

## THE STATUS AND ROLE OF LEGISLATION IN SOUTH AFRICA AS A CONSTITUTIONAL DEMOCRACY: SOME EXPLORATORY OBSERVATIONS\*

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"When deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the *Constitution* is invalid to the extent of its inconsistency." Thus section 172(1)(a) of the *Constitution* decrees,<sup>1</sup> subjecting<sup>2</sup> "law or conduct", and thereby legislation as well, to a form of constitutional review rigorous and robust by any standard. Section 172(1)(b) admittedly seeks to mitigate potentially overharsh effects of such review, providing that a court "may make any order that is just and equitable".<sup>3</sup> Striking down unconstitutional legislation is therefore not the only, but arguably the default option.

Section 172(1) must be construed mindful of the section 39(2) injunction that "the spirit, purport and objects of the Bill of Rights"<sup>4</sup> are to be promoted. The section 172(1) and 39(2) standards of review also apply to all legislation in force when the Constitution took effect.<sup>5</sup>

*In the face of probably one of the most unequivocal forms of constitutional review in a modern day state, all legislation in South Africa has since 27 April 1994 grown in status (and stature) nonetheless, and has assumed an unprecedented role in our*

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<sup>1</sup> *Constitution of the Republic of South Africa*, 1996. The transitional *Constitution*, ie the *Constitution of the Republic of South Africa Act* 200 of 1993, included a provision in a similar vein and to the same effect, namely s 98(5).

<sup>2</sup> Like s 98(5) of the transitional *Constitution*.

<sup>3</sup> Section 98(5) of the transitional *Constitution* included a similar qualification.

<sup>4</sup> Chapter 2 Constitution of the Republic of South Africa, 1996.

<sup>5</sup> Such legislation is to remain in force until amended, repealed or declared unconstitutional; schedule 6 item 2(1) *Constitution of the Republic of South Africa*, 1996.

*constitutional democracy*.<sup>6</sup> In this note I wish to briefly explore this proposition, beginning with a few prosaic observations about statute law,<sup>7</sup> more or less unconten-  
tious (until 27 April 1994 at least) and helpful in establishing a discursive context.

- Legislation together with judicial precedent and custom are generative sources of South African statute, case and customary law respectively, in other words, means through which legal norms come into force and have effect.
- Some scholars distinguish these "formal sources" from the historical or "material sources" of South African law, the latter denoting the Roman-Dutch and English origins of present-day legal norms and principles. Law deriving from these historical sources, augmented by and developed through case and, to a lesser extent, customary law, constitutes (the) South African common law.
- Statute law is indispensable for the regulation of the modern state, but whether it is a prime source of origin of South African law has been contentious, due to a curious tension between statute law and common law that existed under parliamentary sovereignty. Courts, deferring to parliament as sovereign law-maker, endeavoured to give meticulous effect to the intention of the supreme legislature, often treating long established precepts of the common law with disdain in order to give optimum effect to apartheid laws. In areas (rightly or wrongly) regarded as "politically non-controversial", statute law was, however, also treated as an exception to the common law and the former was construed restrictively *vis-à-vis* precepts and principles of the latter. This state of affairs has, however, been changing since the advent of constitutional democracy. But even in instances where legislation has been held to trump the common law, the interpretive paradox that common-law canons of construction are relied on to interpret such legislation, has by and large remained, though, generally speaking, constitutionally informed canons of con-

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<sup>6</sup> Constitutional review is, of course, only possible by virtue of the supremacy of the *Constitution* proclaimed in s 2. The *Constitution* is not self-executing and s 2 merely creates the potential of unconstitutionality. Only intervention by a competent court or organ of state can result the amendment, repeal or striking-down of legislation.

<sup>7</sup> These remarks are mainly drawn from Du Plessis "Statute Law and Interpretation" paras 278-279.

struction (like, for example, section 39(2)) have become increasingly significant.

- Finally statutes have binding force because their authors or "makers" are invested with law-making authority (directly<sup>8</sup> or ultimately<sup>9</sup> derived from the supreme *Constitution*). Statutes are therefore construed to be valid and of effect rather than invalid and of no effect.

I briefly want to deal with three features of our system of constitutional review that have not only preserved, but have in actual fact also enhanced the status and stature of legislation and have assigned to it an unprecedented role as a source of law in our constitutional democracy. These factors are, first, the court's exercise of constitutional review with restraint; second, the fact that statutes of a certain kind have become crucial allies of the Constitution, and, third, the enhancement of quality popular participation in legislative deliberation.

## 1 Constitutional review and judicial self-restraint

Certain reading strategies and remedial measures have been designed to help ensure that the constitutional review of legislation proceeds with circumspection. Interpretation in conformity with the *Constitution* - sometimes also referred to as "the presumption of constitutionality"<sup>10</sup> - is an example of a reading strategy in this category. A *prima facie* unconstitutional (and by that token potentially impugnable) provision is to survive constitutional scrutiny if it can - through the adaption of its language, if so required - be read to be constitutional without distorting it or straining its "plain meaning".<sup>11</sup> Such a reading can be either narrower or more restrictive than other possible

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<sup>8</sup> In the case of original legislation.

<sup>9</sup> In the case of delegated legislation.

<sup>10</sup> Devenish *Interpretation of Statutes* 210-212; De Ville *Constitutional and Statutory Interpretation* 223-225.

<sup>11</sup> *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 2000 1 BCLR 39 (CC); 2000 2 SA 1 (CC) para 23; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: in re Hyundai Motor Distributors (Pty) Ltd v Smit* 2000 10 BCLR 1079 (CC); 2001 1 SA 545 (CC) paras 24-26. See also *Laugh it Off Promotions CC v SAB International (Finance) BV t/a Sabmark International* 2005 8 BCLR 743 (CC); 2006 1 SA 144 (CC); *Du Toit v Minister of Transport* 2005 11 BCLR 1053 (CC); 2006 1 SA 297 (CC) para 29; *National Director of Public Prosecutions v Mohamed* 2002 9 BCLR 970 (CC); 2002 2 SACR 196 (CC) para

readings, in other words, a *reading-down*, or a more extensive reading (or one eliminating ambiguity), that is, a "reading-up".<sup>12</sup>

*Severance* and *reading-in* are judicially more activist remedial measures that can be taken either to restrict or to extend the scope of a statutory provision to rescue it from invalidity on constitutional grounds. Through severance that which is unconstitutional in an impugned legislative text (literally: words and phrases) are cut off from the rest of the text, and struck down, in order to preserve the constitutionally valid remainder of the text.<sup>13</sup> Reading-in, on the other hand, refers to the insertion of words into an impugned legislative text in order to render it constitutional, and thereby avert a declaration of invalidity.<sup>14</sup> Severance and reading-in are *constitutional remedies* - as opposed to *reading strategies* - commensurate with section 172(1)(b) of the *Constitution* which allows for "any order that is just and equitable" as an outcome of constitutional adjudication. Severance or reading-in can be ordered on the strength of this provision.

## 2 Statutes as allies of the *Constitution*

A growing body of *subsidiary constitutional legislation*, designed to amplify and give more concrete effect to key provisions of the *Constitution* and the Bill of Rights, has seen the light since 1994. In many (but not all) cases, the *Constitution* explicitly anticipates, authorises and indeed requires the enactment of subsidiary statute law.

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33; *Affordable Medicines Trust v Minister of Health* 2005 6 BCLR 529 (CC); 2006 3 SA 247 (CC) para 36 n 31 where Ngcobo J observed that "it is by now axiomatic that, where possible, legislation ought to be construed in a manner that is consistent with the Constitution". Note, however, the following caveat in *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2007 11 BCLR 1230 (SCA) para 7 per Combrinck JA: "The Constitution does not permit a court to strain the meaning of a statutory provision under its guise particularly when there is more than one constitutional value involved."

<sup>12</sup> Currie and De Waal *Bill of Rights Handbook* 66; *Daniels v Campbell* 2004 7 BCLR 735 (CC); 2004 5 SA 331 (CC).

<sup>13</sup> *Coetzee v Government of the RSA, Matiso v Commanding Officer, Port Elizabeth Prison* 1995 10 BCLR 1382 (CC); 1995 4 SA 631 (CC) para 16; *Case v Minister of Safety & Security, Curtis v Minister of Safety & Security* 1996 5 BCLR 609 (CC); 1996 3 SA 617 (CC) para 1.

<sup>14</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC); 1999 1 SA 6 (CC); *Satchwell v President of the Republic of South Africa* 2002 9 BCLR 986 (CC); 2002 6 SA 1 (CC); *Daniels v Campbell* 2004 7 BCLR 735 (CC); 2004 5 SA 331 (CC); *Niemand v S* 2002 3 BCLR 219 (CC); 2002 1 SA 21 (CC).

Section 9(4), for instance, obliges the national legislature to enact legislation "to prevent or prohibit unfair discrimination" while section 33(3), also in a mandatory manner, enjoins the national legislature to enact legislation to give specific effect to rights and procedures associated with just administrative action. The *Promotion of Equality and Prevention of Unfair Discrimination Act*<sup>15</sup> (PEPUDA) and the *Promotion of Administrative Justice Act*<sup>16</sup> (PAJA) were enacted to comply with the constitutional obligations in sections 9(4) and 33(3) respectively.

The *Labour Relations Act*<sup>17</sup> (LRA) was enacted "to give effect to and regulate the fundamental rights conferred by section 27" of the interim *Constitution*, but section 27 neither explicitly required nor envisaged legislation amplifying and giving more concrete effect to it. Sections 23(5) and (6) of the 1996 *Constitution* do, however, envisage and authorise, in a permissive vein, legislation to regulate collective bargaining and recognise union security arrangements contained in collective agreements.

A comparison of the PEPUDA, PAJA and LRA examples above shows that subsidiary constitutional legislation can be enacted pursuant to a constitutional obligation or a permissive constitutional authorisation or even of the national legislature's (and arguably any other legislature's) own accord. There is a special relationship between the Constitution and this kind of legislation with consequences for the interpretation and application of both, irrespective of whether the subsidiary legislation was passed pursuant to an obligatory or permissive constitutional authorisation or of a legislature's own accord.

First, a litigant taking action because of an alleged infringement of a constitutional right (or rights) to which a subsidiary statute gives more concrete effect, cannot cir-

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<sup>15</sup> *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000.

<sup>16</sup> *Promotion of Administrative Justice Act* 3 of 2000. This act is closely associated with the *Promotion of Access to Information Act* 2 of 2000 (PAIA) which was also enacted as an "ally to the Constitution" to give effect to the right of access to information entrenched in s 32(1) of the *Constitution*.

<sup>17</sup> *Labour Relations Act* 66 of 1995.

cumvent the statute "by attempting to rely directly on the constitutional right".<sup>18</sup> This is a straightforward instance of what I call *adjudicative subsidiarity*, commensurate with the following dictum of Kentridge AJ in *S v Mhlungu*:<sup>19</sup> "I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

Second, the provisions of a subsidiary constitutional statute must, like any other statute, be construed to promote the spirit, purport and objects of both the Bill of Rights, and the specific constitutional provision(s) to which more concrete effect is given. The said provisions may also not be allowed to decrease the protection that a constitutional right affords or to infringe any other constitutional right.<sup>20</sup>

A subsidiary constitutional statute may, in the third place, "extend protection beyond what is conferred by" the constitutional provisions to which it is subsidiary.<sup>21</sup>

From the discussion above it is abundantly clear that subsidiary constitutional legislation enjoys a considerable status and has a very special role to play in the fulfilment of crucial constitutional objectives. It is therefore an indispensable ally of the *Constitution*.

### 3 Popular participation in legislative deliberation

Since *Middelburg Municipality v Gertzen*<sup>22</sup> it has been readily accepted that the status of legislation is largely determined by the degree to which its adoption resulted from deliberation. Because provincial councils were deliberative law-makers provincial ordinances enacted between 31 May 1910 and 1 July 1986, though always sub-

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<sup>18</sup> *MEC for Education: KwaZulu Natal v Pillay* 2008 2 BCLR 99 (CC); 2008 1 SA 474 (CC). Cf also *South African National Defence Union v Minister of Defence* 2007 8 BCLR 863 (CC); 2007 5 SA 400 (CC) para 51.

<sup>19</sup> *S v Mhlungu* 1995 7 BCLR 793 (CC); 1995 3 SA 867 (CC) para 59.

<sup>20</sup> *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 10 BCLR 1027 (CC); 2007 6 SA 199 (CC) para 53 per Moseneke DCJ.

<sup>21</sup> *MEC for Education: KwaZulu Natal v Pillay* 2008 2 BCLR 99 (CC); 2008 1 SA 474 (CC) para 43.

<sup>22</sup> *Middelburg Municipality v Gertzen* 1914 AD 544.

ordinate to parliamentary legislation, were, for example, by virtue of the *Gertzen* judgment, *original* - as opposed to delegated - legislation. Laws democratically made thus command appropriate respect, and it is significant that the Constitutional Court has understood both the transitional and the final constitutions to invest municipal councils, who were delegated legislatures before 27 April 1994, with an original legislative competence.<sup>23</sup>

The *Constitution* requires, in addition to "conventional" forms of deliberation accompanying the adoption of parliamentary legislation, the National Assembly to facilitate public involvement in the legislative and other processes of the Assembly and its committees.<sup>24</sup> The National Council of Provinces<sup>25</sup> and provincial legislatures<sup>26</sup> are under a similar (what has been held to be) *constitutional obligation*. The Constitutional Court has required meticulous compliance with these exigencies of participatory democracy, and has looked on non- or insufficient compliance as the legislative breach of a constitutional obligation.<sup>27</sup> Section 4 of PAJA, in a similar way, provides for public participation in the making of delegated legislation.<sup>28</sup> Duly putting any legislation in the process of adoption through its paces of public participation, greatly enhances its eventual status and stature as a source of law.

#### 4 In conclusion

"Statutory interpretation is the Cinderella of legal scholarship." What William Eskridge<sup>29</sup> here says about the interpretation of statutes as a legal discipline is also a

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<sup>23</sup> *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 12 BCLR 1458 (CC); 1999 1 SA 374 (CC) para 41.

<sup>24</sup> Section 59(1)(a) *Constitution of the Republic of South Africa*, 1996.

<sup>25</sup> Section 72(1) *Constitution of the Republic of South Africa*, 1996.

<sup>26</sup> Section 118(1) *Constitution of the Republic of South Africa*, 1996.

<sup>27</sup> Cf eg *Matatiele Municipality v President of the Republic of South Africa (1)* 2006 5 BCLR 622 (CC); 2006 5 SA 47 (CC); *Doctors for Life v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC); 2006 6 SA 416 (CC); *Matatiele Municipality v President of the Republic of South Africa (2)* 2007 1 BCLR 47 (CC). Cf also *King v Attorneys Fidelity Fund Board of Control* 2006 4 BCLR 462 (SCA); 2006 1 SA 474 (SCA).

<sup>28</sup> Hoexter *Administrative Law* 81-83.

<sup>29</sup> Eskridge *Dynamic Statutory Interpretation* Press 1.

reflection of the status of statute law itself, for as Jeremy Waldron<sup>30</sup> reminds us: "Legislation and legislatures have a bad name in legal and political philosophy, a name sufficiently disreputable to cast doubt on their credentials as respectable sources of law." Eskridge, however, also sees light for the Cinderella discipline: "Once scorned and neglected, confined to the kitchen, it now dances in the ball-room."<sup>31</sup> And legislation then?

Just imagine that legislation herself was the Cinderella in Eskridge's story, then we here in South Africa might, from bitter experience, warn: "Watch her! Tame her - lest she grows up to become an angry and vengeful Amazon!" We have seen a form of social engineering in this country - *Apartheid* was its name - which would have been impossible without...legislation! And now we are rebuilding our country and transforming our society and its institutions, and in the course of it all legislation is coming strongly to the fore! So what are we heading for? A post-apartheid Amazon?

I trust not. The Amazon of Apartheid grew under and drew her strength from the sovereignty of a biased minority parliament. Present day legislation is heading for its heyday, but under the discipline, guidance and authority of a supreme *Constitution*. I would suggest that all of us working with legislation should carry this message further, and canvass its implications. I trust that this note has planted but a tiny seedling to this effect.

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<sup>30</sup> Waldron *Dignity of Legislation* 1.  
<sup>31</sup> Waldron *Dignity of Legislation* 1.

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**THE STATUS AND ROLE OF LEGISLATION IN SOUTH AFRICA AS A CONSTITUTIONAL DEMOCRACY: SOME EXPLORATORY OBSERVATIONS****L du Plessis<sup>\*</sup>****SUMMARY**

This note explores the proposition that in the face of probably one of the most unequivocal forms of constitutional review in a modern day state, legislation in South Africa has since 27 April 1994 grown in status (and stature) nonetheless, and has assumed an unprecedented role in our constitutional democracy. First, it is shown how constitutional review with the necessary judicial self-restraint has instilled respect for legislation in the context of and with reference to the separation of powers. Second, it is shown that and how statutes have become (subsidiary) allies to the Constitution and have been standing the realisation of constitutional values in good stead. Finally, it is argued that the constitutional requirement of popular participation in legislative deliberation has also added to the esteem for legislation in our constitutional democracy.

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