitution in the light of the proviso in Principle II and in view of the continued relevance of the precedents set under this Constitution.[4]

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[2] The Constitution of the Republic of South Africa Act 200 of 1993.

[3] *In re: Ex parte Chairperson of the Constitutional Assembly, Certification of the Constitution of the RSA, 1996* 1996 4 SA 744 (CC) paras 13-15.

[4] In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 15 Ackermann J delivered his judgment under s 9 of the Constitution 'on the assumption that the

2.2 Unenumerated rights and the interim Constitution

In an academic contribution on the drafting of the Bill of Rights of the interim Constitution, Professor Lourens du Plessis, convenor of the Technical Committee on Fundamental Rights during the negotiation process, remarked that the Bill of Rights of the interim Constitution was not 'a *full* bill of rights'.[5] The term 'full bill of rights' is not explained in that contribution and its meaning is far from obvious. Du Plessis's account of the negotiations that lead to the acceptance of this transitional Bill of Rights are, however, insightful. He paints a picture of sharp political disagreement about the constitutionalisation of rights followed by an eventual compromise. Chapter 3 of the interim Constitution containing its Bill of Rights was, in effect, the product of concessions made by all the negotiating parties, and entrenched 25 fundamental rights[6] ranging from civil and political rights to socio-economic and group rights.

The rights contained in chapter 3 were expressed 'as general norms, as broadly as possible, and reliance on lists of specific and detailed guarantees and conditions [were] avoided'.[7] This style of drafting was favoured because it allowed for the use of simple language, making the Bill of Rights more accessible to everyone, for ease of interpretation, to avoid unnecessary restriction through the use of detailed lists and to allow for 'evolutionary interpretation and growth' of the Bill of Rights.[8] The broad formulation of rights, together with the further textual prompt to interpret the Bill of Rights in a manner that promotes 'the values which

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equality jurisprudence and analysis developed by this Court in relation to s 8 of the interim Constitution is applicable equally to s 9 of the 1996 Constitution, notwithstanding certain differences in the wording of these provisions'.

[5] Du Plessis 'The genesis of the chapter on fundamental rights in South Africa's transitional constitution' (1994) *SAPR/PL* 1 at 1, 10 (emphasis added).

[6] Cachalia, Cheadle, Davis, Haysom, Maduna and Marcus *Fundamental rights in the new Constitution* (1994) 5.

[7] Du Plessis (n 5) 12.

[8] *Ibid*. On the Constitution as a living organism, see Dodson 'A Darwinist view of the living constitution' (2008) *Vanderbilt LR* 1319. The metaphor involves attributing characteristics of living organisms to the Constitution, but does not assign an identity to the entity (the Constitution): see Dodson at 1326. On the use of metaphoric reasoning in current South African legal analysis, see Botha 'Methaphoric reasoning and transformative constitutionalism (2)' (2003) *TSAR* 20. The Constitution and the rights contained therein have been described variously through the use of metaphors: see Botha 21. So, eg, rights have been conceived of as relational (Botha 23) or as a dialogue (Botha 24). The latter conception 'declare[s] readiness to listen to other viewpoints, to enter into discussion over our own beliefs, to open ourselves to the possibility of a dialogic modulation of deeply held convictions and prejudices. We commit ourselves to the idea of a public sphere that is characterised by openness, equality and plurality, and the transformation of institutions that do not fully embrace these values'. See also Du Plessis 'Interpretation' in Woolman *et al The constitutional law of South Africa* (2008) 32-22 – 32-28 on the different role-players who contribute to the process of interpretation (an interpretative community). Du Plessis (32-25) notes that courts play an important role and are 'powerful and consequential' interpreters of the Constitution. This role requires the court to be sensitive to 'the plurality of meanings' of constitutional provisions given the fluidity of language and evolving context (32-28).

underlie an open and democratic society based on freedom and equality' (that is, in a purposive manner),[9] led early commentators to remark as follows:

> when a court is confronted with a problem of unenumerated rights it should seek to answer the question as to whether the development of a right which is unenumerated in the Constitution would foster or promote those values which underlie an open and democratic society based on freedom and equality.[10]

It would seem that it was self-evident for these authors that the constitutional protection of fundamental rights extended beyond those fundamental rights that were specifically enumerated in the text. However, did the Constitutional Court share this view in respect of the provisions of the interim Constitution?

2.2.1 A question of residual freedom rights?

In the first judgment of the newly established Constitutional Court, delivered in April 1995 by Kentridge AJ for the unanimous Court, the learned judge noted that while the Constitution embodies values which must be respected and given effect in the interpretative process, it remains a written legal instrument, the language of which must be respected.[11] This fidelity to the text of the Constitution is also evident from subsequent judgments, and specifically that of *Ferreira v Levin NO,*[12] delivered later in 1995, where the Court specifically commented on the issue of unenumerated fundamental rights.

In *Ferreira,* the applicants challenged the constitutionality of legislative provisions that allowed for the questioning of company officials in winding-up proceedings as violating their constitutional rights against self-incrimination.[13] In his minority judgment, Ackermann J specifically recognised unenumerated freedom rights. His conclusion in that regard elicited a response from the other judges which

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[9] Currie and De Waal *The Bill of Rights handbook* (2005) (5th ed) 149: 'Purposive interpretation is aimed at teasing out the core values that underpin the listed fundamental rights in an open and democratic society based on human dignity, equality and freedom and then to prefer the interpretation of a provision that best supports and protects those values'.

[10] Davis, Chaskalson and De Waal 'Democracy and constitutionalism: The role of constitutional interpretation' in Van Wyk, Dugard, De Villiers and Davis (eds) *Rights and constitutionalism: The new South African legal order* (1994) 1 at 127.

[11] *S v Zuma* 1995 2 SA 642 (CC) paras 17-18. Kentridge AJ (para 16) also referred with approval to the oft-quoted dictum of Dickson J of the Canadian Supreme Court in *R v Big M Drug Mart Ltd* (1985)18 DLR (4th) 321, 395-6: 'The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and the securing for individuals the full benefit of the Charter's protection'.

[12] 1996 1 SA 984 (CC).

[13] Paragraph 21.

clarifies the Court's stance on unenumerated rights under the interim Constitution.

Ackermann J held that the Constitution protected the right to freedom and that this right provided the applicants with protection against self-incrimination.[14] The learned judge interpreted the right to freedom and security of the person set out in s 11 as encompassing two aspects, namely the right to freedom on the one hand, and the right to security of the person, on the other.[15] The right to freedom entailed, according to Ackermann J, 'the right of individuals not to have obstacles to possible choices placed in their way by the state'.[16] This broad freedom right existed alongside the specifically enumerated freedom rights in the Bill of Rights, such as the right to freedom of movement.[17] The unenumerated freedoms protected by this constitutional provision should, according to Ackermann J, 'more properly be designated "residual freedom rights"'.[18] Thus, the judge held that the 'proper methodology' when the infringement of a freedom right was alleged, would be to determine whether the right allegedly infringed was a specifically enumerated freedom right. If it was found not to be specifically enumerated, it had to be determined whether a residual freedom right had been infringed before the limitations analysis was engaged as per the two-stage approach approved by the Court in its first judgment.[19]

Ackermann J stood alone in his broad construction of the freedom right.[20] Chaskalson P, with whom the majority of the Court concurred, was of the view that the right protected in section 11 was concerned only with physical integrity.[21] This followed from his assessment that the Bill of Rights contained 'an extensive charter of freedoms'[22] and that the structure of the Bill of Rights and the detailed textual formulation of the different rights could not be ignored in favour of a broad construction.[23] The detailed provisions of the written legal instrument, in other words, demanded respect.[24]

The lack of detail in the 200 year old text of the Constitution of the United States of America has compelled the courts in that jurisdiction to construe its provisions broadly so as to heed the demands of the preamble of that Constitution and to keep up with the changing demands of society.[25] According to the majority of the Constitutional Court in *Ferreira*, the same is not appropriate in the South

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[14]Paragraph 87.
[15]Paragraph 47.
[16]Paragraph 47.
[17]Paragraph 47.
[18]Paragraph 57.
[19]Paragraph 57.
[20]Sachs J supported Ackermann J's application of the freedom right in this matter, but construed the right itself more narrowly: para 249.
[21]Paragraphs 169-170.
[22]Paragraph 171.
[23]Paragraph 172.
[24]Paragraph 176.
[25]Paragraphs 176-177.

African context where the constitutional text enumerates rights in some detail. Chaskalson P further noted that a wide construction of section 11 would lead to anomalous results when it came to the application of the two-stage approach since it would mean that the limitation of residual freedom rights would be subjected to closer scrutiny than the limitation of enumerated freedom rights.[26]

The narrower view of the right protected in section 11 did not, however, cause Chaskalson P to pin the right down rigidly. As an aside, he remarked:

> This does not mean that we must necessarily confine the application of section 11(1) to the protection of physical integrity. Freedom involves much more than that, and we should not hesitate to say so if the occasion demand it. But, because of the detailed provisions of chapter 3, such occasions are likely to be rare. If despite the detailed provisions of chapter 3 a freedom of a fundamental nature which calls for protection is identified, and if it cannot find adequate protection under any of the other provisions in chapter 3, there may be a reason to look to section 11(1) to protect such a right. But to secure such protection, the otherwise unprotected freedom should at least be fundamental and of a character appropriate to the strict scrutiny which all limitations of section 11 are subjected.[27]

What do these different constructions of the constitutional text in *Ferreira* say about unenumerated rights? While the judges disagreed about the applicability of an unenumerated right against self-incrimination in the particular instance, they all seemed to agree that the interim Constitution protected both enumerated and unenumerated freedom rights and that it was the task of the Court to identify these rights in appropriate circumstances with reference to the text and framework of constitutional values established in terms of the text. For the majority of the Court, the detailed provisions of the Constitution meant that the scope for identification and application of such rights was limited. The question of whether this position has changed with the coming into operation of the 1996 Constitution remains.

2.3 Unenumerated rights and the final Constitution

It will be recalled that Principle II required the final Constitution to entrench 'all universally accepted fundamental rights, freedoms and civil liberties' and that it furthermore required the drafters of the Constitution to pay due consideration to the rights entrenched in the interim Constitution. In making sense of the direction provided by this constitutional principle, the Constitutional Court explained in its *Certification* judgment that it interpreted 'fundamental rights, freedoms and civil liberties' as a composite idea requiring the inclusion of the rights and freedoms recognised as inalienable entitlements of human beings in open and democratic societies.[28] It added that the list of such rights was not finite. Therefore, according to the Court, the qualification of 'universal' was added, which required 'that only

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[26] Paragraph 174.
[27] Paragraph 184. Mokgoro J expressed her support for this approach pertinently: para 212.
[28] *Certification of the Constitution of the RSA* (n 3) para 50.

those rights that have gained a wide measure of international acceptance as fundamental human rights must necessarily be included'[29] in the Bill of Rights of the final Constitution. The directive that due consideration had to be paid to the rights that were entrenched in the interim Constitution meant, according to the Court, that the Constitutional Assembly had to consider these rights in deciding on the rights to be included in the Bill of Rights, but that it was not bound by the provisions of that Constitution.[30] According to the Court 'universally accepted fundamental rights, freedoms and civil liberties' form a 'narrower group of rights' than those entrenched in the interim Constitution.[31] The Constitutional Assembly was thus free to go beyond the levels of protection provided for in the interim Constitution, or to reduce the level of protection in the final Constitution, provided that the protection measured up to a standard that is 'universally accepted'. Of the Bill of Rights as a whole the Court said:

> It should be emphasised that in general, the Bill of Rights drafted by the Constitutional Assembly is as extensive as any to be found in any national constitution.[32]

Despite this comprehensiveness,[33] objections to the certification of the text were raised by several groups and individuals who were of the view that Principle II demanded the inclusion or the exclusion of particular rights from the Bill of Rights.[34] In response thereto the Court remarked:

> In respect of each objection [in relation to the rights included or omitted from the text], however, the basic flaw is that the CPs [Constitutional Principles] contain nothing which lends support to it. We repeat that it is not for us but for the CA [Constitutional Assembly], the duly mandated agent for the electorate, to determine – within the boundaries of the CPs – which provisions to include in the Bill of Rights and which not.[35]

Notwithstanding this general rejection of complaints regarding the inclusion or exclusion of particular rights, the Court dealt with one of the objections pertinently. This objection concerned the Constitution's failure to recognise the

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[29]Paragraph 51.
[30]*Ibid*.
[31]Paragraph 52.
[32]*Ibid*.
[33]Mutua 'Hope and despair for a new South Africa: The limits of rights discourse' (1997) *Harvard Human Rights Journal* 63 at 66 note 9 states: 'The Constitution has a strong bill of rights (S AFR CONST (1996 Constitution) ch 2) that in all probability protects the widest range of rights of any constitution in the entire world'.
[34]*Certification of the Constitution of the RSA* (n 3) para 104. Objectors raised issues relating to the reinstatement of the death penalty, abortion, education and specifically the language medium of education, the rights to equality, privacy, the environment, freedom of movement in relation to illegal immigrants, language, culture and the right to present petitions, pornography, obscenity, blasphemy, the right to defend oneself and possess arms, discrimination against homosexuals and the prohibitions on restraint of trade.
[35]*Ibid*.

family as the basic unit of society and/or to constitutionalise the right to marry.[36] In dismissing the objections, the Court held that family forms in South Africa were diverse and that failure to constitutionalise the protection of a particular family form avoids disagreement.[37] The Court held that choices regarding marriage and raising a family would be protected by the values of human dignity, equality and freedom, and the right to human dignity that is explicitly entrenched in the Constitution.[38] In making these remarks, the Court did not identify an unenumerated right to family life or marriage, but merely indicated the scope of the interests protected by the right to dignity. These early tentative remarks about the role of the right to dignity in the protection of family life were confirmed by the Court in *Dawood v Minister of Home Affairs,*[39] as indicated earlier.

Despite early indications from commentators that recognition of unenumerated rights would be unproblematic, the Court's approach has been cautious. In fact, the majority of the Court has not, to date, labelled any right as an 'unenumerated right'. The Court has, however, extended protection beyond the confines of the text by way of an expansive interpretation of enumerated constitutional rights. In what follows we consider this approach in relation to a theoretical framework of unenumerated rights and comparable examples from foreign jurisprudence.

3 The theoretical and jurisprudential framework

The constitutionalisation of rights means that certain legal entitlements are placed beyond 'the vicissitudes of political controversy, … beyond the reach of majorities and officials and [thereby] …establish[ed] …as legal principles to be applied by the courts'.[40] This places significant power in the hands of unelected judges as they are granted the authority to invalidate legislation (supported by the majority of the representatives of the people) or conduct of the executive in the event of its unconstituionality.[41] In the context of the discussion of unenumerated rights, the issue of concern is the power of judges to identify or 'invent' new rights outside the text of the constitution.

3.2 Interpreting rights in a Bill of Rights

Constitutional interpretation is clearly a subject of great controversy raising the counter-majoritarian dilemma.[42] Unelected judges are given the responsibility to

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[36]Paragraph 96.
[37]Paragraphs 99 and 103.
[38]Paragraph 100.
[39]*Dawood v Minister of Home Affairs* (n 1) para 36-38.
[40]*West Virginia State Board of Education v Barnette* 319 US 624, 638 (1943) per Jackson J, quoted with approval in *S v Makwanyane* (n 41) para 89 per Chaskalson P.
[41]Davis, Chaskalson and De Waal (n 10) 6-26 and the sources referred to in that section.
[42]See Davis, Chaskalson and De Waal (n 10) 1.

assign meaning to constitutional provisions and to declare legislation and executive acts unconstitutional on the basis of their interpretation of the constitution. In assigning meaning to constitutional provisions, judges (and other members of the interpretive community) rely on various interpretative approaches. Michelman[43] identifies the standard approaches as literalism, intentionalism, purposivism, instrumentalism and the moralist approach. The first three approaches involve external points of reference, such as dictionaries or the views of the legislature as officially captured, while the latter two approaches open the door for the introduction of personal preferences.[44] But judges seldom, if ever, rely on a single interpretative approach.[45] The power that the judiciary wields is not intended to be unconstrained. Judges interpret both specific and broadly framed constitutional provisions with reference to values and cherished legal traditions of interpretation that can be found both in and outside the text of the constitution.

Tribe and Dorf[46] explain this process of interpretation in relation to the identification of unenumerated rights as one of 'interpolation and extrapolation. From a set of specific liberties that the Bill of Rights explicitly protects, he [the judge, in this instance the reference is to Justice Harlan] inferred unifying principles at a higher level of abstraction, focusing at times upon rights instrumentally required if one is to enjoy those specified, and at times upon rights logically presupposed if those specified are to make sense'. In this process the judgments that judges make are constrained by the constitutional text, precedent and tradition which, used in combination, minimise judicial subjectivity and ensure congruence with the constitutional ideal. This approach ensures the upholding of the constitution as a 'living' constitution.[47] The metaphor of the constitution as 'living' is 'an important tool for understanding, conceptualising, and communicating one complex and ephemeral idea in terms of another that is more concrete and easier to understand'.[48] This metaphor denotes, in our view, the possibilities of extending the protection afforded by the constitution and the ability of the constitution to adapt to changed circumstances.

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[43]Michelman 'A constitutional conversation with Professor Frank Michelman' (1995) *SAJHR* 477 at 482-483.

[44]Michelman (n 44) 483.

[45]See Michelman (n 44) 483: 'I don't believe that any responsible constitutional adjudicator will end up, over any interesting run of cases ignoring any of the factors: perceived verbal significations, perceived concrete intentions, perceived general purposes, perceived and evaluated social consequences, perceived and intuited normative theories or unifying visions'. Also see Botha *Statutory interpretation* (1998) (3rd ed) 141.

[46]Tribe and Dorf 'Levels of generality in the definition of rights' (1990) *University of Chicago LR* 1057 at 1068.

[47]Tribe and Dorf (n 46) 1100-1103. See also Brennan Jr 'The Ninth Amendment and fundamental rights' in J O'Reilly *Human rights and constitutional law: Essays in honour of Brian Walsh* (1993) 109 at 121-122: 'Justice Brandeis once wrote that the American Constitution "is a living organism. As such it is capable of growth – of expansion and adaptation to new conditions. … Because our Constitution possesses the capacity of adaptation, it has endured as the fundamental law of an ever-developing people"'. See also (n 8).

[48]Dodson (n 8) 1346.

The manner in which the United States Supreme Court has adjudicated disputes pertaining to the Constitution of the United States of America provides a good example of the way in which the process of judicial interpretation may be structured and guided to grant protection beyond textual formulation. The Constitution of the United States of America is the oldest written constitution still in operation. The lack of detail in the text of that constitution has resulted in the United States Supreme Court recognising unenumerated rights via the door of due process, through a 'reasoned elaboration' of express constitutional provisions, such as the First Amendment guarantee of freedom of speech and the right to liberty.[49] This approach calls for a court to assess the relative merits of the contending interests by way of a judicial approach not dissimilar to a common law method seeking 'reasoned judgment' and incorporating a proportionality enquiry of sorts. Importantly, at least two constraints on such an approach have been noted by this Court. Firstly, a court is bound to confine the values that it recognises to those truly deserving constitutional stature because they are expressed in a constitutional text or emanate from a country's legal tradition.[50] This is aimed at precluding a judge from relying upon personal beliefs in deciding such cases.[51] Secondly, the emphasis must remain on constitutional *review* and the weighing of contending interests between individual and state in order to determine whether a *statute* in question is reasonable. It is not an invitation for judicial lawmaking.[52]

> It is only when the legislation's justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way. Only if this standard points against the statute can the individual claimant be said to have a constitutional right.[53]

There may, indeed, be no clear, universally acceptable test for the precise circumstances in which the courts that follow such an approach will not defer to the legislature and will move to strike down an offending piece of legislation as contravening an unenumerated right. While these issues receive further attention in conclusion, the judgment of Harlan J in *Poe*[54] possibly comes closest to summarising the position:

> Due Process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to

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[49] See, eg, *Texas v Johnson* 491 US 397, 109 S Ct 2533, 105 L Ed 2d 342 [1989] which used the notion to hold that the First Amendment protected both verbal and non-verbal speech and even tolerated expression in the form of flag burning.
[50] *Poe v Ullman* 367 US 497, 542 (1961).
[51] *Rochin v California* 341 US 165, 170-171 (1952).
[52] *Youngberg v Romeo* 457 US 307, 320-321 (1982).
[53] *Cruzan v Direcot, Mo Dept of Health* 497 US 261, 279 (1990).
[54] *Poe v Ullman* (n 50) 542.

> this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

A number of general principles of constitutional interpretation have become established in South Africa during the past two decades. It is, for example, now clear that the provisions of the supreme Constitution must be given a generous and purposive interpretation:[55]

> A Constitution is an organic instrument. Although it is enacted in the form of a statute it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid 'the austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government.[56]

The principles of international human rights law and foreign law must be applied with due regard for the South African context, which implies that constitutional interpretation is centered on the South African Constitution.[57] Case law also refers to a 'liberal' interpretation of the Constitution which, rather than favouring a political connotation, appears to suggest 'flexibility' and 'generosity' of interpretation.[58] Constitutional interpretation further demands adherence to the spirit and tenor of the Constitution, which means that the values and moral standards underpinning the Constitution must be taken into account throughout the interpretation process.[59] The Constitution must be interpreted in a fashion which gives clear expression to the values it espouses.[60] This is not a 'free-floating exercise', but ultimately is intimately concerned with questions of law, with due consideration for the need to balance various societal interests and values.[61]

In addition, a provision in the Constitution cannot be interpreted in isolation, but must be read in the context as a whole, which includes the historical factors that led to the adoption of the Constitution in general, and the fundamental rights in

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[55] *Shabalala v The Attorney-General of Transvaal* 1994 6 BCLR 85 (T) 100H.
[56] *Government of the Republic of Namibia v Cultura* 2000 1994 1 SA 407 (Nm) 418, quoted with approval by Mahomed J in *S v Mhlungu* 1995 3 SA 867 (CC) para 8.
[57] *S v Makwanyane* 1995 3 SA 391 (CC) 406E-407C; *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) para 123.
[58] Botha (n 45) 142. Constitutional interpretation is an inherently flexible process. It is not a dogmatic and mechanical application of predefined approaches and rules and allowance must be made for changing circumstances: *Nortje v Attorney-General of the Cape* 1995 2 SA 460 (C) 471D-F.
[59] *S v Acheson* 1991 2 SA 805 (Nm) 813C; Botha (n 45) 142.
[60] *Qozoleni v Minister of Law and Order* 1994 3 SA 625 (E) 80H-I.
[61] Botha (n 45) 144.

particular.[62] This approach includes a healthy respect for the language employed in the Constitution, so that historical context and comparative interpretation never reflects a purpose that is not supported by the constitutional text itself.[63]

For influential legal philosopher Ronald Dworkin, the distinction between enumerated and unenumerated rights 'is only another misunderstood semantic device'[64] with no real significance.[65] According to Dworkin, the American Constitution (and in our view, all constitutions) embodies abstract principles of political morality creating a framework for governance by politicians and adjudication by judges, allowing the latter to interpret and apply these authoritative standards in concrete circumstances.[66] It thus does not make sense to classify rights as 'enumerated' or 'unenumerated' because all the provisions of the Constitution require interpretation and application to concrete circumstances.[67]

Dworkin's assertion is indeed correct. Questions about unenumerated rights are, in fact, questions about interpretation of constitutions. Judges are tasked to interpret constitutional provisions, whether specific or abstract, in relation to concrete circumstances. The process of assigning meaning to constitutional provisions is the daily toil of judges. Commentators (and even the judges themselves on occasion) have labelled the protection extended to an unlisted right as identification or 'invention' of an unenumerated right. But the pinning of a label – enumerated or unenumerated – should not be the focus of the enquiry; one should rather determine whether the extension of protection in a concrete situation stems from an appropriate interpretation of the provisions of the Bill of Rights.

4 Analysis and conclusion

The Bill of Rights in chapter 2 of the South African Constitution contains detailed provisions outlining the protection of fundamental rights. On the strength of the precedent set in terms of the interim Constitution, one can conclude that the existence of detailed provisions in the text of the Constitution means that it would

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[62] *S v Makwanyane* 1995 3 SA 391 (CC) 403G-404H.

[63] Botha (n 45) 143. This, of course, does not imply a mechanical adherence to literal legalism, but suggests 'an open-ended process of elucidation and commentary which explores, reads into, derives and attaches significance to every word, section or clause in relation to the whole context': *Nyamakazi v President of Bophuthatswana* 1992 4 SA 540 (B) 567H.

[64] Dworkin 'Unenumerated rights: Whether and how Roe should be overruled' (1992) *University of Chicago LR* 381 at 386.

[65] According to Du Plessis, 'the idea of value-coherent, teleological interpretation, closely corresponding with Dworkin's understanding of the law as integrity represents an apogee of modern-day liberal thinking on legal interpretation in South Africa'.

[66] Dworkin (n 66) 382 and Dworkin *Life's dominion* (1994) 119. See also Michelman (n 44) at 480-482 and Du Plessis in Woolman *et al The Constitutional law of South Africa* 32-22 and 32-25 emphasising the role of courts as 'powerful and consequential' interpreters of the Constitution.

[67] Dworkin (n 66) 129-130. Anders 'Justices Harlan and Black revisited: The emerging dispute between Justice O'Connor and Justice Scalia over unenumerated fundamental rights' (1993) *Fordham LR* 895 at 901.

rarely be necessary for the Court to resort to the identification of unenumerated rights to further constitutional ideals, including that of transformation of the South African society.[68] More often than not, the rights enumerated in the text will be adequate for the protection of citizens' interests. This does not imply, however, that constitutional silence in relation to particular (claimed) rights results in the conclusion that such rights are completely unprotected by the Constitution. Modern bills of rights do not represent strict codifications of human rights without room for interpretation and expansion. A view of a bill of rights as a legislative enumeration of protectable interests that has to be construed narrowly without reference to extra-textual realities is unrealistic, untenable and undesirable. It may therefore be argued that human rights are not 'fundamental' merely on account of their express enumeration in a written constitution.

Accepting that rights are not only worthy of protection when they are enumerated to the letter leaves the question as to who should be responsible for extending recognition to 'new' rights (that is, rights not specifically mentioned) and what the limits in that regard should be. While the elected branches of government could, conceivably, consider such issues on a case-by-case basis, the practice in constitutional democracies has been for the courts to decide the scope of protection afforded by the constitution.[69] Judges in different jurisdictions have, at different times in history, recognised a variety of rights not specifically

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[68]It is widely accepted that the South African Constitution embodies the idea of transformative constitutionalism. See Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146. Klare (150) explains that transformative constitutionalism is 'a long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law'. See also Langa 'Transformative constitutionalism' (2006) *Stell LR* 351; Moseneke 'The fourth Bram Fischer memorial lecture: Transformative adjudication' (2002) 18 *SAJHR* 309; Van der Walt 'Legal History, Legal culture and transformation in a constitutional democracy' (2006) 12 *Fundamina* 1. Klare's vision of transformative constitutionalism is, according to Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?' (2009) *Stell LR* 258 premised on the methodologies of the Critical Legal Studies movement which involve particular political commitments (259). Roux argues that Klare's express political or ideological choice in favour of a post-liberal reading of the Constitution so as to ensure the constitutionally envisioned transformation, is not the only way in which the Constitution can be read 'transformatively'. He argues that Dworkin's theory of constructive interpretation serves the transformative ideals of the Constitution (269-270).

[69]Botha suggests that the judiciary in South Africa must adopt a more 'activist' role with regard to the role of fundamental values during constitutional interpretation. 'Activist' constitutional interpretation, according to Botha, deals primarily with the active and positive promotion and strengthening of the fundamental constitutional values. The substantive (value-laden) component of the constitutional state must be activated and concretised by the courts, by emphasising not only the rights and values of the individual, but those of the community (including the marginalised and disadvantaged) as well: Botha (n 45) 145.

mentioned in the constitutional texts they are mandated to interpret. Such recognition, in other words, has been time-, context- and society-dependent, especially with respect to socio-economic rights recognition.[70] It must also be remembered that in setting out the detailed provisions which appear in the Constitution, the drafters employed imprecise terms such as 'freedom', 'dignity' and 'equality'. It is the task of the Court to assign meaning to terms contained in the Constitution with reference to the text, context, and values of the Constitution, as explained by Tribe and Dorf and as illustrated by judgments of the United States Supreme Court. This process of interpretation provides an avenue for the courts in South Africa to expand upon the scope of protection provided by the rights enumerated in the Bill of Rights.

The position is reminiscent, to some extent, of the approach adopted by the Indian Supreme Court. This Court has, from its inception, afforded recognition to a number of fundamental rights which are not expressly mentioned in the chapter on fundamental rights contained in the Indian Constitution. This judicial exercise was performed on the premise that certain unspecified rights are implicit or inherent in the express enumerated guarantees.[71]

Unlike India, the South African Constitutional Court has, interestingly, chosen not to label its expansive interpretation of imprecise concepts (in order to protect unlisted interests) as the identification of unenumerated rights. It is submitted, however, that such expansive interpretation has the same effect as the identification of unenumerated rights and is thus susceptible to the same criticisms as those levelled at the identification of unenumerated rights. For example, issues relating to the separation of powers and certainty regarding the scope of protection afforded by broad concepts such as 'freedom' and 'dignity' arise.

In order to minimise the effect of these criticisms, the Court has to respect the boundaries of the doctrine of separation of powers without undermining the protection afforded by the Bill of Rights and articulate its interpretative approaches and interpretations clearly to enhance certainty. This approach requires judges to identify unenumerated rights within the framework of justice embraced by the Constitution utilising different interpretative approaches (such as literalism,

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[70] See, eg, *Hanif v State of Bihar* [1959] SCR 629 at 655 and *Singh v State of Uttar Pradesh* [1964] 1 SCR 332. The former case saw the principle of 'harmonious construction' being upheld, which allowed fundamental rights to be read into directive principles of state policy in India. The latter judgment illustrates a broad reading of the right to 'personal liberty' to encapsulate socio-economic aspects life.

[71] For example, the Supreme Court read in art 14 the notions of 'fairness', 'reasonableness' and 'absence of arbitrariness' and thus widened the protection of that provision: *Moti Ram v State of MP* AIR 1978 SC 1594; (1978) 4 SCC 474; 1978 Cr LJ 1614. In addition, while the Indian Constitution does not specifically guarantee freedom of the press as a fundamental right, in several decisions of the Supreme Court from 1950 onwards, freedom of the press has been held to be implicit in the art 19 guarantee of freedom of speech and expression, thereby acquiring the status of a fundamental right: *Express Newspapers v Union of India* [1959] SCR 12. Unarguably the greatest development along such lines has occurred with respect to art 21 of the Indian Constitution: see,eg, *Olga Tellis v Bombay Municipal Corporation* [1985] 3 SCC 545.

intentionalism, purposivism, instrumentalism and moralism, as identified by Michelman) and considering competing arguments about the appropriate interpretation of provisions. The text and context demand interpretation of the rights included in the Bill of Rights with specific reference to the facts of a particular case and the socio-economic realities prevailing in the country. For the poor and illiterate sectors of society, the legitimacy of the new constitutional order is inextricably linked to socio-economic rights realisation, rather than to grandiose theories of constitutional interpretation.[72] The appropriate process of interpretation could, ideally, enhance the ability of judgments to address some of the challenges faced by disadvantaged members of South African society satisfactorily, thus furthering the transformative agenda of the Constitution.[73]

The Constitution was clearly intended to serve as an instrument of reconstruction and transformation in South Africa.[74] Because of the detailed and justiciable human rights provisions (including socio-economic rights clauses) contained in the South African Constitution, however, it appears as if South African courts will hesitate to be over-liberal in their interpretation of such rights. Despite this restraint, it is submitted that the broad notions of life,[75] freedom, dignity and equality which are contained in the South African Constitution could, by way of careful judicial construction in accordance with the text, context and values of the Constitution, be interpreted so as to advance the needs of those crippled by poverty in the country. Such an approach would allow South African judges, by way of an approach not dissimilar to that used in India, to interpret and apply the South African Constitution in a manner which ensures that the document grows to meet the numerous challenges facing South African society. This may be the ultimate test for the Constitution to face – its effectiveness in facilitating a change in the plight of the poor and the marginalised, the oppressed and those in suffering. An over-cautious approach which equates the large number of enumerated rights in South Africa with a need for narrow interpretation could damage the social justice agenda so clearly espoused in the Constitution.

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[72]Botha (n 45) 145.

[73]See (n 70). It has been argued that the judiciary has to ensure that the state meets its positive obligations with regard to the social advancement of the community and that, in the modern state, preventing people from enjoying opportunities and benefits may be a more serious infringement of fundamental rights than governmental abuse of power. A bill of rights, in other words, is not only a shield against government intervention, but a positive guide to 'opportunities, services, resources and empowerment': Botha (n 45) 145.

[74]In terms of the preamble the Constitution serves to create a society based on democratic values, social justice and fundamental human rights, as well as to improve the quality of life of all citizens and free the potential of each person.

[75]In *Victoria and Alfred Waterfront v Police Commissioner, W Cape* 2004 4 SA 444 (C) Desai J held that the right to life included the right to livelihood. This generous interpretation was rejected by Gauntlett JA in the Lesotho Court of Appeal in *Baitsokoli v Maseru City Council* [2005] 3 All SA 79 (LesCA) who held that the right to life in the context of the Lesotho Constitution did not extend that far in view of a textual provision of that Constitution securing the opportunity to work as a policy of State principle.