Judicial Remedies

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9.1 INTRODUCTION

In the midst of the 1950s crisis over the removal of coloureds from the voting roll, Centlivres CJ reminded South African lawyers of the importance of the question of remedies.¹

'There can to my mind be no doubt that the authors of the Constitution intended that those rights (that is, the rights entrenched in the Constitution) should be enforceable by the Courts of law. They could never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. *Ubi jus, ibi remedium.*

Remedies can take different forms: legislative, executive, judicial, even private or self-help remedies. Significantly, the interim and final Constitutions created an impressive range of remedial agencies with Constitutional status such as the Human Rights Commission, the Public Protector, and others. The practice of these agencies will contribute significantly to the range and content of available remedies.

None the less, the legal profession, like Centlivres CJ, has tended to focus on judicial remedies and this chapter will do so as well. Several initial sections cover the textual sources of constitutional judicial remedies, the range of available remedies, and how courts should choose among the range of remedies. The next section treats the effect of a declaration of invalidity. Two further sections address the important issues of who may invoke constitutional remedies and what bodies may grant them. A final section briefly examines the existence of the courts’ non-constitutional remedies.

Several important remedies topics are not covered. The withholding of remedies (for reasons of ripeness, mootness, lack of concrete issues, etc) relates to the issue of justiciability.² Further, the remedy of exclusion of evidence relates to issues of criminal procedure.³

9.2 REMEDIES IN THE CONSTITUTION

The textual source of the remedial power of a court is not often articulated and usually simply assumed. None the less, different textual sources may mean different remedies and the issue is worth examining briefly. The interim and final Constitutions have both primary and secondary remedy clauses. The secondary clauses serve both to reserve part of the remedial powers granted by the primary clauses to the courts and to grant to the courts the discretion to implement that relief.

¹ Minister of the Interior & another v Harris & others 1952 (4) SA 769 (A) at 780. For an introduction to remedial jurisprudence in a constitutional context, see K Cooper-Stephenson ‘Principle and Pragmatism in the Law of Remedies’ in J Berryman (ed) Remedies: Issues and Perspectives (1991) 1–48. See also F Michelman ‘A Constitutional Conversation with Frank Michelman’ (1995) 11 SAJHR 477 at 481 (noting the American failure to distinguish between analytical jurisprudence and political argument and arguing that such a conflation contributes to a too tight identification of rights and remedies). Kriegler J has noted that the interaction between the right and the remedy is not entirely one-way in Sanderson v Attorney-General, Eastern Cape 1997 (12) BCLR 1675 (CC) at para 27 (‘Our flexibility in providing remedies may affect our understanding of the right.’).

² See above, Loots ‘Access to the Courts and Justiciability’ ch 8.

³ See below, Trengove ‘Evidence’ § 26.4 and Le Roux ‘Criminal Procedure’ § 27.3(f).
(a) Primary remedy clauses

In the interim and final Constitutions there are two primary remedy clauses: a supremacy clause and a fundamental rights remedy clause.¹ The supremacy clause in the interim Constitution, s 4(1), stated the following:

‘This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.’

The supremacy clause in the final Constitution, s 2, provides:

‘This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.’

As an indication of its importance, the supremacy clause is one of the first few provisions of the Constitution.

The fundamental rights remedy clause, the other primary remedy clause, is located within the Bill of Rights.

²The supremacy clause in the interim Constitution s 7(4)(a) provided:

‘When the infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.’

Similar wording is contained in the final Constitution’s s 38, entitled ‘Enforcement of Rights’:

‘Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights . . .:’

The final Constitution also makes a significant innovation in recognizing the importance of non-judicial remedies in including s 7(2), which provides:

‘The state must respect, protect, promote and fulfil the rights in the Bill of Rights.’

This wording draws from international human rights instruments.

¹ In structure and wording these primary remedy clauses are somewhat parallel to the supremacy clause (s 52(1)) and the fundamental rights remedy clause (s 24(1)) in the Canadian Constitution.

² An implied remedy power, either general or specific, could also be found within the constitutional texts. For instance, one could read a remedy power from the existence of non-Bill of Rights rights such as IC s 3 and FC s 3(2). Also, supplemental remedial power is certainly implied by FC s 9(2) and possibly by IC s 28. See below, Chaskalson & Lewis ‘Property’ s 31.8.

³ The reference to ‘appropriate relief’ in the fundamental rights remedy clause grants the courts the flexibility to create new remedies necessary for the enforcement of the Bill of Rights. See Fose v Minister of Safety and Security 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) at para 95, where Ackermann J stated the following:

‘Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.’

See also City Council of Pretoria v Walker 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at paras 90–7; Gerber v Voorsitter: Komitee Oor Amnestie van die Kommisie vir Waarheid en Versoening 1998 (2) SA 559 (T) at S60E–571G.

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It is an open question as to whether the supremacy clause and the fundamental rights remedy clause constitute a unified or divided source of remedial power. In Canada a relatively strong distinction is made between the use of the supremacy clause and the fundamental rights remedy clause. According to the understanding there, the supremacy clause should be invoked where a law is itself held unconstitutional and struck down to the extent of the inconsistency. However, where the law is constitutional, but the action taken under it is unconstitutional, the fundamental rights remedy clause provides the appropriate remedy.1 The latter situation occurs where the statute supports a constitutional and an

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unconstitutional interpretation and an action is taken pursuant to the unconstitutional interpretation.\(^1\) While the law itself does not need to be struck down but merely interpreted in conformity with the Constitution, the individual does need to have her situation remedied. According to the Canadian understanding, it will be the rare case where an individual remedy is available along with a supremacy clause remedy. Where invalidity is ordered, it is unlikely that a court would order an individual fundamental rights remedy as well.\(^2\) The practical import of this is that affirmative remedies are not ordered when only the supremacy clause is applicable.

The Canadian distinction between the two primary remedy clauses seems to be the historical product of the introduction of a written Constitution in Canada well before the addition of a bill of rights to that Constitution. South Africa does not share this feature of constitutional history\(^3\) and it is submitted that South African courts should not follow the Canadian approach to the two primary remedy clauses. Even under a scheme of co-operative government there will be a need for individual and affirmative remedies such as declarations, damages, mandatory interdicts and structural interdicts in constitutional cases that are not decided on the basis of fundamental rights. This category of non-bill of rights constitutional challenges consists largely of matters of governmental structure and the division of legislative competence between the provinces and the central government. While it would be possible to find a right at issue in cases that initially appear not to present a bill of rights question, it is submitted that the supremacy clause itself — referring, as it does, to the need for obligations imposed by the Constitution to be fulfilled — is interpretable as encompassing any remedy available in terms of the fundamental rights remedy clause. In the final Constitution s 172 itself makes no distinction between these two source of primary remedial power.

\((b)\) Secondary remedy clauses

Beyond the primary remedy clauses there are other clauses in the interim and final Constitutions dealing expressly with remedial issues. In the interim Constitution in particular these secondary clauses were more specific in formulation and effect. Some of them were the following: s 98(5) (declarations of invalidity), s 98(6) (effect of declaration of invalidity), s 98(7) (orders to correct administrative or executive acts), s 98(8) (orders for costs), and s 98(9) (advisory jurisdiction). These sections applied to the Constitutional Court and, by virtue of IC s 101(4), to the provincial and local divisions of the Supreme Court. In the final Constitution these specific clauses have been replaced by a single secondary clause, FC s 172(1). Section 172(1) provides:

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1 This is akin to a situation well known in administrative law when delegated legislation is not itself unreasonable, but action taken in terms of the delegated legislation is unreasonable. See Baxter *Administrative Law* 524–5; *Natal Newspapers v State President* 1986 (4) SA 1109 (N) at 1122B.


3 Indeed, the constitutional history here would point in the other direction in that both individual and declaratory remedies had the same source, the Supreme Court’s inherent jurisdiction. See Baxter *Administrative Law* 524.
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 the 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.

What is the relationship between these secondary clauses and the two primary remedy clauses, the supremacy clause and the fundamental rights remedy clause? One interpretation suggests that an inquiry into the remedial powers of the courts can begin with these secondary clauses as sources of power for the courts independent of the supremacy and the fundamental rights remedy clauses. However, the better interpretation is rather that the secondary clauses serve to channel some of the remedial power granted in the primary clauses to specific institutions. In other words, the secondary clauses identify which organs of state may exercise particular elements of the general constitutional remedial power which finds its sources in the primary clauses.

In the interim Constitution s 98(5) thus restricted to the Constitutional Court and to the Supreme Court one feature of the supremacy clause remedy, namely the power to declare laws to be unconstitutional. That power is similarly restricted to those institutions by the operation of FC s 167(5). The reading of these secondary clauses to limit the otherwise generally available power of the supremacy clause is further supported by the careful demarcation of subject-matter jurisdiction in IC s 98(3) between the provincial and local divisions of the Supreme Court and the Constitutional Court. Such a demarcation attempted to delineate exactly in which circumstances the powerful remedy of striking down laws may be employed. Perhaps because of this method, the section’s attempt to reserve this power to the Supreme and Constitutional Courts was never fully successful. In the final Constitution the demarcation of the power of declaratory invalidity between the various courts is done explicitly as a matter of remedial power in s 172(2).

1 See Ferreira v Levin NO & others 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 161. That s 98(5) was concerned with the power of declaratory invalidity is supported by s 98(6)’s subsequent concern with the effect of the declaration of invalidity. For the different solution chosen in Germany, see D Davis, M Chaskalson & J de Waal ‘The Role of Constitutional Interpretation’ in Van Wyk, De Villiers, Dugard & Davis (eds) Rights and Constitutionalism (1994) 76n431 (while the separate treatment of constitutional and ordinary legal issues is the hallmark of a Constitutional Court system, this separate treatment should not be exaggerated).

Other questions beyond the scope of this chapter arise in relation to this power. Is there greater scope for an argument of following a sister court’s judgment (as, for instance, in another province) in constitutional matters than there has been heretofore in South African jurisprudence? See Shabalala v Attorney-General, Transvaal; Gumede v Attorney-General, Transvaal 1995 (1) SA 608 (T) (settled law that a court can depart from the previous decisions of a court of equivalent status in the same area of jurisdiction only where it is satisfied that the previous decision is ‘clearly wrong’ should also apply to constitutional interpretation). Will a non-Constitutional Court but judicial ruling of invalidity, say by a provincial or local division of the High Court, be followed by other organs of state in the legislature and the executive?

2 The Constitutional Court has employed subject-matter jurisdiction reasoning in considering which courts had the power to declare Acts of Parliament generally invalid in terms of the Constitution. In Zantsi v Council of State, Ciskei 1995 (4) SA 615 (CC), 1995 (10) BCLR 1424 (CC) the court held that only the Constitutional Court (and not provincial and local divisions of the Supreme Court) had such a power. The court’s reasoning depended upon the division of subject-matter jurisdiction effected by s 98(2)(c) read with s 101(3)(c). The court decided at para 38 that ‘the subject-matter of s 98(3)(c) [sic]’ included Acts of Parliament, whereas s 101(3)(c) did not. (The report in the South African Law Reports reads ‘the subject-matter of s 98(3)(c)’, but this must be a typographical error since no s 98(3)(c) exists and s 98(2)(c) was clearly intended.)

3 See also Constitutional Court Complementary Act 13 of 1995 s 8.
The secondary clauses also serve as the textual source for the courts’ powers to determine aspects of their orders such as costs and retrospectivity. In these respects the final Constitution in s 172(1) grants to the courts full discretion over matters that the interim Constitution attempted to regulate in s 98(6) and elsewhere.

Some general principles in construing s 172(1) may lie in Minister of Justice v Ntuli.\(^1\) Subsections (a) and (b) were read together rather than disjunctively in that case.\(^2\) Moreover, similar considerations were said to be at work whether an application was dealt with under s 172(1) or under s 173, which gives the Constitutional Court the inherent power to regulate its own process and develop the common law, indicating that common-law remedial principles retain significance.\(^3\)

9.3 THE RANGE OF CONSTITUTIONAL REMEDIES AVAILABLE

In comparative constitutional jurisprudence\(^4\) supremacy clause remedies usually take several forms: (a) reading down, (b) invalidity/ non-application, (c) severance, (d) reading in, and (e) temporary validity. In a sense these are all variations on the basic remedy of invalidity and may be seen as defensive remedies. Fundamental rights remedies include these, but also provide some affirmative remedies: (f) declaration of rights, (g) declaration of general invalidity, (h) damages, and (i) temporary, final, and structural interdicts.

(a) Reading down

Where a statute will bear two interpretations, reading the statute in line with the interpretation that does not offend the Constitution is the appropriate remedy. The Canadian term of art used for this remedy is ‘reading down’; in Germany it is ‘interpretation in conformity’. Interpreting the statute in this way will avoid a breach of the Constitution and is based on the doctrine of judicial restraint.

In Nel v Le Roux NO & others\(^5\) the Constitutional Court held that the provisions of s 205 of the Criminal Procedure Act 51 of 1977 properly construed — so that, for instance, ‘a just excuse’ in s 189(1) of the Act was interpreted with due regard to the spirit, purport and objects of the bill of rights — were not inconsistent with the Constitution.\(^6\)

The limits of reading down were demonstrated in S v Bhulwana,\(^7\) a case involving a statutory provision of the Drugs and Drug Trafficking Act 140 of 1992. O’Regan J held

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\(^1\) Minister of Justice v Ntuli 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC).
\(^2\) At para 25.
\(^3\) At para 31.
\(^5\) 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC).
\(^6\) The court has also engaged in reading down in Bernstein v Bester & others NNO 1996 (2) SA 621 (CC), 1996 (4) BCLR 449 (CC); Prinsloo v Van der Linde 1997 (3) SA 1012 (CC) at paras 10–13, 48.
\(^7\) 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC), 1995 (2) SACR 748 (CC) at paras 25–9. See also Mistry v Interim National Medical and Dental Council & others 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC) at paras 24–5; Premier of Province of the Western Cape v President of the RSA & others 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC) at paras 95–6.
that the words ‘until the contrary is proved’ were not ‘reasonably capable’ of meaning ‘unless the evidence raises a reasonable doubt’ in view of the unambiguous language and the considerable and consistent judicial dicta interpreting that phrase.\(^1\) Bhulwana thus also indicates that judicial interpretations — at least where ‘considerable and consistent’ — as well as statutory language must be considered in assessing the remedy of reading down.\(^2\)

(b) Invalidity/non-application

Within its jurisdiction a court or tribunal finding a law or conduct inconsistent with the Constitution is obliged to apply the supremacy clause and ignore the law or act to the extent of the inconsistency. Importantly, this obligation includes administrative bodies.\(^3\) The litigation at issue is then concluded as if the law or act did not exist. This remedy of non-application should be distinguished from the remedy of a declaration of general invalidity. Here there is no power to declare the law generally invalid; rather the law or conduct is simply not applied in the particular case.

Under the FC s 170, courts of a status lower than a High Court ‘may not enquire into or rule on the constitutionality of any legislation or any conduct of the President’.\(^4\) By its prohibition of enquiry into such subject-matter this section precludes these courts from applying the remedy of non-application when considering provincial or national legislation. This remedy can, however, be applied by such courts when considering official conduct below the level of the President.

(c) Severance

When courts find a provision of a law inconsistent with the Constitution one appropriate remedy may be to sever the inconsistent provision from the rest of the legislation. One example would be a statute that unconstitutionally barred persons over 65 from receiving unemployment insurance benefits as an exception to an otherwise general rule of entitlement. Excising the offending words, a court could extend benefits to those persons unconstitutionally denied them.\(^5\) The Constitutional Court first exercised this remedy of severance in Coetzee v Government of the Republic of South Africa,\(^6\) where it excised sections of the

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\(^1\) S v Bhulwana at para 29. The ‘reasonably capable’ test came from IC s 35(2) and s 232(3).

\(^2\) Because of the absence of settled judicial interpretations of their terms, ‘plain language’ statutes lend themselves to reading down. See, for example, Carephone (Pty) Ltd v Marcus NO & others 1999 (3) SA 304 (LAC), 1998 (10) BCLR 1326 (LAC) at paras 25–8, where Froneman DJP read down ss 145 and 158(1)(g) of the Labour Relations Act 66 of 1995 to avoid any inconsistency between their compulsory arbitration provisions and FC s 34, which guarantees access to court.

\(^3\) See below, § 9.8(b).

\(^4\) The identification of courts with status equivalent to the High Court is treated above, Loots & Marcus ‘Jurisdiction’ ch 6.


\(^6\) 1995 (4) SA 631 (CC), 1995 (10) BCLR 861 (CC).
Magistrates’ Courts Act\(^1\) which provided for the imprisonment of judgment debtors. Since \textit{Coetzee} there have been several cases in which an order of severance has been made.\(^2\)

The courts are not confined to a ‘blue pencil’ test of severance. IC s 98(5) and FC s 172(1)(a) oblige a court confronted with an unconstitutional law or provision to declare it invalid ‘to the extent of its inconsistency’ with the Constitution. The Constitutional Court held in \textit{Ferreira v Levin}\(^3\) that this wording could accommodate ‘notional severance’\(^4\) in cases where the problem of unconstitutionality in the statute could not be cured merely by the excision of certain offending words. Notional severance remains a remedy of last resort, however:

“The omission of words or phrases from a legislative provision leaves it with clear language subject to the ordinary rules of interpretation. Notional severance leaves the language of the provision intact but subjects it to a condition for proper application. At times, such an order is appropriate in order to achieve a constitutional result. It should, however, not be preferred to an order of actual severance where such is linguistically competent.”\(^5\)

The choice of whether to order severance or another remedy is discussed below, § 9.4(c).

\((d)\) \textit{Reading in}\(^6\)

A court may also order a remedy akin to severance by reading in statutory provisions that the legislature has not included. ‘Reading in’ thus means adding words to the legislation in

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1. Act 32 of 1944.
2. See, for example, \textit{National Coalition for Gay and Lesbian Equality v Minister of Justice} 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC); \textit{South African National Defence Union v Minister of Defence} 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC); \textit{Case & another v Minister of Safety and Security} 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC), 1996 (1) SACR 587 (CC).
4. An order of notional severance is one which merely declares the ambit of the unconstitutionality and invalidity of the statute, as opposed to one which actually severs words from the statute. See, for example, the order in \textit{Ferreira v Levin NO & others} 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC), which is reproduced in the footnotes to § 9.3(d) below.
6. For a discussion of the principles applicable to reading in see the judgment of Davis J in \textit{National Coalition for Gay and Lesbian Equality v Minister of Home Affairs} 1999 (3) SA 173 (C) at 188B–189H, 1999 (3) BCLR 280 (C). Related to severance/reading in in Canada is the sometimes argued-for remedy of constitutional exemption. This doctrine states that courts can declare laws unconstitutional in their application to certain individuals or groups. In essence, the granting of a constitutional exemption (for instance in the application of a Sunday closing law to non-Sunday Sabbath observers) grants a judicial discretion in the application of a law. While there are dicta that such a remedy may be available in certain cases, it has not been applied in the Supreme Court of Canada. According to Wilson J in \textit{Osborne v Canada (Treasury Board)} (1991) 82 DLR (4th) 321, [1991] 2 SCR 69, ‘it is not open to the Court to cure over-inclusiveness on a case by case basis leaving the legislation in its pristine over-inclusive form outstanding on the books’. See also \textit{R v Seaboyer} [1991] 2 SCR 577, 83 DLR (4th) 193 (refusing to grant a constitutional exemption because to do so would effectively rewrite the statute by requiring an additional element of judicial discretion). This Canadian line of cases was cited with approval in \textit{Kauesa v Minister of Home Affairs & others} 1996 (4) SA 965 (NmS) at 987H–988A. See also \textit{Prince v President of the Law Society of the Cape of Good Hope & others} 1998 (8) BCLR 976 (C), where the applicant argued that Rastafarians should, on religious grounds, be granted a constitutional exemption from the prohibition in s 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 against the use and possession of cannabis. The court, however, held that the prohibition did not unconstitutionally limit the freedom of religion of Rastafarians. Thus the case did not reach the remedial inquiry.
front of the court.\(^1\) Note that ‘reading in’ is a qualitatively different situation from that of ‘reading down’, where a plausible interpretation in conformity with the Constitution is available. Here no such interpretation is possible.

The Constitutional Court has not as yet expressly adopted the remedy of reading in. However, it has achieved the result of reading in by using a process of notional severance. In this way words are effectively read into a statute through a declaration of the particular extent of its unconstitutionality. For example, in *Ferreira v Levin*\(^2\) the court declared the provisions of s 417(2)(b) of the Companies Act\(^3\) to be invalid, to the extent that they permitted the answers of an examinee in a s 417 inquiry to be used in evidence in criminal proceedings against that examinee.\(^4\)

\(\text{(e) Temporary validity}\)

The interim Constitution expressly recognized the discretionary power of a court to order the temporary validity of otherwise unconstitutional laws as a proviso in s 98(5) ‘in the interests of justice and good government’. The same remedy is available in the final Constitution in terms of s 172(1)(b)(ii), which provides that a court ‘may make any order that is just and equitable including . . . an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect’.

In *Executive Council, Western Cape Legislature, & others v President of the Republic of South Africa & others*\(^5\) the Constitutional Court invoked s 98(5) of the interim Constitution to sustain certain amendments to the Local Government Transition Act 209 of 1993.\(^6\) This was a clear case for the application of temporary validity because the interests of good government were overwhelmingly in favour of temporary validity. Parliament was given an opportunity to correct the constitutional defect. Had temporary validity not been invoked, the first nationwide democratic local government elections would have had to be postponed for a lengthy period.

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1. For instance, a court may find that a non-discrimination statute is unconstitutional because it does not list sexual orientation as one of its prohibited grounds of discrimination. To remedy this unconstitutionality a court could read the ground of sexual orientation into the legislation. See *Miron v Trudel* (1995) 124 DLR (4th) 693, 29 CRR (2d) 189; *Haig v Canada* (1992) 9 OR (3d) 495 (CA).
3. Act 61 of 1973. Section 417 deals with winding-up inquiries into companies unable to pay their debts.
4. The order stated the following:
   ‘The provisions of section 417(2)(b) of the Companies Act 1973 are, with immediate effect declared invalid, to the extent only that the words
   “and any answer given to any such question may thereafter be used in evidence against him”
   in section 417(2)(b) apply to the use of any such answer against the person who gave such answer, in criminal proceedings against such person, other than proceedings where that person stands trial on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement in connection with such questions and answers or a failure to answer lawful questions fully and satisfactorily.’
5. 1995 (4) SA 877 (CC).
(f) Declaration of rights

An affirmative remedy is a declaration of rights. By declaring the shape and content of the fundamental rights at issue — although not enforcing them directly in terms of any order — a court may employ a remedy that in a sense goes beyond the usual defensive remedy of refusing to apply an unconstitutional law. A declaration of rights purports merely to clarify but not to alter the pre-existing legal position. A declaration of rights may assist a competent authority in discerning or remedying a constitutional issue and may also be a prelude to an interdictory judicial remedy.

For instance, where the provisions of a statute are permissive in extending language rights to a minority, a court may not wish to declare those provisions invalid and rewrite the impugned legislation. Instead a court could choose to declare and set out the minority and language rights at issue, thus providing some remedy to the issue. Likewise, in Louw v Matjila & others the court gave a declaratory order rather than a mandamus, reasoning that the declarator would prophylactically remedy the violation of the constitutional requirement of a local government election by proportional representation.

The remedy of declaration is provided for expressly in both IC s 7(4)(a) and FC s 38.

(g) Declaration of general invalidity

A far stronger affirmative remedy than a declaration of rights, a declaration of general invalidity will alter the pre-existing legal position by judicially declaring an existing law to be invalid. IC s 98(5) and FC s 172(1)(a) specifically state that a court shall declare a statute inconsistent with the Constitution invalid to the extent of the inconsistency. The declaration of invalidity can relate to an entire law or, very narrowly, to the use of a statutory provision in specific circumstances, such as the use in criminal proceedings of evidence gained by means of compulsion under s 417(2)(b) of the Companies Act 61 of 1973.

In J T Publishing (Pty) Ltd v Minister of Safety and Security the Court emphasized that it would not grant declarations where to do so would serve no purpose. The Court based its power not to consider the constitutional issue put before it (in this case, the constitutionality of provisions of an Act that was to be repealed by an enacted Act of Parliament that had yet to commence) on the general rule of judicial prudence against deciding points of law which are merely abstract, academic or hypothetical ones.

2 1995 (11) BCLR 1476 (W); see below, De Waal ‘Political Rights’ § 23.6(a).
3 Ferreira v Levin NO 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 157.
4 1997 (3) SA 514 (CC), 1996 (12) BCLR 1399 (CC).
5 The court raised but did not decide the issue whether such a non-justiciable case would not fall within the bounds of the appropriate relief to be afforded by the courts in terms of IC s 7(4)(a) at para 15. See also Traco Marketing (Pty) Ltd & another v Minister of Finance & another 1998 (6) BCLR 710 (SE) at 724B–E. Of course, where a case deals with a repealed law which was in force at the time that the relevant cause of action arose, a decision on the constitutionality of the law is not abstract or academic and its repeal presents no barrier to a declaration of invalidity. See Baldeo v Minister of Safety and Security 1997 (12) BCLR 1728 (D). For a discussion of issues of justiciability, see above, Loots ‘Access to the Courts and Justiciability’ ch 8.
In terms of s 167(5) of the final Constitution, only the Constitutional Court may make the final decision whether an Act of Parliament, a provincial Act, or any conduct of the President is constitutional. In terms of s 172(2)(a) the Supreme Court of Appeal or a court of High Court status may make an order of invalidity, but such an order has no force unless it is confirmed by the Constitutional Court. However, s 172(2)(b) provides that the court making the order may grant a temporary interdict or other temporary relief to a party.\(^3\)

Under the interim Constitution the Court regarded itself as not having the power to declare a rule of the common law invalid.\(^4\) Where such a rule was inconsistent with the interim Constitution, however, the court issued guidelines for the then Supreme Court to use in developing ‘the details’ of the common law so that the inconsistency is removed.\(^5\) In the final Constitution the power of the Constitutional Court as well as other courts to develop the common law is explicitly provided for in s 173 as well as in s 8(3).

(h) **Damages**

A favourite remedy amongst lawyers and their clients is often money damages. Foreign jurisdictions have granted constitutional damages, mostly for wrongs committed by state officials.\(^6\) While there is no Supreme Court of Canada judgment precisely in point, lower Canadian courts granting affirmative remedies under the fundamental rights remedy clause have included awards of damages.\(^7\) While the form of the action is generally parallel, note that the standards appropriate for awards of damages under the common law may not be appropriate for constitutional damages claims. The South African law of damages, which

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\(^3\) See also Constitutional Court Complementary Act 13 of 1995 s 8.

\(^4\) *Du Plessis & others v De Klerk & another* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC) at paras 52–3.

\(^5\) *Shabalala & others v Attorney-General of Transvaal & others* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC), 1995 (2) SACR 761 (CC) at para 58.

\(^6\) Apparently the farthest-reaching jurisprudence comes from Ireland, where the Constitution has been interpreted to provide a legal basis for damages even between private persons, at least where other remedies prove inadequate. See A Butler ‘Constitutional Rights in Private Litigation: A Critique and Comparative Analysis’ (1993) 22 Anglo-American LR 1. The Supreme Court of India has been reported to grant such a remedy. See *Jain Indian Constitutional Law* 4 ed 599–601 (citing *Rudul Shah v Bihar* AIR 1983 SC 1086). See also *Maharaj v A-G Trinidad and Tobago* [1978] 2 All ER 670 (PC) (affirming money compensation for unconstitutional loss of liberty).

\(^7\) See Pilkington ‘Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms’ (1984) 62 Canadian Bar Review 517. For a post-Schachter case, see *Prete v Ontario (Attorney-General)* (1993) 110 DLR (4th) 94, where a plaintiff was able to circumvent a state statutory prescription period by bringing an action for damages under the Charter.
has focused largely on patrimonial (financial) loss, may thus be shifted considerably. For instance, one constitutional commentator argues that constitutional damages should be based on (1) effectively redressing the wrong suffered by the plaintiff, (2) deterring future constitutional infringements and ensuring future compliance, and (3) recognizing the division of judicial and legislative/executive responsibilities.¹

There are also United States cases that grant such direct ‘constitutional torts’, such as *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics.*² Such actions have been recognized in the context of the Fourth, Fifth, and Eighth Amendments.³ Justice Brennan, writing in *Bivens*, did not limit the plaintiff to an ordinary private-law remedy in delict, but allowed a constitutional damages suit even without authorization by the legislature. To Brennan, the absence of authorization meant that the court should examine whether there were ‘special factors counselling hesitation in the absence of affirmative action by Congress’ and found none.⁴ While legislative intention would clearly be determinative, other ‘special factors’ could include ‘independent status in [the] constitutional system as to suggest that judicially created remedies . . . might be inappropriate.’⁵

The South African law on the topic derives from *Fose v Minister of Safety and Security.*⁶ In this case the plaintiff sued the Minister of Safety and Security for delictual damages as well as for ‘constitutional damages’, including an element of punitive damages. The action arose out of an alleged assault and torture of the plaintiff by unknown members of the South African Police Services in violation, inter alia, of his constitutional rights in terms of ss 10,

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² 403 US 388, 91 SCt 1999 (1971) (damages available directly against federal official violating Fourth Amendment rights of search and seizure); *Davis v Passman* 442 US 228, 99 SCt 2264 (1979) (damages available for illegal gender discrimination in termination of employment by a member of Congress); *Carlson v Green* 446 US 14, 100 SCt 1468 (1980) (damages available for death in prison caused by intentional lack of provision of medical treatment).
³ Note that there is a much larger body of American jurisprudence (judicial, legislative, and administrative) available in the form of American s 1983 litigation. This federal statute (42 USC s 1983) gives private persons a cause of action for constitutional violations committed by state officials.
⁶ 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC). The matter was an appeal from the judgment of Van Schalkwyk J in *Fose v Minister of Safety and Security* 1996 (2) BCLR 232 (W). At 243E–H of his judgment Van Schalkwyk J appeared not to reject the plaintiff’s contention that there was a fundamental difference between the purpose served by an award of delictual damages, namely to resolve a private dispute through compensation, and that served by an award of constitutional damages, namely to redress constitutional violations and regulate government conduct. At 245D the judge accepted that, strictly speaking, the common law does not recognize the delict of torture. Furthermore, Van Schalkwyk J suggested at 246E–F that the enforcement of the Constitution may require constitutional damages, at least in the form of per se damages, for example, where the right to vote is infringed. Nevertheless, and relying on IC s 35(1) and (3), the judge concluded at 246B–C that the common law, properly adapted where needs be, provides ample scope for the remedy sought, including the recovery of punitive damages. In upholding the exception the judge held that there is ‘no scope for a separate action, based on the same facts, for a claim for constitutional damages’. Despite its constitutional holding, affirmed on different reasoning by the Constitutional Court, the lower-court *Fose* decision is thus an important milestone in the development of a common-law remedy, which would include punitive damages, where government misconduct is flagrant or egregious.
11, and 13 of the interim Constitution. The plaintiff’s constitutional claim for damages was based upon IC s 7(4)(a). The defendant excepted to the claim for constitutional damages on the grounds that such a claim does not exist in law and that the payment of damages does not constitute ‘appropriate relief’ as contemplated in s 7(4)(a). The court a quo upheld the exception and the Constitutional Court affirmed that decision, assuming that the common-law compensation to be granted in the court a quo would be adequate for compensatory purposes.

In the course of its judgment the court made a number of important holdings. The Constitutional Court held that no punitive damages were appropriate in this particular case. Moreover, the majority opinion gave approval to a presumption against punitive damages. A similar holding was made in relation to nominal or per se damages. Nominal damages are ruled out where compensation is granted, but the question of their availability where no compensation is granted is left open, but presumed unlikely. Although this case was not successful, the court held that damages can be appropriate relief. Didcott J would have gone further to hold that punitive damages were never available against the state. But Kriegler J, also concurring, felt that a presumption against punitive damages was going too far; his preferred approach was a fact-specific enquiry.

Ackermann J’s judgment for the court depended on three broad categories of reasons to justify its holding. First, it argued against overcompensating, by means of constitutional damages, a plaintiff who was already fully compensated by means of an adequate common-law award of damages. This fear of overcompensation appeared to have particular weight with regard to the resources available to the state and with regard to the present time of transitory reforms. Secondly, it was argued that the function of deterrence would be ineffective. This assertion rested both on the inertia of the police faced with substantial damages awards for assaults and similar delicts and on the ability of the police to regard the damages simply as an operating cost. By comparison, it was argued that interdicts would be more effective as a deterrent. A final rationale, which was not as prominent as the other two, was the desire to leave the field of determining damages for constitutional violations to Parliament.

A litigant seeking to remedy a practice of persistent torture such as that alleged in Fose would clearly be well advised to seek an interdict relief rather than an award of damages based on this judgment. None the less, after Fose, there would appear to three routes to judicially granted constitutional damages.

1 Fose v Minister of Safety and Security 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) at para 70.
2 At para 70.
3 At paras 67–8.
4 At para 60.
5 At para 86 (Didcott J concurring). For Didcott J, they are possibly available against private persons.
6 At para 97 (Kriegler J concurring).
7 A fourth rationale raised by Ackermann J is that of maintaining the distinction between criminal and civil law. The grant of punitive damages would erode that distinction (at para 70).
8 At para 72.
9 At paras 21 and 65.
10 At para 85 (Didcott J concurring).
The first route to judicially granted constitutional damages would be where the common law does not provide an adequate compensatory remedy. One instance where this might occur is where there is a statutory ouster of the court’s common-law jurisdiction, such as by the KwaZulu Natal Code. 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. Fose makes it clear that damages can be an appropriate remedy. Another instance where the common law would not provide adequate compensation is where the Constitution protects an interest which the common law does not recognize. For instance, a court may wish to make an award of damages to protect a child’s right or an environmental right. With these claims 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.

A second route to constitutional damages is the one illuminated but not taken in Fose, the pursuit of an award for punitive damages. The court appeared to view the common law as providing scant support for awards of punitive damages over and above the awards for patrimonial loss, pain and suffering, loss of amenities, contumelious, and other general damages. Still, the crux of the court’s argument against punitive damages was that they would serve no deterrent effect. To accept and carry that reasoning forward, instances where punitive damages would be awarded would be those circumstances where they would be likely to have deterrent effect. One indication of what such cases might consist of comes in Kriegler J’s concurrence, where he emphasized that punitive damages were inappropriate in Fose because the problem (the allegation of a pattern of police torture) was widespread. By extension, cases where the 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.

A third route to judicially granted constitutional damages 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. Such awards would have little monetary value but would serve to vindicate the constitutional rights at issue as for instance in political rights cases.

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

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1 Given its unique jurisdictional position under the interim Constitution, it may also be the case that the Constitutional Court itself in such matters may have no statutory remedy available and no common-law jurisdiction. In such an instance, damages may be appropriate, although a referral to a lower court may also be an alternative.

2 At para 62.

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

4 At para 103 (Kriegler J concurring).

5 At para 68.
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.

(i) Interdicts

(i) Interim interdicts

Faced with a constitutional challenge to a statute, should a court temporarily prevent its enforcement or implementation while the challenge is finally decided? The remedy is clearly available under FC s 172(2)(b), but the choice is a difficult one. Fundamental rights are as much at issue as the benefits valid legislation provides to the public at large. The choice was particularly difficult when the court did not understand itself to have the power to make the final decision, as was the case with most provincial and local divisions of the Supreme Court prior to the passing of the Constitutional Court Complementary Act.

Pre-constitutional South African law on interim interdicts held that an interdict will be granted where the applicant has demonstrated four requirements: (a) a prima facie right, (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted, (c) the balance of convenience, and (d) no other remedy is available to the applicant. As illustrated by Ferreira v Levin NO & others and Ynuico Ltd v Minister of Trade and Industry & others, the South African law is in the process of changing to accommodate constitutional concerns. In general the grant of an interdict to

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1 Act 13 of 1995. The relevant provisions of the Act were repealed and re-enacted as IC s 101(7) by the Constitution of the Republic of South Africa Second Amendment Act 44 of 1995. See above, Loots & Marcus `Jurisdiction, Powers and Procedures of the Court’ § 6.2(d).

2 As was pointed out by Van Dijkhorst J in Ynuico Ltd v Minister of Trade and Industry & others 1995 (11) BCLR 1453 (T) at 1473C–E, the requirement of a prima facie right was not appropriate for interim relief in all constitutional matters under the interim Constitution because it is designed for situations where the law is clear but the facts are in dispute. In applications for interim relief from acts authorized by a statute pending a decision by the Constitutional Court on the constitutional validity of the statute, the Supreme Court under the interim Constitution lacked the jurisdiction to determine the validity of the statute and therefore could not pronounce on the existence of a prima facie right. Van Dijkhorst J therefore suggested that reasonable prospects of success could take the place of the requirement of a prima facie right in these cases. It is submitted that this approach should be followed by our courts. Under the interim Constitution the standard of ‘reasonable prospects of success’ avoided the shortcomings of the prima facie right test in cases where determination of the constitutional issue was beyond the jurisdiction of the court. Under the final Constitution ‘reasonable prospects of success’ remains a useful test because it captures elements of the constitutional interim relief enquiry which do not relate to the existence of a prima facie right. For example, the authorities may be able to defeat a party seeking interim relief from a law if they can satisfy the court that even if the law is unconstitutional, there is a likelihood that the Constitutional Court will suspend an order of invalidity to enable Parliament to remedy the constitutional shortcomings of the law.

3 See Joubert (ed) LAWSA vol 11 para 323 `Interdict’.

4 1995 (2) SA 813 (W), 1995 (4) BCLR 437 (W). See also Reitzer Pharmaceuticals (Pty) Ltd v Registrar of Medicines & another 1998 (9) BCLR 1113 (T), which followed Ferreira v Levin at 1143B.

5 1995 (11) BCLR 1453 (T).

6 In Ferreira v Levin NO 1995 (2) SA 813 (W), 1995 (4) BCLR 437 (W) the court, per Heher J, applied the Canadian test to a constitutional challenge to s 417 of the Companies Act of 1973. Heher J stated at 836C: `This Court is not bound by the standard which applies in an ordinary application for an interim interdict. We are at large to arrive at our own decision as no rule has been laid down for such interdicts involving constitutional issues.’
enforce constitutional rights will likely be exceptional. In *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd* the Supreme Court of Canada rejected the idea that there should be any presumption of constitutionality of a statute.¹ None the less, the case made it clear that ‘interlocutory injunctive relief in constitutional cases is the exception rather than the rule’.² Exceptions where injunctive relief may be granted have included cases presenting a pure question of law, cases of grave urgency, and cases where the impugned piece of legislation affects a limited number of individuals and the public would suffer no significant harm.³ However, with much unconstitutional legislation on the statute books exceptions may be the rule, at least for an initial ‘constitutional audit’ period of litigation. Perhaps more importantly, in interdicts seeking to preserve constitutional rights the public interest should be added to the consideration of the balance of convenience.⁴ This public interest element can operate either in favour of or against the granting of the interim interdict because it ‘includes both the concerns of society generally and the particular interests of definable groups’.⁵

Following *Ferreira v Levin NO & others* and *Ynuico Ltd v Minister of Trade and Industry & others*, it is submitted that the test for interim relief from acts authorized by a statute pending a decision of the Constitutional Court on the validity of the statute is: (1) are there reasonable prospects of success in the application to have the statute declared unconstitutional and invalid;⁶ (2) is there a real prospect that the applicants will suffer irreparable harm if the relief is not granted; and (3) taking into account the public interest, where does the balance of convenience lie?

(ii) Final interdicts

South African law has required a more difficult showing to be granted a final interdict than a interim interdict.⁷ Most often these final interdicts have taken the form of an order either to prevent harm to a legal right or to make good harm already suffered. Such interdicts are described as prohibitory and mandatory interdicts. Prohibitory interdicts prevent future courses of action. Mandatory interdicts attempt to put right the effect of past wrongs. Such

¹ [1987] 1 SCR 110, 38 DLR (4th) 321. This case was discussed and confirmed in *RJR-McDonald Inc v Attorney General of Canada* (1994) 111 DLR (4th) 385.
² ¹Sharpe *Injunctions and Specific Performance* s 3.1230.
³ *Sharpe Injunctions and Specific Performance* s 3.1330.
⁴ See, for example, *Ynuico Ltd v Minister of Trade and Industry & others* 1995 (11) BCLR 1453 (T) at 1473F–1474B; *Reitzer Pharmaceuticals (Pty) Ltd v Registrar of Medicines & another* 1998 (9) BCLR 1113 (T) at 1143D–1145H. See also *Soundprop 1239 CC t/a ‘777 Casino’ v Minister of Safety and Security & others* 1996 (4) SA 1086 (C), 1996 (6) BCLR 1177 (C) at 1186G (where temporary validity likely to be ordered by Constitutional Court, no interim relief available). *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd* [1987] 1 SCR 110, 38 DLR (4th) 321 at 339: ‘While respect for the Constitution must remain paramount, the question then arises whether it is equitable and just to deprive the public, or important sectors thereof, from the protection and advantages of impugned legislation, the validity of which is merely uncertain, unless the public interest is taken into consideration in the balance of convenience and is given the weight it deserves.’
⁶ *Ynuico Ltd v Minister of Trade and Industry & others* 1995 (11) BCLR 1453 (T) at 1473C–E. The standard of ‘reasonable prospects of success’ is one familiar in South African law and is thus to be preferred over the related Canadian standard of a ‘serious question to be tried’. But see *Reitzer Pharmaceuticals (Pty) Ltd v Registrar of Medicines & another* 1998 (9) BCLR 1113 (T); *Ferreira v Levin* 1995 (2) SA 813 (W), 1995 (4) BCLR 437 (W), which follow the Canadian approach.
⁷ South African law presently allows final interdicts where there is (a) a clear right, (b) an injury, and (c) no other available ordinary remedy. *Joubert* (ed) *LAWSA* vol 11 para 316 ‘Interdict’.
interdicts will be available for the protection of constitutional rights as well, either under the High Court’s inherent jurisdiction or under its constitutional jurisdiction.

For instance, in *T S Masiyiwa Holdings (Pvt) Ltd v Minister of Information, Posts and Telecommunications*¹ the Zimbabwe Supreme Court ordered that certain delayed administrative procedures related to the licensing of a mobile cellular telephone service be completed within fixed time limits.

(iii) **Structural interdicts**

Structural interdicts represent an assertion of judicial power that goes significantly beyond that of prohibitory and mandatory interdicts.² Structural interdicts involve the court itself in ongoing supervision of an institution or public agency as a last resort.³ Most acutely, structural interdicts may involve courts in budgetary questions and raise difficult issues of the legitimate limits of court power.⁴

Courts in foreign jurisdictions have used structural interdicts to attempt to enforce fundamental rights. The Indian experience serves as an example.⁵ In *Rural Land and Entitlement Kendra, Dehradun v State of Uttar Pradesh*⁶ limestone quarries owned by the state but let to private companies posed serious environmental hazards. The Indian Supreme Court first appointed a series of committees to investigate the situation and then closed some quarries and ordered others to take certain conservation measures. If these measures were not taken, the quarries would be shut down. Further, the court ordered the state to implement other soil conservation and afforestation programs. In *MC Mehta v Union of India*⁷ a plant posing serious environmental concerns was allowed to reopen (after initial closure) as long as certain stringent safety measures were adhered to. Satisfaction of these conditions was to be monitored on a continuing basis by the state and by an expert committee appointed by the court.⁸

The real difficulty is to attempt to identify what standards should determine the contours of a structural interdict. In terms of procedure the courts clearly will need to engage in new forms of fact-finding and evidence-gathering. Fact-finding and investigative commissions as ordered in India are thus likely.⁹ Such commissions are likely to engage also in monitoring

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¹ 1997 (2) BCLR 275 (ZS).
² The classification is derived from Owen Fiss *The Civil Rights Injunction* (1978). For the Canadian situation, see generally Sharpe *Injunctions and Specific Performance* ss 3.1220–3.1530. This section draws heavily on Sharpe’s analysis.
³ These structural interdicts may be styled as interim or final interdicts.
⁴ These issues will have to be resolved by the courts because the Constitution itself offers no clear answers. Under the interim Constitution the definition of the constitutional interdict power comes from s 98(7). This section defines the power of the court ‘to order the relevant organ of state to refrain from such act or conduct . . . or to correct such act or conduct . . . in accordance with this Constitution’. Under the final Constitution it is defined by s 172(1)(b), allowing a court to make ‘any order that is just and equitable’.
⁵ See generally Davis et al ‘The Role of Constitutional Interpretation’ 48–61.
⁶ AIR 1985 SC 652.
⁷ AIR 1987 SC 965.
⁸ See *MC Mehta v Union of India* AIR 1987 SC 965 and *MC Mehta v Union of India* AIR 1987 SC 962.
⁹ See Davis et al ‘The Role of Constitutional Interpretation’ 56. These commissions will differ significantly from a judicial commission of inquiry under the Commissions Act 8 of 1947 since a judicial-appointed commission reports to the court itself.
the actual compliance with the court’s interdict. Other roles such as mediation and arbitration should also be squarely within the role of the court in ordering a structural interdict. In terms of substance it remains to be seen how far South African courts will need to move in this field.

The structural interdict is an extreme remedy and should be applied only in cases where there are no other judicial remedies capable of setting matters right. Even in such cases considerations of institutional competence, resources and legitimacy will frequently militate against the grant of a structural interdict, and a declaration of rights will always be a preferable remedy where there is a likelihood that the declaration will trigger an adequate legislative or administrative response to the underlying problem. Nevertheless, as was illustrated by the facts of *August & another v Electoral Commission & others*, there will be cases in which a structural interdict constitutes appropriate relief. *August* was the 1999 prisoners’ voting rights application, and the first case in which the Constitutional Court granted a structural interdict against a public authority. Through no fault of the applicant prisoners, the first hearing of their case was delayed until less than three months before the date of the general election in which they claimed the right to vote. By the time the Constitutional Court held on appeal that the respondents had acted unconstitutionally in denying the applicants the opportunity to vote, voter registration had closed and the election was barely two months away. The applicants had sought a mandatory interdict directing the respondents to make all reasonable arrangements necessary to enable prisoners to register as voters on the voters’ roll and to vote in the upcoming elections. This order was granted, but the fear remained that if the arrangements made by the respondents proved inadequate, this would not be rectified quickly enough to afford the applicants the only meaningful relief they claimed, namely the opportunity to vote in the June elections. The court guarded against this fear with the threat of a structural interdict. It fortified its mandatory interdict with a secondary order, directing the respondents to file an affidavit with the registrar before 16 April 1999 setting out what steps they proposed to take in fulfilment of their obligation to comply with the mandatory interdict. The order stipulated further that this affidavit had to be served on the applicants and was to be available for inspection at the court by any interested person. In his judgment for the court Sachs J expressed confidence that in this way ‘practical solutions will be found for what are essentially practical problems’. This confidence was not misplaced. The court’s order galvanised the respondents into action. Their affidavit setting out a plan for prisoner registration and voting did not elicit any adverse comment from the applicants or other interested persons. The plan was implemented without difficulty and the applicants and other prisoners were able to vote in the elections.

1. *1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC).*
2. The case is discussed in some detail below. See below, De Waal ‘Political Rights’ § 23.6(b)(iii).
3. See paras 39–42 of the *August* judgment.
4. *August* at para 41.
The utility of structural interdicts is not limited to cases of extreme urgency like August. For example, the prospect of a structural interdict may be necessary to encourage victims of rights violations to use the legal process to remedy their plight rather than resorting to extra-legal self-help. This was recognized by the Constitutional Court in *City Council of Pretoria v Walker.* The respondent Walker had refused to pay his municipal service charges on the grounds that the municipality was discriminating against white residents in the levying of those charges and their recovery through the judicial process. When the council sued him on his outstanding account for municipal fees he raised their discrimination as a defence. The Transvaal Provincial Division granted him absolution from the instance on the grounds that it should not allow its process to be used in implementation of a discriminatory policy of recovering service charges from white residents only. The Constitutional Court disagreed. It concluded that absolution from the instance was not appropriate relief because it encouraged victims of discrimination to take the law into their own hands by refusing to pay debts legally owed by them. Appropriate relief should not provide such an incentive. Rather it should be designed to remove the discrimination that was the cause of the respondent’s complaint. In a clear statement of the court’s willingness to grant structural interdicts in circumstances such as these, Langa DP stated the following: ‘Instead of withholding amounts lawfully owing by him to the council, the respondent could, for instance, have applied to an appropriate court for a declaration of rights or a mandamus in order to vindicate the breach of his section 8 right. By means of such an order the council could have been compelled to take appropriate steps as soon as possible to eliminate the unfair differentiation and to report back to the court in question. The court would then have been in a position to give such further ancillary orders or directions as might have been necessary to ensure the proper execution of its order. It cannot simply be assumed, particularly in our new constitutional dispensation, that the council would not have taken all diligent steps to ensure scrupulous compliance with any such order. The court would in any event be in a position to deal appropriately with any deliberate failure or refusal to comply.’

9.4 CHOICE OF REMEDY

(a) Appropriate remedies and judicial discretion

The constitutional cases decided to date have very little explicit judicial discussion of remedial issues. Implicitly, the approach adopted by the Constitutional Court in this area, as in so many others, is that of balancing. As with the limitations analysis, remedial analysis is apparently a matter of taking into account all the relevant factors. Rather than setting out a precise method and clearly distinguishing between various approaches, courts (including the Constitutional Court) have been and are likely to continue to engage in a case-by-case inquiry into relief appropriate in the circumstances. For this reason it is somewhat artificial
to set out, as the remainder of this section does, a logical analysis of the issue of the choice of remedy, but it is worthwhile identifying the options with which the courts will be faced and the factors which may condition their choices. None the less, the above caveat relating to the discretionary and case-specific nature of these issues should be kept firmly in mind.

(b) The determination of the extent of the inconsistency

The first issue for the court to determine is the extent of the violation.\(^1\) This is a necessary step in order to assess what options are available to the court. It may be that an entire Act is inconsistent with the Constitution. This would be the case if the purpose of a piece of legislation were found to be unconstitutional.\(^2\) It may be that only part of the piece of legislation at issue is in violation of the Constitution. This would be the case where only a section of a statute was found to be inconsistent with a constitutional command. In determining whether the inconsistency is whole or partial the limitations analysis is likely to be crucial. Partial inconsistency will frequently exist where the Act serves a constitutional purpose, but the limitation inquiry has shown that the extent of the interference with fundamental rights is not justified by this purpose.

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1. See, for example, Scagell & others v Attorney-General, Western Cape, & others 1997 (2) SA 368 (CC), 1996 (11) BCLR 1446 (CC) at para 20.

2. An example is R v Big M Drug Mart (1985) 18 DLR (4th) 321, [1985] 1 SCR 295. That case found that the purpose of the Lord’s Day Act was inconsistent with Canadian societal values. Thus the whole Act was struck down.
In *Ferreira v Levin NO & others*\(^1\) the court (per Ackermann J) emphasized that the reference to ‘to the extent of the inconsistency’ in IC s 98(5) reflected a Constitutional choice for ‘a narrow striking down’. Of course, the precise ambit of the order will depend heavily on the circumstances of the case. The court has attempted to match the order closely to the extent of the constitutional violation.\(^2\)

(c) **The choice to rework or to strike down the inconsistency**

With the extent of the unconstitutionality set, the court must face perhaps the most difficult question: whether to rework (i.e., order either severance or reading in)\(^3\) or strike down the unconstitutional provision or action. In some cases the answer will be relatively easy. For instance, if, as a matter of limitations analysis, a certain provision has been found not to be rationally connected to the legislative objective, then that section should be struck down and can be struck down without disturbing the remaining portion of the legislation.\(^4\) However, the more usual case will be the difficult one where the court must consider whether to sever the offending provision or to read in further provisions in order to remedy the inconsistency or to strike down the entire statute as invalid.

(i) **The test for severance**

How then to decide whether reworking or invalidity is appropriate? To date the pre-constitutional test for severability has simply been carried forward. In *Government of the Republic of Namibia & another v Cultura 2000 & another* the Namibian Supreme Court needed to decide whether severance was an appropriate remedy and identified

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\(^1\) 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 131. See also *Case & another v Minister of Safety and Security* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC), 1996 (1) SACR 587 (CC) at para 76 (Mokgoro J).

\(^2\) See *Larbi-Odam & others v MEC for Education (North-West Province) & another* 1997 (12) BCLR 1655 (CC) at paras 39–45, where Mokgoro J rejected the option of making an order of partial as opposed to full invalidity. The Justice reasoned in part that she could not be ‘sure’ that such a limited order ‘would not be doing an injustice to temporary residents [who would thus be excluded]’. As a remedial matter, the court thus chose to protect non-citizens who were temporary residents as well as those who were permanent residents where it was not possible to determine the extent of the inconsistency.

\(^3\) It is submitted that the propriety of the remedy of reading in is closely linked to the propriety of the remedy of severance. If the mere style of drafting is not to be determinative of the remedial issue, inclusively worded and exclusively worded statutes should not be treated differently. As Lamer CJ stated in *Schachter v Canada* (1991) 93 DLR (4th) 1 at 13, [1992] 2 SCR 679:

‘A statute may be worded in such a way that it gives a benefit or right to one group (inclusive wording) or it may be worded to give a right or benefit to everyone except a certain group (exclusive wording). It would be an arbitrary distinction to treat inclusively and exclusively worded statutes differently. To do so would create a situation where the style of drafting would be the single critical factor in the determination of a remedy. This is entirely inappropriate.’

None the less, members of the Constitutional Court have expressed hesitation about the remedy of reading in. See *Case & another v Minister of Safety and Security* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC), 1996 (1) SACR 587 (CC) at para 78 (Mokgoro J) and *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC), 1995 (10) BCLR 861 (CC) at para 62 (Sachs J).

\(^4\) A Canadian example is *Andrews v Law Society of British Columbia* (1989) 56 DLR (4th) 1, [1989] 1 SCR 143, where the legislative requirement of Canadian citizenship for membership of the Bar was struck down as not being rationally connected with the objective of providing lawyers familiar with and committed to Canadian laws and institutions, but the statute itself survived.
two principal factors: legislative objective and constitutional purpose. Mahomed CJ applied the public-law test for severance set out in a 1952 South African case, Johannesburg City Council v Chesterfield House (Pty) Ltd.

The Constitutional Court took a similar position in Coetzee v Government of the Republic of South Africa, formulating the following test:

‘Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute (Johannesburg City Council v Chesterfield House (Pty) Ltd 1952 (3) SA 809 (A) at 822D–E. See also S v Lasker 1991 (1) SA 558 (C) at 566). The test has two parts: first, is it possible to sever the invalid provisions and, second, if so, is what remains giving effect to the purpose of the legislative scheme?’

In Coetzee the court pointed out that the Act unconstitutionally provided for imprisonment of those without the ability to pay their debts as opposed to those who had the ability to pay their debts but were unwilling. As for the remedy, the court reasoned that it was not possible to excise those portions of the Act that distinguished between the two categories of debtors, but that it was possible to sever the provisions relating to imprisonment. Finding the severance not to be contrary to the purpose of the legislative scheme, the court excised those provisions, thus eliminating imprisonment even for those who had the ability to pay their debts but were unwilling.

In Fraser v Children’s Court, Pretoria North, & others the court declined severance where its effect would be to grant all fathers a veto over the adoption of their children born out of wedlock. The court reasoned that it was not clear that Parliament would have wished that result if it was aware of the constitutional issues.

In a second but unrelated case by the name of Coetzee, S v Coetzee, the members of the court continued to use Kriegler J’s two-part severance test, but they applied it in sharply

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1 1994 (1) SA 407 (NmS). In identifying these two factors as starting points, Cultura 2000 bears a close similarity to the reasoning in Schachter v Canada (1991) 93 DLR (4th) 1, [1992] 2 SCR 679. At 14–16 Schachter also discusses two principal starting points. The first is the evident intention of the legislature. The second is the purposes underlying the Charter.

2 Cultura 2000 at 424C–426L, citing Johannesburg City Council v Chesterfield House (Pty) Ltd 1952 (3) SA 809 (A). For a non-constitutional severance case of note, see Metal and Allied Workers’ Union v State President of the Republic of South Africa 1986 (4) SA 358 (D).

3 1995 (4) SA 631 (CC), 1995 (10) BCLR 861 (CC) at para 17. Sachs J agreed generally with the test as formulated by Kriegler J with one ‘methodological qualification’ at para 75: ‘[I]n deciding whether the legislature would have enacted what survives on its own, we must take account of the coming into force of the new Constitution in terms of which we receive our jurisdiction and pay due regard to the values which it requires us to promote. We must, accordingly, post a notional, contemporary Parliament dealing with the text in issue, paying attention both to the constitutional context and the moment in the country’s history when the choice about severance is to be made.’

4 See also Larbi-Odam & others v MEC for Education (North-West Province) & another 1997 (12) BCLR 1655 (CC) at para 46, where the court also reasoned from the legislative purpose to reject the option of excluding temporary resident non-citizens from its order declaring invalid an employment regulation of the national Department of Education.
contrasting directions. Inter alia, the case decided that the reverse onus provisions of s 332(5) of the Criminal Procedure Act 51 of 1977, which determined the criminal liability of a director of a corporate body in circumstances where the corporate body commits an offence and the director, though aware of the offence, does not prevent its commission, were unconstitutional. The majority (per Langa J) held further that severance was not possible and that the section should be declared invalid.¹ The accepted test comes in two parts: first, is it grammatically possible to sever and, second, if so, would the main object of the legislation be achieved? Differences emerged on both legs. First, as a matter of statutory interpretation, Langa J felt that the remainder of the section properly interpreted would continue to be unconstitutional.² This straight textual approach was supported by Mahomed DP and Didcott J in concurring judgments.³ Using the same approach, Kentridge AJ came to the contrary conclusion and, dissenting, would have held that severance was possible.⁴ One of the differences between these two positions was the use of pre-constitutional South African case law in the judgments of Mahomed DP and Didcott J and the use of persuasive Commonwealth authority by Kentridge AJ.⁵ A second set of differences paid more attention to the objects of the legislation. Ackermann J saw the main object of s 332(5) of the Act as the achievement of the reverse onus provisions which had been held to be unconstitutional.⁶ Dissenting, O’Regan J saw a second purpose to ‘the legislative scheme’: the imposition of a legal duty upon directors and servants of a corporate body to take steps to prevent the commission of offences about which they knew.⁷ Where the section, after severance, would still serve one constitutional purpose, severance was appropriate. Mokgoro J agreed with O’Regan J’s analysis and clearly articulated a stronger view of the possibilities of reading down and severance than that of the majority.⁸ Sachs J agreed with O’Regan J’s approach, seeing three aims to the section: ‘In my view, if a combination of reading down and severance rescues the achievement of the first two legitimate legislative purposes, while eliminating the illegitimate third one, we should adopt it.’⁹ None the less, Sachs J finally differed as to the strength of the remedy of reading down:

*I believe the Constitution requires us to be creative in saving the garment, or at least, a wearable part of it, if we can do so in a manner consistent with the purpose of the Legislature as expressed in the text. But, too much reading down of too many terms, coupled with too many excisions of the text, leaves something so tattered and insecure, that it cannot be said that effect would be given to any of the principal objects of the Legislature.*¹⁰

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¹ S v Coetzee 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC) at paras 51–2.
² At para 51: ‘I am of the view that it is not open to the court to assign an interpretation to the provision in order to make it constitutionally acceptable, if that interpretation is not supported by the words used. Such an exercise would introduce more uncertainty into the interpretative task of the courts.’
³ At paras 64, 79, and 81.
⁴ At paras 107–8.
⁵ Compare S v Coetzee’s para 107 (Kentridge AJ using Canadian and Privy Council authority) with para 80 (Didcott J unwilling to follow such authority to the extent they are in point).
⁶ At paras 66–70.
⁷ At paras 205–6.
⁸ At para 147 (‘In my view, the course of severance, combined with reading down the severed section, is a reasonably permissible route to follow in bringing s 332(5) in line with the Constitution’) (Mokgoro J dissenting).
⁹ At para 222.
¹⁰ At para 226.
An alternative analysis

The starting points of this good/bad test are fundamental and could be developed to yield a four-factor test to decide when severance and reading in are appropriate.1 While the court may not identify these factors explicitly, they remain factors that will explain and predict constitutional remedial jurisprudence. The following four factors thus point in the direction of permitting a court to order the remedies of severance and reading in as opposed to invalidity.

First, the starting point of legislative objective indicates that the degree of interference with the objective of the legislation at issue should be as little as possible. Courts should respect the role of the legislature in the democratic political process.2 They should not engage in severance or reading in without being satisfied that such a remedy comports with the objective of the legislation at issue.3 In order to minimize its interference the court must determine the legislative objective. There can be varying methods of determining this objective, as pointed out in Schachter:4

‘This objective may . . . be obvious from the very text of the provision. In other cases, it may only be illuminated through the evidence put forward under the s 1 analysis, the failure of which would precede this inquiry. A second level of legislative intention may be manifest in the means chosen to pursue that objective.’

Secondly, the concern with respecting the objective of the legislature also reflects a concern with the possible remedial precision of the remedies of severance and reading in.5 According to the court in Schachter:6

1 At least one judge of the court has looked to Schachter for guidance. See Case & another v Minister of Safety and Security 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC), 1996 (1) SACR 587 (CC) at para 74 (Mokgoro J).

2 For instance, in S v Lawrence; S v Negal; S v Solberg 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) at para 80. Chaskalson P wrote: ‘A court can strike down legislation that is unconstitutional and can sever or read down provisions of legislation that are inconsistent with the Constitution because they are overbroad. It may have to fashion orders to give effect to the rights protected by the Constitution [Fose v Minister of Safety and Security 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC)], but what it cannot do is legislate.’ See also Mistry v Interim National Medical and Dental Council & others 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC) at paras 26–8, where Sachs J declined a request to rework the overbroad s 28(1) of the Medicines and Related Substances Control Act 101 of 1965 which authorised warrantless searches of private premises for the purpose of finding medicines or other controlled substances. Sachs J concluded that the task of designing a appropriate scheme for the powers of inspectors under the Act was too complicated to be performed by the court and was a legislative function.

3 In the USA and Australia a common shorthand method of determining the objective of the legislature with respect to severance is the enactment by the legislature of severance provisions. A severance provision is an explicit statement by the legislature of its intention that, should some section of the piece of legislation be struck down by a court, the legislature intends the remaining portion to stand. A severance provision could operate to save the non-offending portion of a statute. It remains to be seen whether such provisions become part of the drafting process in South Africa, although a legislature embarking upon a legally risky project would be well advised to include such a provision.

4 In addition to its four-factor test, Schachter v Canada (1991) 93 DLR (4th) 1, [1992] 2 SCR 679 suggests two shorthand methods of determining whether a remedy is an unwarranted intrusion into the legislative sphere. The first is to ask whether the non-offending provisions would greatly change in significance were the offending provisions severed or the necessary provisions added. Would the legislature have passed the scheme as it would then stand? Schachter at 21–3 (DLR). The second holds that where the provisions remaining after severance have been part of the law for a long time, it is safe to assume that the legislature would have enacted the permissible portion. Schachter at 23–5 (DLR).

5 For an implicit concern with remedial precision, see the reasoning of Mokgoro J in refusing to exclude temporary residents from an order of invalidity in favour of non-citizens generally in Larbi-Odam & others v MEC for Education (North-West Province) & another 1998 (1) SA 745 (CC),1997 (12) BCLR 1655 (CC) at paras 39–46.

6 At 19 (DLR).
“[T]he Court should not read in in cases where there is no manner of extension which flows with sufficient precision from the requirements of the Constitution. In such cases, to read in would amount to making ad hoc choices from a variety of options, none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution. This is the task of the legislature, not the courts.”

Of course, the degree of severance can be answered with greater precision than can the degree of reading in. With severance a court knows exactly what it is taking out. With reading in a court must make an inquiry into what is appropriate. To this extent there is therefore a relevant distinction between the remedies of reading in and severance.

A third factor is that of budgetary concern. While budgetary considerations may be either irrelevant or peripheral to limitations analysis, they should constitute an explicit factor to consider in the choice of remedy. Where severance or reading in will impose substantial additional financial obligations on the state, courts should be wary of granting such remedies. How this factor gets translated into legal analysis is more difficult to predict. Where severance or reading in would have the effect of adding a group that is much smaller than the group already benefited, the assumption that this fits with the objective of the legislature is warranted. This, however, is a matter of degree. As Lamer CJ stated in Schachter:

“In determining whether reading in is appropriate then, the question is not whether courts can make decisions that impact on budgetary policy, it is to what degree they can appropriately do so. A remedy which entails an intrusion into this sphere so substantial as to change the nature of the legislative scheme in question is clearly inappropriate.”

A fourth factor is the comparison with the other available remedies, particularly that of invalidity. If invalidity is an inferior remedy, it should not be exercised; rather severance or reading in should be ordered. Deriving from the notion of a purposive interpretation, this factor thus encourages the court to be inclusive rather than exclusive in choosing a remedy. For instance, in Andrews v Law Society of British Columbia the Supreme Court of Canada held that the purpose of s 15, the Canadian equality clause, is to promote a society ‘in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration’. Given this purpose, a declaration of invalidity was not sufficient to satisfy the purposes of the right and a severance of the provision excluding non-citizens from the right to practise law was appropriate. This concern with the purpose of the Constitution should be particularly relevant where so-called positive rights (rights that place an affirmative duty on government) are concerned. As Lamer CJ put it:

\[Schachter \text{ v Canada (1991) 93 DLR (4th) 1 at 19, [1992] 2 SCR 679. See also National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 1999 (3) SA 173 (C) at 188B–189G, 1999 (3) BCLR 280 (C), where Davis J expressed similar views.}\]

\[Note that in the Haig v Canada (1992) 105 DLR 577, 9 OR (3d) 495 (CA) reading in case, homosexuals constitute a small group. It would be less intrusive to add them in than to strike down the whole Act. The cost was unlikely to change the nature of the legislation. Adding them in would be consistent with the objective of the Act.\]


\[See below, Kentridge & Spitz ‘Interpretation’ ch 11.\]


‘Cases involving positive rights are more likely to fall into the remedial classifications of reading down/reading in or striking down and suspending the operation of the declaration of invalidity than to mandate an immediate striking down. Indeed, if the benefit which is being conferred is itself constitutionally guaranteed (for example, the right to vote), reading in may be mandatory. For a court to deprive persons of a constitutionally guaranteed right by striking down underinclusive legislation would be absurd.’

(d) The choice to grant temporary validity

A final remedial question to answer is whether any declaration of invalidity should be temporarily suspended in terms of IC s 98(5) and FC s 172(1)(b)(ii). In deciding whether to exercise this power the court must balance the social purpose served by the challenged legislation against the infringement of constitutional rights which that legislation effects.

It is difficult to envisage a situation where a statute imposing criminal liability will be sustained under this remedy. The notion that an accused person can be convicted under a law which violates the Constitution is fundamentally subversive of the interests of justice.

In respect of statutes which do not impose criminal liability there may well be cases where the interests of justice and good government suggest that a statute should be given temporary validity rather than being struck down for unconstitutionality. This will most often be the case where the object of the legislation in question is one which promotes constitutional values but the legislature has chosen unconstitutional means to achieve its objective. However, even in such cases temporary validity will frequently be inappropriate. As pointed out by O’Regan and Ackermann JJ in Executive Council, Western Cape Legislature, & others v President of the Republic of South Africa & others, the consequence of an order of temporary validity may have to yield to the interests of justice. (See also National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at paras 94--7.) In such cases it is appropriate for courts to reserve the power to vary their orders suspending a declaration of invalidity.

1 This decision need not be irreversible. In many cases the courts will not be able to anticipate all the consequences of an order suspending a declaration of invalidity. To cater for this problem, a court may reserve to itself the right to vary its order of temporary validity on application by an interested party. See, for example, South African National Defence Union v Minister of Defence 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at paras 42 and 45, where the Constitutional Court suspended its order of invalidity of s 126B(1) of the Defence Act 44 of 1957 for a period of three months but indicated that the applicant and respondents could apply for a variation of this order if they were able to show that the three months’ suspension would cause them ‘substantial prejudice’. Orders of this nature will be confined to exceptional cases because they undermine the certainty of judicial decisions. (See the concerns expressed in this regard by the Constitutional Court in Minister of Justice v Ntuli 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC) at paras 22--30, S v Zuma & another 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), 1995 (2) SACR 277 (CC) at para 43 and S v Bhalwana 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC), 1995 (2) SACR 748 (CC) at para 32.) Nevertheless, there will be cases like South African National Defence Union v Minister of Defence where the interests of certainty may have to yield to the interests of justice. (See also National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at paras 94--7.) In such cases it is appropriate for courts to reserve the power to vary their orders suspending a declaration of invalidity.

2 Of course, where the social purpose served the challenged legislation is adequately protected by other legislation which is consistent with the Constitution, there is no basis of an order suspending a declaration of invalidity. See South African National Defence Union v Minister of Defence 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at para 38.

3 See, for example, South African National Defence Union v Minister of Defence 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC), where the Constitutional Court was confronted with an unconstitutional prohibition of union membership in the SANDF (s 126B(1) of the Defence Act 44 of 1957) and a separate provision which fortified this prohibition with a criminal sanction (s 126B(3) of the Defence Act). It struck down the latter with immediate effect, but suspended for three months its order of invalidity in respect of the former.
invalidity under IC s 98(5) is invariably that an applicant who successfully demonstrates that a law is unconstitutional nevertheless loses his or her case. \(^1\) This is not just and equitable, \(^2\) nor is it in the interests of justice. \(^3\) In the immediate aftermath of the commencement of the interim Constitution the courts showed some latitude with respect to requests for temporary validity to be granted to apartheid-era legislation. This was justified on the basis that the new legislature could not be expected overnight to replace all the unconstitutional legislation it had inherited. \(^4\) With the passage of time, however, such latitude can no longer be expected and temporary validity must be reserved for exceptional cases. \(^5\)

Exactly how much time is a reasonable period of time for Parliament to address and remedy an unconstitutional provision is a topic on which some case law is emerging. \(^6\) In \(S v Ntuli\) \(^7\) the Constitutional Court invoked its powers under IC s 98(5) to sustain the unconstitutional s 309(4)(a) of the Criminal Procedure Act for 16 months after its order. (The section prevented unrepresented convicted persons from prosecuting criminal appeals unless a judge certified that their appeals had some prospects of success.) The order of temporary validity under s 98(5) was designed to allow Parliament sufficient time to design new legislation to deal with the problems created by the invalidity of the section. Didcott J stated at para 28:

‘The long perpetuation of an unconstitutional scheme is admittedly unfortunate. But the statute book cannot be purged suddenly of all its old elements that are now repugnant to the Constitution. And, if fresh problems are to be avoided, the removal of the objectionable parts and their replacement by ones that are sound and realistic has to be both thorough and thoughtful. That, I have no doubt, is “in the interests of justice and good government”. We must therefore provide the opportunity for it.’

In \(Fraser v Children’s Court, Pretoria North, & others\) the court granted temporary validity to an unconstitutional provision of the Child Care Act 74 of 1983 for a period of two years. In view of the complexity of the issue and the variety of alternatives to be faced by Parliament the court felt two years would be a ‘reasonable period’. \(^8\)

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\(^1\) 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 159.
\(^2\) FC s 172(1)(b)(ii).
\(^3\) IC s 98(5).
\(^4\) See, for example, \(S v Ntuli\) 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC), 1996 (1) SACR 94 (CC) at para 28. See also \(Executive Council, Western Cape Legislature, & others v President of the Republic of South Africa & others\) 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 159.
\(^5\) See, for example, \(South African National Defence Union v Minister of Defence 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC)\) at para 42. In this case the Constitutional Court ultimately did suspend its order of invalidity of s 126B(1) of the Defence Act 44 of 1957. However, it expressed its dissatisfaction with the fact that the respondents had wasted more than five years in which they ought to have introduced a Bill to amend the relevant unconstitutional provisions which they had inherited from the pre-1994 period.
\(^6\) In addition to the cases discussed below, see \(S v Smith & others\) 1997 (1) BCLR 70 (Nm) (six months); \(East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council & others\) 1996 (11) BCLR 1545 (N) (seven months given to a provincial legislature).
\(^7\) 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC), 1996 (1) SACR 94 (CC).
\(^8\) 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC). In considering whether or not to grant temporary validity, the Fraser court has phrased the power to grant temporary validity as a matter given to its jurisdiction within the terms of the proviso to IC s 98(5). As discussed above, § 9.1, this section and its successor, FC s 172, are not independent sources of judicial power but are secondary remedy clauses serving to allot the remedy of temporary validity to the judiciary. See also \(J T Publishing (Pty) Ltd v Minister of Safety and Security 1997 (3) SA 514 (CC), 1996 (12) BCLR 1599 (CC)\) at para 15 (treating the relationship between IC s 7(4)(a) and IC s 98(5)).
Where the gap left by an unconstitutional law can be filled by delegated legislation, the period of suspension can be reduced. For example, in *South African National Defence Union v Minister of Defence*¹ the Constitutional Court held that three months would be sufficient time to enable the Minister of Defence to promulgate regulations to govern trade unionism in the SANDF. It tailored its order suspending declaration of invalidity of s 126B(1) of the Defence Act² accordingly.

The final Constitution’s s 172(1)(b)(ii) emphasizes that the period of validity is to allow the competent authority to remedy the defect. Where temporary validity would merely prolong the constitutional violation and not serve to remedy it, it is an inappropriate remedy. In *Retrofit (Pvt) Limited v Minister of Information, Posts and Telecommunications*³ the Zimbabwe Supreme Court refused to extend an unconstitutional violation of the freedom of expression where the purpose was to benefit the violator, not to afford the legislature time to remedy the defect.

In *Minister of Justice v Ntuli*⁴ the court faced the situation where Parliament had failed to address and remedy a provision of the Criminal Procedure Act 51 of 1977 previously declared unconstitutional but given temporary validity for a period of sixteen months. The Minister of Justice asked for an extension of the period of temporary validity for a further twenty months. This the court refused to do. The court assumed that in an appropriate case it could vary a final order and extend the period of suspension of invalidity.⁵ But this was not such a case. The court noted the ‘generous’ period of ‘almost 17 months’ and noted that no information had been placed before it to indicate that the matter was complicated.⁶ The court recounted the ‘sorry tale’ of the Department of Justice’s failure to take the necessary remedial steps, but termed the delays to be ‘inexcusable’ and the time ‘sufficient’.⁷ The court concluded by emphasizing that the government should place information in front of the court to justify its request for an order of temporary validity.⁸

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¹ 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC).
² Act 44 of 1957. Section 126B(1) had unconstitutionally prohibited union membership in the SANDF.
³ 1996 (3) BCLR 394 (ZS) at 399E–F.
⁴ 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC).
⁵ The court thus left open the issue of whether a court has the power, in constitutional matters, to change a final order made in a previous judgment: *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC) at paras 21–30. It is submitted that a competent court does have that power owing to its continuing constitutional jurisdiction, at least in cases where a suitable standard of necessity is demonstrated. As Chaskalson P made clear, such a power should be used sparingly: *Ntuli* at para 30 (quoting *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 306F–G). In particular, it is doubtful if such a power can be exercised where the legislation has already been invalidated and rights have vested: *Ntuli* at para 38. Note, that a court can, in its original order of invalidity, reserve to itself the right to vary that order on application by an interested party. See, for example, *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at paras 42 and 45, which is discussed at the start of this section.
⁶ *Minister of Justice v Ntuli* at para 35.
⁷ At paras 37 and 39.
⁸ *Minister of Justice v Ntuli* at para 41: ‘It is the duty of the Minister responsible for the administration of the statute, who wishes to ask for an order of invalidity to be suspended, whether under the interim or the 1996 Constitution, to place sufficient information before the court to justify the making of such an order, and to show the time that will be needed to remedy the defect in the legislation. This should be done with due regard to the importance of the fundamental rights enshrined in the Constitution, and to the fact that it is an obligation of the government to ensure that such rights are upheld and that the suspension of rights consequent upon the difficulties of the transition is kept to a minimum.’.
The court returned to this injunction in *Mistry v Interim National Medical and Dental Council & others.* Sachs J reiterated that a party asking for an order of temporary validity must ensure that all evidence relevant to this remedial enquiry is placed on record timeously. Such evidence would ordinarily have, at least, to set out ‘what the negative consequences for justice and good government of an immediately operational declaration of invalidity would be; why other existing measures would not be an adequate alternative stop-gap; what legislation on the subject, if any, is in the pipeline; and how much time would reasonably be required to adopt corrective legislation.’

The Canadian Supreme Court has identified three narrow instances where temporary suspensions are appropriate. The first is where there is a danger to the public, such as with new rules relating to incarceration of mental patients. The second is where the rule of law is threatened by the massive disruption of invalidity. The best-known examples here are the language cases where, for instance, an entire century’s worth of Canadian provincial laws were invalid but given temporary validity. The third exception is where temporary validity is appropriate in certain cases of underinclusiveness in order to allow the legislature to decide whether to cancel or to extend the benefits at issue.

For the Canadians the question of suspension is a totally separate issue from the appropriate remedy under the supremacy clause. As one commentator states, ‘[d]elayed declarations of nullity should not be seen as preferable to reading in in cases where reading in is appropriate’. However, this does seem an attractive option for a court, as it appears both to vindicate rights and respect the role of the legislature. Why then are suspensions not to be preferred in Canada? Schachter gives two rationales. First, suspensions maintain an unconstitutional statute in place. Secondly, they interfere with the legislative process by forcing the matter onto the legislative agenda.

However, both these Canadian ‘problems’ are not so much problems as realities in South Africa. There is much unconstitutional legislation on the books when one considers the inherited pre-27 April 1994 legislation. And it is to be encouraged — not discouraged — for the courts to identify and to place on the legislative agenda those pieces of unconstitutional legislation which serve a useful social purpose. The use of invalidity (especially when

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1 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC) at para 37.
3 *Schachter v Canada* (1991) 93 DLR (4th) 1, [1992] 2 SCR 679 itself is an example of this third exception. In *Schachter* the court faced the situation (perhaps not uncommon) where striking down the law would deny the benefits to the already existing group (adoptive parents), but would not extend such benefits to the excluded group (natural parents). Lamer CJ thus declared: ‘The logical remedy is to strike down but suspend the declaration of invalidity to allow the government to determine whether to cancel or extend the benefits.’ In fact this had already been done, so the individual received absolutely nothing from the court other than costs.

There were two reasons why the court did not opt for severance or reading in. The first was that it was not clear what the legislative objective was: the extension of benefits to parents of newborns caring for them at home or the extension of benefits to respond to the specific circumstances of adoptive parents. Secondly, the court noted the budgetary implications: ‘Given the nature of the benefit and the size of the group to whom it is sought to be extended, to read in natural parents would in these circumstances constitute a substantial intrusion into the legislative domain.’ *Schachter* at 31.

coupled with temporary validity) as a remedy is a tool of judicial restraint, leaving the option and policy space open to the competent legislature to amend the statute.\(^1\)

\((e)\) Combined remedies

Courts are not limited to choosing one of the remedies discussed above. The broad discretion conferred by FC s 172(1)(b) allows for any combination of remedies that will lead to an ‘order that is just and equitable’. In National Coalition for Gay and Lesbian Equality v Minister of Home Affairs\(^2\) the Cape Provincial Division invoked this general remedial discretion to deal with the unconstitutionality of s 25(5) of the Aliens Control Act,\(^3\) which discriminates on grounds of sexual orientation in the conferment of immigration privileges. The section provides for the grant of immigration permits to spouses and dependent children of foreign nationals with permanent residence rights in South Africa. The National Coalition for Gay and Lesbian Equality and several same-sex life partners of South African citizens and permanent residents challenged the constitutionality of the section on the grounds that it unfairly deprived them of immigration benefits extended to heterosexual married couples and therefore violated their fundamental right against unfair discrimination on grounds of sexual orientation. Davis J upheld the constitutional challenge but was faced with difficult questions relating to the appropriate remedy. The applicants argued that ‘same-sex life partners’ should be read into s 25(5) as a simple way of curing its unconstitutionality. Davis J rejected this argument. He noted that there was no precise meaning of ‘same-sex life partner’ and that the legislature should be given the opportunity to define the scope of same-sex relationships that should qualify for immigration privileges under the Act. He also pointed out that if same-sex partners were to be included in s 25(5), Parliament may want to consider legislating for recognition procedures of the sort that applied to customary unions under s 1(2) of the Act. Davis J accordingly concluded that an order merely reading ‘same-sex partners’ into s 25(5) lacked remedial precision and would intrude impermissibly on the terrain of the legislature.\(^4\)

Striking down s 25(5) with immediate effect was clearly undesirable because that would be of no assistance to the applicants and would, moreover, deprive all spouses and dependent minor children of permanent residents of the immigration privileges currently extended to them under the Act. Davis J therefore decided to declare s 25(5) unconstitutional to the extent that it discriminated against same-sex life partners but to suspend his order of invalidity for twelve months in order to enable Parliament to correct the inconsistency.\(^5\)

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\(^1\) Minister of Justice v Ntuli 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC) at paras 40–1. Addressing a suggestion that the court order a legislature to rectify an assumed unconstitutional defect in a legislative scheme in a particular manner, Madala J in East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council 1998 (2) SA 61 (CC), 1998 (1) BCLR 1 (CC) at para 12 stated: ‘That is not an order which this court would be likely to make in the circumstances of the present case . . . The consequences of such a declaration [that a defect existed] might be addressed by the legislature in various ways . . . These and other possible ways of dealing with the problem are legislative choices to be made by the legislature and not this court.’

\(^2\) 1999 (3) SA 173 (C), 1999 (3) BCLR 280 (C).

\(^3\) Act 96 of 1991.

\(^4\) National Coalition for Gay and Lesbian Equality v Minister of Home Affairs at 188B–189H.

\(^5\) National Coalition for Gay and Lesbian Equality v Minister of Home Affairs at 189I–190G.
Had Davis J left his order at this point, the applicants would have been deprived of any substantial relief because their applications for immigration permits would have been governed by the existing discriminatory provisions of s 25(5). This was clearly undesirable, and Davis J sought a way around the problem by invoking his general just and equitable remedial jurisdiction under s 172(1)(b). Section 28(2) of the Act authorizes the Minister to exempt categories of foreign nationals from the requirement of holding immigration permits if he is satisfied that there are special circumstances which justify such an exemption. For a period prior to the application in 1997 the Minister of Home Affairs had reached an understanding with the National Coalition for Gay and Lesbian Equality that he would exercise his discretion under s 28(2) to grant exemptions to same-sex partners of South African citizens and permanent residents. This arrangement had terminated in December 1997, when the Minister decided that he would no longer automatically grant s 28(2) exemptions to same-sex partners. Davis J sought to bridge the gap between his order of invalidity and the amending legislation that it contemplated, by issuing a declaratory order that resurrected the 1997 arrangement pending the enactment of the amending legislation. His order stated the following:

‘The exclusion of same-sex life partners from the benefits conferred by s 25(5) of the Act constitute [sic] special circumstances requiring the grant of an application for exemption made in terms of s 28(2) of the Act by a same-sex life partner of a person permanently and lawfully resident in the Republic. This part of the order shall remain in force as long as it takes Parliament to correct the inconsistency.’

Davis J is to be commended for engaging creatively with the discretionary power conferred by FC s 172(1) in his search for a just and equitable remedy. His combination of an order suspending the declaration of invalidity with a declarator to govern the period of suspension is attractive in that it provides the applicants with the relief they sought without appearing to intrude on the terrain of the legislature. On closer inspection, however, the logic of his remedy breaks down. The order of temporary validity was preferred over a reading in of ‘same-sex life partners’ into s 25(5) because that reading in lacked remedial precision and was properly a matter for Parliament to delimit. The order of temporary validity, however, left the applicants without any substantial relief. To cure this problem, Davis J imposed an obligation on the Minister to exempt same-sex life partners under s 28(2) until Parliament had addressed the problem in s 25(5). In so doing, he effectively read ‘same-sex life partners’ with all its remedial imprecision into s 28(2) instead of s 25(5). Furthermore, he turned the discretionary power vested in the Minister by s 28(2) into a non-discretionary obligation. So his declaratory order intruded not only into the domain of the legislature but also into the domain of the executive. It seems that he would have been better off merely reading ‘same-sex life partners’ directly into s 25(5) and leaving Parliament to decide in its own time whether it needed to remedy any definitional problems this might have created.

His choice of remedy seems to have been premised on the assumption that a reading in would have deprived Parliament of the opportunity to regulate the extension of immigration privileges to same-sex life partners. This assumption is clearly incorrect. The legislative authority vested in Parliament gives it the power to amend or to repeal any statute that it has enacted. The fact that a particular provision of a statute may have been read in by the courts does not immunize it from amendment or repeal, unless the product of this amendment or repeal is itself inconsistent with the Constitution.
Separation of power limits on judicial remedial power

While the matter might have been unclear under the interim Constitution, the final Constitution is explicit in s 167(4)(e) that the Constitutional Court has the power to decide whether a provincial or even the national legislature has failed in its obligation to enact legislation. The question then becomes whether the court’s power to decide under s 172(1)(b) encompasses the power to make an order to implement that decision. It is submitted that in an appropriate case the court does have such power. Such an order is unlikely to be given except as a last resort, if only as a matter of the legitimacy of the court’s role in a constitutional democracy.

At least one court has found it within its power under the interim Constitution to order the President to correct a defect in a presidential Act. In Hugo v State President of the Republic of South Africa & another the court gave the President six months to remedy gender discrimination in an Act setting the mothers of children under 12 years of age free from gaol but not releasing single-parent fathers. It is submitted that once such a constitutional violation has been established, such a remedy is within the terms of ‘appropriate relief’ of IC s 7(4) and FC s 38.

9.5 THE EFFECT OF A DECLARATION OF UNCONSTITUTIONALITY

The effect of a judicial declaration of unconstitutionality can be felt upon either the law at issue or acts done in terms of that law. Should a law declared unconstitutional become unconstitutional only from that moment or should it be regarded as unconstitutional from the time of its enactment? Likewise, what is the legal status of acts done or permitted under legislation which appeared to be valid, as most legislation usually appears?

The first issue was not expressly treated by the text of the interim Constitution, but surfaced for judicial consideration in an early case. In Ferreira v Levin NO & others the Constitutional Court relied on the wording of the supremacy clause, IC s 4(1), to hold that the Constitution applied of its own force and that unconstitutional laws are invalid even without declaration. Under the interim Constitution the court thus opted for the doctrine of objective invalidity rather than declaratory invalidity. The final Constitution recognizes this doctrine as the general rule since it expressly gives the court the power to limit the retrospectivity of a declaration of invalidity in s 172(1)(b).

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1 See Re Hoogbruin (1985) 24 DLR (4th) 718 (BCCA). Note also that FC s 165(5) makes a distinction between an order and a decision of a court.

2 See further Bushbuck Ridge Border Committee v Govt of the Northern Province 1999 (2) BCLR 193 (T) at 200H–202H. Note, however, that the relief sought in this case went far beyond an order compelling Parliament to comply with an existing constitutional obligation.

3 1996 (4) SA 1012 (D), 1996 (6) BCLR 876 (D).

4 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at paras 27–30 per Ackermann J. Although a majority of the court disagreed with Ackermann J on other issues, they concurred expressly in this aspect of the judgment. See the judgment of Chaskalson P at para 158.

5 See further National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at para 84.
Important consequences flow from the conclusion that an unconstitutional law is invalid even before there is any judicial pronouncement to this effect. The most significant of these relates to the standing of persons to challenge laws which are invalid because they violate the constitutional rights of other persons. This issue is discussed above.\(^1\) Another consequence flowing from the doctrine of objective invalidity concerns the status of laws which were unconstitutional under the interim Constitution, but were not challenged in litigation before that Constitution was replaced by the final Constitution. If the interim Constitution of its own force nullified all laws which were inconsistent with it, these laws will be invalid whether or not any court has declared them to be unconstitutional. The invalidity of these laws cannot be cured retroactively by the replacement of the interim Constitution with the final Constitution, even if they are fully consistent with the final Constitution.\(^2\) Thus, after its repeal, the interim Constitution continues to be an independent source of constitutional invalidity of statutes which predate the final Constitution.\(^3\)

In addressing the second issue — the legal status of acts done in terms of a law declared unconstitutional — the IC s 98(6) attempted to regulate this effect specifically. In terms of s 98(6)(a) acts done under an old law were valid unless ‘the interests of justice and good government’ demanded otherwise (s 98(6)(b) provided the opposite for challengers of acts under the new laws). This rule, however, put litigants in a difficult situation. Litigants challenging the constitutionality of a statute come to court because they have an interest in attacking the validity of an act purportedly authorized by the statute. If a declaration of unconstitutionality has only prospective effect on acts done in terms of the law, the declaration will be of no use to the litigant. The acts which she seeks to impugn will already have been performed in nearly all cases. Whereas challengers of acts under new laws would have succeeded, the default rule was that challengers of acts done under old laws would fail.

Faced with this paradox and with a series of cases concerning such acts under old laws, the Constitutional Court soon determined the exception of s 98(6)(a) to be its rule. In S v Bhulwana\(^4\) O’Regan J stated the following with regard to s 98(6)(a):

> ‘Central to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief that they seek. It is only when the interests of good government outweigh the interests of the individual litigants that the court will not grant relief to successful litigants. In principle too, the litigants before the court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants.’

\(^1\) See below, Loots ‘Access to the Courts and Justiciability’ § 8.2(b)(ii)(aa).

\(^2\) See Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC) at paras 16–20, where Chaskalson P discussed the different effects of s 126(3), which regulates conflicts between provincial and national legislation, and s 4(1), which governs conflicts between the Constitution and other laws. In terms of s 126(3) a provincial law which prevails over a conflicting national law does not invalidate the national law. The national law remains valid but inoperative. It will revive with full force and effect if the conflicting provincial law is subsequently repealed. In terms of s 4(1), however, any law which is inconsistent with the Constitution is invalid. It is nullified and will not be revived if the Constitution is amended so that the source of inconsistency is removed.

\(^3\) For instance, in National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC), which was a case launched after the final Constitution had come into effect, the Constitutional Court extended the retroactivity of an order declaring a statutory provision invalid to the date the interim Constitution came into force. See para 96.

\(^4\) 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC), 1995 (2) SACR 748 (CC) at para 32.
This became the authoritative approach to s 98(6). Unless the interests of good government dictated otherwise, a declaration of invalidity of a statute generally had retrospective effect, irrespective of when that statute was enacted. In the application of this test only one clear principle emerged under the interim Constitution jurisprudence. In order to avoid dislocation and uncertainty in the administration of justice, orders of retrospective invalidity did not affect cases which had been finalized at the date of the order. It was possible, however, to take advantage of the order of invalidity in any trial, appeal or review which was pending at the date of the order. Beyond this principle, questions of retrospective relief, good government, and the interests of justice tended to be approached by the court on an *ad hoc* basis with an inclination not to grant retrospective relief in cases where the consequences of doing so were not clearly predictable.

In terms of FC s 172(1)(b)(i), questions of retrospectivity may be regulated by the Constitutional Court and other courts in their power to make a just and equitable order.

The Constitutional Assembly granted the courts the broad discretion over the shape of judicial orders that the courts had asserted, and the final Constitution thus affirmed the interim Constitution jurisprudence outlined above.

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1 See, for example, *East Zulu Motors (Pty) Ltd v Empangeni/Ngewelezane Transitional Local Council* 1998 (2) SA 61 (CC), 1998 (1) BCLR 1 (CC) at para 9 (quoting *S v Bhalwana; S v Nfese* 1997 (11) BCLR 1543 (CC) at para 14); *S v Mbluza* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC), 1996 (1) SACR 371 (CC) at para 31; *Brink v Kitzhoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at paras 54–5; *S v Julies* 1996 (4) SA 313 (CC), 1996 (7) BCLR 899 (CC) at para 3. The principle that individual litigants should not be singled out for relief was reaffirmed in *Mistry v Interim National Medical and Dental Council & others* 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC) at para 35.

2 See *O’Mannon NO v Padayachi & others* 1997 (2) BCLR 258 (D) (discretion of IC s 98(6)(a) would not be exercised where result would be invalidity of transitional local government elections).

3 See *S v Zuma & others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), 1995 (1) SACR 568 (CC) at para 43; *S v Bhalwana* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC), 1995 (2) SACR 748 (CC) at para 32; *Scagell & others v Attorney-General, Western Cape, & others* 1997 (2) SA 368 (CC), 1996 (11) BCLR 1446 (CC) at paras 35–6. Compare *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at paras 96–7 and 106, where the Constitutional Court handed down an order which facilitated the reopening of cases to set aside convictions for consensual sodomy on the grounds that the common-law crime of sodomy was unconstitutional. However, the court provided for judicial control over this process by requiring that an application for condonation be brought for the late noting of appeals in these cases.

4 See, for example, *Mistry v Interim National Medical and Dental Council & others* 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC) at para 34.

5 The High Courts must exercise this power as well as the Constitutional Court. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at paras 87–8 and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 1999 (3) SA 173 (C) at 188A–B. 1999 (3) BCLR 280 (C).

6 FC s 172(1)(b)(i) is even more flexible than its IC counterpart, s 98(6). See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at paras 93–4.
9.6 STANDING TO INVOKE CONSTITUTIONAL REMEDIES

An expansive view of standing is granted to persons to enforce the fundamental rights of the Bill of Rights. IC s 7(4) and FC s 38 set out the constitutional ambit of permitted standing, stating the ‘appropriate relief’ of the fundamental rights remedy clause may be sought by these persons. The minimum standing requirements for fundamental rights litigation are delineated by these sections.

Beyond persons acting in their own interest, standing extends to associations, third parties, classes, and parties claiming to litigate on behalf of the public interest. While the exact parameters of standing are unclear, the sections appear intended to broaden the conception of standing from the pre-existing standard.

What are the standing requirements for actions to enforce constitutional challenges under the supremacy clause as opposed to the fundamental rights remedy clause? According to O’Regan J in Ferreira v Levin NO & others, standing in such cases is not governed by the fundamental rights remedy clause. This would also be consistent with the approach adopted by Chaskalson P in that case.

It is none the less submitted that standing for supremacy clause remedies should as a constitutional matter be equivalent to standing under the fundamental rights remedy clause. As a matter of policy it is not clear why there should be any distinction made between constitutional causes of action based on fundamental rights and those based on other constitutional provisions. As a matter of judicial prudence, however, it may make some sense to reduce constitutional applications for invalidity brought by officious intermeddlers. Nevertheless, IC s 7(4)(b)(v) and FC s 38(d) provide sufficient scope for the courts to ensure a genuine public interest before granting locus standi.

9.7 REMEDIAL JURISPRUDENCE FOR SOCIO-ECONOMIC RIGHTS

A number of rights in the final Constitution are often termed ‘socio-economic rights’. These would include environmental rights, housing rights, and health care, food, water and social security rights, as well as rights of the child and of education. Whether or not these rights are enforceable by a court is a question commonly raised.

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1 See above, Loots ‘Access to the Courts and Justiciability’ ch 8.
2 Comparatively, note that standing under the fundamental rights remedy clause in the Canadian Charter is stricter than standing to apply for a number of non-Constitutional remedies. See Hogg Constitutional Law of Canada sec 37.2(d).
3 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 223.
4 See above, Loots ‘Access to the Courts and Justiciability’ § 8.2(b).
5 As Hogg Constitutional Law of Canada sec 56.2(e) states: ‘Both grounds have the effect of withholding power from legislative bodies, and both grounds lead to invalidity under the supremacy clause.’
6 See the judgment of O’Regan J in Ferreira v Levin NO & others 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 234.
In considering an objection to the justiciability of such rights in the course of the first certification judgment, the Constitutional Court stated that it sees only a difference of degree, not of kind, between these socio-economic rights and other rights protected in the Bill of Rights. The court stated:

'It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of State benefits to a class of people who formerly were not beneficiaries of such benefits . . .
The objectors argued further that socio-economic rights are not justiciable, in particular because of the budgetary issues their enforcement may raise. Nevertheless, we are of the view that these rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the N[ew] T[ext] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.  

In considering the remedial aspects of the rights guaranteed in the Bill of Rights, one should thus build on this understanding of the interdependence and indivisibility of these fundamental rights.

One place to begin is with s 7(2) of the final Constitution, one of the primary remedy clauses, which provides: ‘The state must respect, protect, promote and fulfil the rights in the Bill of Rights.’ This wording places three distinct duties on the state. The first is a negative duty: that the state itself refrain from infringing on the rights. This is a protection from unjustified interference. The second is a less minimalist duty: that the state protect persons from infringement by third parties through the creation of legal and institutional framework. This may entail action on the part of the state. The third is the provision of a benefit or service by the state to the holder of the right. This includes the creation of conditions in which the right can be realized by the right-holder.

It is this third duty that is the least well defined. A court will need to assess whether the level of benefits or services being provided meets the state’s constitutional duty. In considering the fulfillment of this constitutional obligation a court may in particular need to consider the qualification placed on some of the rights such as in s 26(2) and s 27(2). These sections provide:

‘The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [these] right[s].’

The entrenchment of these rights in the Constitution in this manner raises the issue of whether legislative measures are mandatory in some cases. It also poses the question whether appropriate judicial remedies are available for enforcement. These are clearly questions that a court is capable of resolving. Likewise, a court will be able to give meaning to the qualifications contained within these rights. The concept of progressive realization is a flexible one, with some international jurisprudence interpreting it. The state will need to demonstrate that it is taking steps progressively to realize the rights in question and that it has achieved a ‘minimum core obligation’. The concept of available resources recognizes that courts will take into account the resources of the society in judging the fulfillment of this right. The state will need to show an effort to use all its resources and to devise a monitoring and remedial strategy where these are inadequate.

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3 It is furthermore likely that remedial issues will spill over into the rights definition and limitations analysis stages. See for example Soobramoney v Minister of Health (KwaZulu-Natal) 1997 (12) BCLR 1996 (CC); Van Biljon & others v Minister of Correctional Services & others 1997 (4) SA 441 (C), 1997 (6) BCLR 789 (C) (determination of adequate medical treatment could consider state resources).
9.8 Non-constitutional and non-judicial remedies

(a) Savings of non-constitutional remedies

A court’s receipt of constitutional remedial powers does not oust its remedial powers based upon legislation and common law. This proposition is affirmed by IC s 101(2) and FC s 173. All remedies available to courts before 27 April 1994 should continue to be available ‘subject to’ the Constitution.¹

The High Court and the Supreme Court of Appeal thus retain their power derived from statute, such as that granted under s 19 of the Supreme Court Act of 1959 to grant a declaration of rights. Powers deriving from these courts’ inherent jurisdiction are also preserved.

(b) Remedial jurisdiction beyond the courts

(i) Administrative bodies under the interim Constitution

Administrative bodies are bound by the supreme law of the Constitution.² The Constitution clearly would grant a remedy for unconstitutional action taken by an administrative body. What is not clear is whether administrative bodies themselves have the subject-matter jurisdiction to determine that a law to be applied by them is inconsistent with the Constitution and the remedial jurisdiction to choose not to apply that unconstitutional law.

In this regard, note that some Canadian administrative tribunals are competent to refuse to apply laws on the basis of their inconsistency with the Constitution.³ The theory is that the tribunal is obliged to apply the law and the Constitution is the supreme law. However, only tribunals with the statutory power to consider questions of law may make determinations of invalidity on grounds of conflict with the Charter.⁴ Canadian courts have looked for either an express statutory provision regarding legal questions or for an indication that a particular tribunal was to take final decisions.⁵ The policy behind limiting this power to these tribunals is that tribunals without the power to decide questions of law are poorly equipped to decide Charter issues from a skills and workload point of view.⁶

¹ One inherent jurisdiction remedy that is ‘subject to’ the Constitution and unavailable to the High Court is that of judicial review of parliamentary legislation. Without deciding whether the then Supreme Court’s inherent jurisdiction contained the remedy of striking down parliamentary legislation, the Constitutional Court decided in Zantsi v Council of State, Ciskei 1995 (4) SA 615 (CC), 1995 (10) BCLR 1424 (CC) at para 28 that if such a power existed at common law, its exercise by the Supreme Court under s 101(2) is prohibited by the grant of exclusive constitutional jurisdiction to the Constitutional Court in s 98(3).
² Section 4(2): ‘This Constitution shall bind all legislative, executive and judicial organs of state at all levels of government.’
³ Douglas/Kwantlen Faculty Association v Douglas College (1990) 77 DLR (4th) 94, [1990] 3 SCR 570 at 594: ‘A tribunal must respect the Constitution so that if it finds invalid a law that it is called upon to apply, it is bound to treat it as having no force or effect.’
⁶ Hogg Constitutional Law of Canada sec 37.3(b). Apparently the question remains open in Canada as to whether an administrative tribunal without express power to decide questions of law can invalidate a law on non-Charter grounds.
It is submitted that some administrative bodies (those granted the competence to consider questions of law) do have the power to treat laws as invalid because they are inconsistent with the Constitution. The argument in favour of some administrative bodies having such jurisdiction under the interim Constitution proceeds as follows: first, the Constitution contains no express exclusion of any form of constitutional jurisdiction in relation to administrative bodies. The section granting the Constitutional Court its jurisdiction, s 98(2), refers to the Constitutional Court as a court. Moreover, the exclusive jurisdiction provision, s 98(3), also refers only to courts in making constitutional jurisdiction initially exclusive to the Constitutional Court. It does not refer to administrative bodies or legislative bodies. Secondly, even if the operation of s 98(3)’s exclusivity were interpreted to extend to administrative tribunals, an administrative body’s subject-matter jurisdiction to determine questions of constitutional law and its jurisdiction to remedy applications of laws inconsistent with the Constitution could (by the terms of s 98(3) as amended) derive from an Act of Parliament. The Act of Parliament which empowers the administrative body generally may, in some cases, be capable of an interpretation which would grant such jurisdiction to the administrative body. Thirdly, most administrative bodies will not be competent to apply the remedy of non-application or invalidity since most administrative bodies do not enjoy the subject-matter competence to determine questions of law. Constitutional subject-matter jurisdiction is, it is submitted, only granted to those tribunals given power by Parliament to determine questions of law either as an express grant or by virtue of their power to make final determinations. Fourthly, even where such competence has been granted by Parliament, administrative bodies cannot exercise the power of a declaration of invalidity or other fundamental rights remedies. For instance, a constitutional remedy of damages would not be available to an administrative tribunal. As indicated by s 7(4)(a)’s reference to ‘competent court[s] of law’ and s 98(5), these remedies are reserved to the courts. Administrative non-applications of statutes on the basis of constitutional invalidity would thus be binding only on the parties concerned. Thus the recognition of the availability of this limited remedy would not usurp even the spirit of the scheme of exclusive constitutional jurisdiction resting in the Constitutional Court and to some extent in the Supreme Court. Thus this limited remedy will not ‘open the floodgates’.

What South African administrative tribunals would be competent? In the category of express empowerment to decide questions of law would be the Registrar of Trade Marks, who has the powers of a single judge of the Supreme Court with an appeal only lying to the Supreme Court itself. Further examples of bodies ordinarily taken to be administrative

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1 As amended, this section defines a sphere of exclusive Constitutional Court jurisdiction, subject to certain exceptions: s 101(3), s 101(6), s 103(1), and an Act of Parliament.
2 This is the situation in Canada.
3 The power of declaring a law invalid is limited to courts by the specific empowerment of s 98(5). Moreover, in Zantsi v Council of State, Ciskei 1995 (4) SA 615 (CC), 1995 (10) BCLR 1424 (CC) the court held that only the Constitutional Court (and not provincial and local divisions of the Supreme Court) had the necessary subject-matter jurisdiction in terms of s 98(2)(c) read with s 101(3)(c) to declare Acts of Parliament generally invalid in terms of the Constitution.
4 Moreover, any court of law would have the power to review an administrative tribunal’s determinations of law and would owe no deference to the decision of the tribunal.
5 Section 55 of the Trade Marks Act 62 of 1963.
bodies but given the power to decide questions of law would be the Labour Appeal Court\(^1\) and an insolvency inquest.\(^2\) An administrative body that might fit the definition of bodies of final decision may be those such as the special court set up to hear appeals from the decisions of the Minister and the Competition Board.\(^3\) As a final body, that special court would be able to decide constitutional questions.

(ii) **Administrative bodies under the final Constitution**

A similar textual argument for the limited remedial jurisdiction of some administrative bodies can be made under the final Constitution. Again, the source of the remedial power is the supremacy clause, s 2, since the rights remedy clause, s 38, refers specifically to ‘a competent court’ and thus administrative bodies are excluded. The argument for limited remedial jurisdiction (essentially the remedy of non-application) has three steps under the final Constitution. First, the Constitution does not contain any express exclusion of any form of constitutional jurisdiction in relation to administrative bodies. Secondly, some — but relatively few — administrative bodies are given the competence by Parliament to consider questions of law in their enabling statutes, either expressly or by implication. Thirdly, where that interpretive competence has been statutorily afforded the administrative body the limited supremacy clause remedy of non-application is available. Additionally, the principle of objective invalidity of the Constitution as adopted by the court in *Ferreira v Levin NO & others*\(^4\) supports the remedial jurisdiction of administrative bodies.

It should, however, be noted that the final Constitution, with its clearer taxonomy of courts, may limit to a further extent the bodies before which this argument can be advanced. If an administrative body is determined to be a ‘court’ in terms of s 170, then it is bound by the terms of that section and may not ‘enquire into or rule on the constitutionality of any legislation or any conduct of the President’. In such a case the remedy of non-application is not available.\(^5\)

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1. See Editorial *Employment Law* vol 10 no 3 (January 1994) 49 (suggesting that the industrial court, as an administrative body, is directly bound by Chapter 3).
2. It is not clear whether this issue surfaced in *Ferreira v Levin* 1995 (2) SA 813 (W).
5. As courts in terms of s 170, the Labour Appeal Court and the special court set up in terms of s 15 of the Maintenance and Promotion of Competition Act 96 of 1979 would be bound by its provisions. Cf above, § 9.8 (b)(i).